[HIGH COURT OF AUSTRALIA.]

NELUNGALOO PROPRIETARY LIMITED . APPLICANT ;
PLAINTIFF-APPELLANT,

AND

THE COMMONWEALTH AND OTHERS . RESPONDENTS.
DEFENDANTS-RESPONDENTS,

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SYDNEY, 1951, *July* 26, 27, 30, 31 ; *Aug.* 1, 2.

MELBOURNE, 1952, *March* 14.

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

Constitutional Law (Cth.)—Privy Council—Appeal from High Court—Question as to limits inter se of constitutional powers of Commonwealth and States—Wheat—Compulsory acquisition by Commonwealth—Compensation to growers—Just terms—Validity of regulations—Certificate of High Court—The Constitution (63 & 64 Vict. c. 12), s. 74.

(1) A question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States exists when the interpretation of a paramount concurrent legislative power of the Commonwealth is involved so that an interpretation advancing or retracting the Commonwealth power as the case may be means a corresponding retraction or advancement of the absolute legislative power of the State, that is the State power absolute in the sense that its exercise cannot be defeated under s. 109 of the Constitution by the operation of inconsistent Commonwealth laws.

(2) A question as to such limits *inter se* also exists when the interpretation of a legislative power of the Commonwealth exclusive over its whole area is involved so that an interpretation advancing or retracting the Commonwealth power means a corresponding retraction or advancement of the power of the State which otherwise is not excluded.

(3) The requirement of just terms imposed by s. 51 (xxxi.) of the Constitution forms part of the definition of the power of acquisition conferred by that paragraph so that a question of what amounts to just terms is a question *inter se*.

(4) What amounts to an appeal from a decision of the High Court upon a question *inter se* discussed.

(5) Section 74 places the responsibility of the interpretation of the Constitution in its distribution of powers upon the High Court, subject to the power vested in the Court in special circumstances of permitting an appeal

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from its decision to the Privy Council. Exceptional circumstances providing strong considerations are necessary in any case before the High Court should grant a certificate which would result in the transfer of that responsibility to the Privy Council.

MOTION.

The appeal of Nelungaloo Pty. Ltd., (hereinafter called "the applicant") from the decision of the High Court (1) having been dismissed by the Privy Council on the ground that a certificate under s. 74 of the Constitution had not been granted by the High Court (2), the applicant now moved that Court for an order "certifying under Section 74 of the Constitution that the following questions are questions which ought to be determined by His Majesty in Council :—

1. Whether on the footing that the acquisition of the Applicant's wheat was valid the amount of compensation to which the Applicant was entitled should be determined under Regulation 19 of the National Security (Wheat Acquisition) Regulations as the exclusive method of determining the same or whether it should be determined upon common law principles because of the invalidity of Regulation 19 construed as providing the exclusive method of determining compensation.

2. Or in the alternative whether upon the footing that the acquisition of the Applicant's wheat was valid the said Regulation 19 validly provided the exclusive means of determining the amount of compensation payable."

G. E. Barwick K.C. (with him *B. P. Macfarlan* and *L. W. Street*), for the applicant. There is not any suggestion that the applicant ought to have moved in this matter any earlier in point of time than the present. The Court is free to deal with the matter without any obligation based upon any suggestion of delay or the like. The decision of the Privy Council in *The Commonwealth* v. *Bank of New South Wales* (*The Banks' Case*) (3) ; in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (2) ; and in *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (4) has so far changed the focus or centre of this question both of the Privy Council's jurisdiction and of the nature of an *inter se* question with any earlier views which this Court may have formed as to the considerations which might lead it, on the one hand, to grant, or on the other hand, to refuse a certificate, as to necessitate a reviewal of those views. Prior to the decision in

(1) (1947) 75 C.L.R. 495.
(2) (1951) A.C. 34 ; (1950) 81 C.L.R. 144.
(3) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.
(4) (1951) A.C. 53 ; (1950) 82 C.L.R. 357.

the *Banks' Case* (1) the cases on applications for a certificate under s. 74 of the Constitution did not disclose any truly settled doctrine in the matter of granting or refusing applications: see *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (2).

[DIXON J. referred to the *Builders' Labourers' Case* (3).]

Whatever that case means, this case has gone back to it. All the prior decisions on applications for a certificate have assumed that there has been a decision on the so-called *inter se* point; that there has been a decision upon the point, either in the case in question, or perhaps there is some slight suggestion, in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (4) that in some other case the point had been determined. All the prior decisions have gone upon the basis that the question of a so-called *inter se* question involved a conflict with powers which the Court has consistently called an Australian question. Although *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (2), in which the certificate was granted, involved less of the elements of conflict than any of the cases, it was, nevertheless, present in that case. The position after the decisions of the Privy Council in the *Banks' Case*, the *Nelungaloo Case* and *Grace Bros. Case* has quite changed for the reasons:—(i) There need now be no decision by this Court either in the case in question or in any other case available as a precedent; (ii) there need now have been no opportunity for the Court to have decided the *inter se* point; (iii) the *inter se* point is not necessarily to be decided on the appeal before the Privy Council; (iv) because it would now seem that an *inter se* point does not arise in the delimitation of an exclusive Commonwealth power (*Nelungaloo Pty. Ltd.* v. *The Commonwealth* (5)); *Jones* v. *The Commonwealth Court of Conciliation and Arbitration* (6) does not mean what this Court thought it meant; and (v) the *inter se* point now arises in a case, whenever the extent of a power granted under s. 51 of the Constitution can arise, even though a consideration of that question is but a step in construction and it does not necessarily result in the invalidity of a law. Presumably an *inter se* question will not arise when considering the validity of a State law (*Jones' Case* (6) *Nelungaloo Case* (7)). An *inter se* question will arise, even though the delimitation of the Commonwealth power does

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1912) 15 C.L.R. 182; (1913) 17 C.L.R. 644; (1914) A.C. 237.
(3) (1914) 18 C.L.R. 224; (1917) 24 C.L.R. 396.
(4) (1907) 4 C.L.R. 1087.
(5) (1950) 81 C.L.R. 144, at pp. 154, 155.
(6) (1917) A.C. 528; 24 C.L.R. 396.
(7) (1950) 81 C.L.R. 144.

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not affect any constitutional power of a State whether by way of annihilation or by way of rendering it subordinate. It was expressly stated in *Jones' Case* that the *inter se* question only arises when a Commonwealth law made under a concurrent power obtrudes in operation into the territory of a State, the validity of which falls for decision, but this Court in *Ex parte Nelson* [*No.* 2] (1) took that statement to mean that the *inter se* question arises because the valid Commonwealth power was overshadowing, either annihilating or subordinating, the State law. That was not acceptable. *Dixon* J. explained in *Nelson's Case* that there is an *inter se* question under a concurrent power, whenever a Commonwealth law works into the State, the word State so used meaning, apparently, the territorial quality of the State. It is now conceded that an *inter se* question is involved and use is made of the circumstances that there is here no conflict of power, as a reason for the certificate, though it is said not to be a reason for denying that it is an *inter se* question. The Privy Council takes a view of an *inter se* question which extends it beyond the ideas of this Court, and the case falls exactly in the area between what this Court formerly thought was an *inter se* question and what the Privy Council now says is an *inter se* question. This case is beyond the considerations which have fundamentally moved the Court to refuse a certificate. There has been some weakening of the operation of s. 40A of the *Judiciary Act* 1903-1950. The Privy Council has now held that if the question of the validity of a law passed under s. 51 of the Constitution can arise, albeit for the first time before that Council, and whether it is merely involved in the powers of statutory construction or not, the Council loses jurisdiction. On that view of *inter se* questions it is difficult to comprehend just how such questions can arise between States. Circumstances which afford special reasons for granting a certificate now, bearing in mind the change which has taken place, are (i) that there has not been any decision at all by any Court upon the question ; (ii) that the particular question, although now technically *inter se*, does not in reality involve any conflict of power between State and Commonwealth ; (iii) that the *inter se* point is not the central point of the case ; (iv) that there are large and important questions of general significance in issue between the parties, particularly if the general questions have not been resolved by this Court for reasons acceptable to a majority of its members who participated in the case ; and (v) that this Court has not had an opportunity to decide the point. The Privy Council is the only tribunal which can decide it in the case.

(1) (1929) 42 C.L.R. 258.

The result of the *Banks' Case*, the *Nelungaloo Case* and the *Grace Bros. Case* is that the Privy Council has not now any jurisdiction without a certificate to grant leave to appeal or to hear, or to give judgment in an appeal from this Court if in any conceivable event the consideration and the extent of any Commonwealth concurrent power, whether to assist construction or otherwise may arise on the hearing of the appeal, unless in cases where this Court has decided the matter, the appellant submits to this Court's decision and offers reasons in support of the appeal which, being accepted, may result in its allowance without consideration of the *inter se* point. On the question of the meaning of an *inter se* point, the three Privy Council decisions overrule *Ex parte Nelson* [*No.* 2] (1) and so much of *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 2] (2) as was founded upon it, except in so far as those cases decide that the delimitation of an exclusive Commonwealth power does not give rise to a question *inter se*. The Privy Council followed the views expressed by it in *Jones' Case* (3). It is not right that every consideration of the extent of Commonwealth concurrent powers must involve a question *inter se*. The cases show that the test of whether an *inter se* question arises is whether a Commonwealth law, passed under a concurrent power, would, if valid, operate in a State, where formerly only State law operated. The first step is to ascertain where the matter now is in relation to broad problems. In the *Banks' Case* (4) the Privy Council accepted the view that no appeal is permissible without a certificate if the relief sought on appeal cannot be granted without the determination of an *inter se* question. The Privy Council has now gone much beyond that. In this case their Lordships seem to have thought there is not any *inter se* point in s. 92 of the Constitution, not because there is no conflict but because the law cannot validly operate anywhere, s. 92 being a prohibition in all States. Equally when one gets to exclusive power there is not any room for a State law at all, so there is not any conflict in a territorial sense. The decision of the Privy Council in this case advances the interpretation of s. 74 a stage beyond the decision in the *Banks' Case*. In that case the formula proffered was that if the appeal necessarily involved the decision of the *inter se* point it was an appeal which fell within the scope of s. 74. From the *Nelungaloo Case* it is clear that the position laid down in the *Banks' Case* as to the limitation of the jurisdiction of the Privy Council has been extended. It is

(1) (1929) 42 C.L.R. 258.
(2) (1946) 71 C.L.R. 115.
(3) (1917) A.C. 528; 24 C.L.R. 396.
(4) (1949) 79 C.L.R., at pp. 623, 624, 628.

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no longer necessary that the point must inevitably be decided in the appeal. It is sufficient if it might be. *Jones' Case* (1), the *Banks' Case* (2), *Grace Bros. Case* (3) and the *Nelungaloo Case* (4) show that the propositions put to this Court as flowing from those cases are correct. The Privy Council has no jurisdiction, even though the High Court has not decided the point and the Privy Council itself may not be called upon to decide the point. Circumstances which, as mentioned above, ought to be regarded as special reasons are present in this case. The precise *inter se* point which is suggested here is whether reg. 19, as part of the scheme of acquisition, read with reg. 14 offers just terms. The Commonwealth conceded before the Privy Council that reg. 19, if invalid, was severable. There is a stalemate in which there is not any effective decision of this Court. From regs. 14 and 19 of the Wheat Acquisition Regulations it is plain that a grower is not entitled to be paid any sum of money as a right until the Minister makes a recommendation. There was never a right at any stage to get anything out of the pool. The Minister never did make a determination. There have been advances only. The attitude of the Privy Council was that before the applicant got the large amount it had to get rid of reg. 19 in some way or other, or the Privy Council had to adopt the construction in *Tonking's Case*. If the initial order had not been made in that way, what has happened could not have happened. It would then have been the defendant-respondent and not the applicant-appellant who would have applied for the certificate. All that stems from the form of the order. Before the trial judge this case was conducted, by common consent, on the footing of *Tonking's Case* (5): see (6). All the facts, except the price, were found in favour of the plaintiff. As a result of a review of the judgments delivered in this Court it emerges: (i) that there is not any view of the case which is acceptable to any majority of this Court; (ii) that the judgment of the trial judge, in particular for its reasoning and its result, was only acceptable to *Rich* J., because the very reasons which led the Chief Justice, *McTiernan* J. and *Webb* J. to their conclusions were antithetical to the reasons of the trial judge; and (iii) that the real question in issue between the parties, namely, what was the value of the wheat taken, only involved the question of the validity of reg. 19 as a very incidental point. The main point between the parties remains, as far as this Court is concerned,

(1) (1917) A.C. 528; 24 C.L.R. 396.
(2) (1949) 79 C.L.R. 497.
(3) (1951) A.C. 53; (1950) 82 C.L.R. 357.
(4) (1951) A.C. 34; (1950) 81 C.L.R. 144.
(5) (1942) 66 C.L.R. 77.
(6) (1947) 75 C.L.R., at p. 505.

not decided in any way acceptable to a majority of the Justices. Resulting from the way in which the matter has progressed in this Court the Privy Council is the only tribunal where it can now be decided. The question of the validity or invalidity of reg. 19 does not involve any conflict of powers between State and Commonwealth, and that is so even if it be an *inter se* point. Regulations 14 and 19 together constitute a law authorizing acquisition and no more. It would not be possible by construction to hold that the Commonwealth was purporting to take the exclusive power to acquire wheat at that time. That could not be construed into the regulations, consequently there is not any limitation of any State power by the mere enactment of the regulations; it does not pass any shadow upon State power by its mere enactment. Any Commonwealth law which merely authorizes acquisition does not cast any shadow on the constitutional powers of a State. The element which is the reason for this Court refusing certificates in previous cases, namely, a conflict of powers, is not present in this case. It is an odd result that the applicant should be a suppliant for a certificate to enable it to overcome a point, taken by the Crown for the first time in the Privy Council, which point, if the Crown had taken it before the Full Court, or *Williams* J., would have been decided adversely to it. There is not any satisfactory view of this Court on the real matter in dispute between these parties and the point itself has no great constitutional significance. This is a very apt case for a certificate. There was not any conflict of powers in this case because the question directed to invalidity is merely whether just terms are provided. The presence or absence of just terms does not add to State power or detract from it. It is really a limitation on the Commonwealth power. Certificate applications were dealt with in *Murray & Co.* v. *Collector of Customs* (1); *Deakin* v. *Webb* (2); *Baxter* v. *Commissioners of Taxation (N.S.W.)* (3); *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (4). In the last-mentioned case an equal division of opinion was regarded as a very substantial reason, and *Isaacs* J. thought that another substantial reason was that the matter could only be remedied by its being dealt with by the Privy Council. Other cases were: *R.* v. *Commonwealth Court of Conciliation and Arbitration* (5);

(1) (1903) 1 C.L.R. 25, at p. 38.
(2) (1904) 1 C.L.R. 585, at pp. 619, 625, 628, 630, 631.
(3) (1908) A.C. 214, at p. 216; (1907) 4 C.L.R. 1087, at pp. 1118, 1148, 1151.
(4) (1912) 15 C.L.R. 183, at pp. 233, 234.
(5) (1914) 21 A.L.R. 13, at p. 14.

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Amalgamated Society of Engineers v. *Adelaide Steamship Co. Ltd.* (1); *Minister for Trading Concerns (W.A.)* v. *Amalgamated Society of Engineers* (2); *In re Judiciary and Navigation Acts* (3); *Attorney-General (N.S.W.)* v. *Collector of Customs (N.S.W.)* (4); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (5); *Pirrie* v. *Macfarlane* (6); *Nelson's Case* [*No.* 2] (7); *New South Wales* v. *The Commonwealth* [*No.* 2] (8); *Cox* v. *Journeaux* (9); and *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 2] (10). A review of those decisions shows that there was really no settled doctrine with respect to an application under s. 74 for a certificate, and, so far as the Court had proceeded in the past, depended on the idea of there having been a decision of the Court upon a point that was a point as to the conflict of power, and therefore a truly Federal question, and that it was the real issue between the parties. In the light of the recent Privy Council decisions the point need not be a point at all so far as the parties are concerned. It could be something that emerged in their Lordships' consideration after judgment reserved. That would be sufficient, consistently with the decision in the *Nelungaloo Case*, and they would lose jurisdiction.

[DIXON J. referred to *Maslen* v. *Laffer* (11).]

Whatever the difficulties are going to be in the future, the approach must be a new one and a liberal one. The limits of it will be that the Court will need to know that the question itself is really a Federal one, whether technically *inter se* now or not—whether it is truly a question as to conflict. The possible harm constitutionally should be weighed against the great wrong perhaps likely to be done to parties who bring non-constitutional matters for decision. The matter at issue in this case is not a Federal question, but is the very narrow question of whether the amount proffered by the Commonwealth is a just amount as between the community and the individual. There should in this case be a certificate for the following reasons: the whole approach to the question of a certificate must now be liberalized bearing in mind the decisions of the Privy Council. The *inter se* point was not decided in this case by this Court except inferentially in favour of the applicant. Behind the judgment in *Tonking's Case* (12) was the

(1) (1921) 29 C.L.R. 406, at pp. 411, 413.
(2) (1923) A.C. 170, at pp. 172-174.
(3) (1923) 32 C.L.R. 455, at p. 456.
(4) (1909) A.C. 345, at p. 347.
(5) (1918) 25 C.L.R. 434, at p. 469.
(6) (1925) 36 C.L.R. 170, at p. 197.
(7) (1929) 42 C.L.R. 258.
(8) (1932) 46 C.L.R. 235, at pp. 239, 242, 243, 245.
(9) (1934) 52 C.L.R. 282, at p. 285.
(10) (1946) 71 C.L.R. 115, at pp. 119, 121, 123.
(11) (1950) 82 C.L.R. 101.
(12) (1942) 66 C.L.R. 77.

reasoning that reg. 17 of the then regulations would have been invalid but for the particular construction given. The Court did not have any opportunity to decide the *inter se* point in this case, and will not have any further opportunity. The Privy Council is now the only tribunal which can decide it in this case. Large and important questions of general principle not involving constitutional limitations do arise between the parties. Such questions have not been satisfactorily resolved by this Court.

A. R. Taylor K.C. (with him *R. Else-Mitchell*), for the respondents. The issue of value has been concluded against the applicant by the views of five members of the Court to two. Four members of the Court, which for that purpose is the final court of appeal, agreed entirely in principle with the reasons of the judge of first instance. The mere fact that at the hearing of the appeal before the Full High Court counsel for the Commonwealth took the view that the question of the validity and the question of the construction of the regulations in this case was governed by *Tonking's Case* (1), and that it was not competent to argue that reg. 19 was exclusive in view of the decision in that case, thereby, according to counsel for the applicant herein, depriving this Court of an opportunity of deciding the point, does not warrant the granting to the applicant of a certificate under s. 74 of the Constitution. Such an argument on the part of the applicant seeks to place it in a much better position than it would have been if the point had been taken and determined there and then in its own favour or against it. The applicant should not be put in any better position because the matter was not so raised by counsel, and was not pronounced upon by this Court (*Banks' Case* (2)). That is the very type of case to which the Privy Council had regard in the *Banking Case* (3) when it discussed s. 74. The Privy Council has taken the view that it is not for that Council to determine *inter se* questions, even though they have not been determined by this Court or arise in any way, and there is not any judicial pronouncement upon them by this Court. If they are involved the matter cannot go to the Privy Council without a certificate. The Privy Council is not the only body at this stage which can determine the question, because, in another suit, involving similar features, this very point could be determined by this Court as it is at present constituted. This Court was intended to be the ultimate court of appeal except in very special circumstances. It is immaterial whether it is the central

(1) (1942) 66 C.L.R. 77.
(2) (1949) 79 C.L.R., at p. 627.
(3) (1949) 79 C.L.R. 497.

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point of the case or a point on the outskirts of the case. Section 74 was intended to prevent those questions from getting to the Privy Council in any shape or form, and, indeed, if that was not the intention the whole purpose of s. 74 would be defeated. In effect the applicant's counsel suggests that the decision of this Court in the instant case is a condition precedent to the application for a certificate, and to him the position is that the *inter se* point should be decided by the Privy Council because there is another point which ought to be determined by the Privy Council and a certificate can only be granted if the *inter se* point involved is one which ought to be decided by the Privy Council. Section 74 was intended to prevent an *inter se* point in any way getting before the Privy Council unless that point, in the opinion of this Court, should be decided by the Privy Council. If it were otherwise *inter se* points would come before the Privy Council almost indiscriminately and its judgments would compete with the judgments of this Court. The words " ought to be decided " in s. 74 refer to one circumstance only, the importance of the point itself. *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (1) was a special case, there being an equal division of opinion between the then only four justices of this Court. In *Nelson's Case* the suggestion was that one other justice was available whose opinion might be taken. Similarly, a course open to the applicant is that the opinion of this Court, as at present constituted, on this point could be taken. Contrary to the view expressed on behalf of the applicant there is a principle common to the majority of this Court. The judgments given by the members of this Court on the question of value were satisfactory. The point under s. 74 arose from the necessity for supporting the judgment of this Court before the Privy Council, and it was inevitable that the point had to be argued before the Privy Council upon an analysis of the judgments given in this court of appeal. The fundamental purpose of the Wheat Acquisition Regulations was not that of providing the community with cheap bread. The series of Acts designed to stabilize the wheat industry and provide a payable price for wheat are listed in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (2). The legislation was dealt with by the judge of first instance (3). The main purpose of the scheme was to stabilize the wheat farmers' returns from wheat. After the war commenced there was in existence a general scheme of price fixing. It was a matter of common knowledge that that common system of price fixing was used to

(1) (1912) 15 C.L.R. 182; (1914) A.C. 237; 17 C.L.R. 644.

(2) (1948) 75 C.L.R., at p. 524.

(3) (1947) 75 C.L.R., at p. 508.

prevent people living in Australia from paying famine prices for commodities of which Australia had an exportable surplus. Not only was it improbable—it was also impossible to assume upon the hypothesis that were there none of those controls—that there would not have been some other controls, because other controls were operating with respect to every commodity where Australia had an exportable surplus. That view commended itself to the trial judge and also to four of the members of the Court who sat on the appeal: see (1). It will be seen from those references that five members of the Court have expressly and entirely agreed in principle as to the manner in which this question should be approached, and their findings on the facts are identical because they were all concerned with the question of whether it would be more than £4,295. There was a very small margin between the figures, yet every member of the Court said there was nothing new which satisfied him that the plaintiff should get more than £4,740, certainly not any more than the amount he would get out of the pool. Those five members of the Court were entirely in accord as to the principle to be applied in determining compensation. The common principle among the five judges was simply to say that to ignore the facts which arose and were likely to arise from the war conditions then prevailing was to close one's eyes to reality. The trial judge found that there was not any ordinary market at the date of the acquisition, not merely because the Wheat Board was operating, but because of the disturbed conditions at the time. It is the Court's responsibility to deal with this matter as if special leave to appeal had not been granted. When one considers the certificate application the considerations which were relevant to the leave application in the Privy Council are not material. They do not apply on an application for a certificate. The mere fact that leave has been given does not indicate in any sense that the Privy Council regarded the judgments as unsatisfactory. The figures prepared on behalf of the applicant do not take into account a number of difficulties, e.g., the varying world position with regard to export price. When he makes his contract a person does not know what he will get on the world market. It may be uncertain whether it will rise or fall. When he makes his contract with the grower the merchant does not know what proportion of the crop is going to be exported, and that is a vital consideration in determining what taxes will have to be paid by way of wheat export charge or wheat tax under, *inter alia*, the *Wheat Industry Assistance Act* 1938, the *Wheat Tax*

(1) (1948) 75 C.L.R., at pp. 512, 516, 539, 544, 586, 587.

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Act 1946, and the *Wheat Export Charge Act* 1946. He cannot know until the season is finished. Regard must also be had to the merchant's profits, and to the delays he is going to experience because of difficulties of transport, shipping, &c. Another factor was that there was a ready-made means for preventing the exportation of wheat under the *Customs Act*. In a consideration of the problematical question of the value of the plaintiff's wheat, a number of matters must be considered, including, *inter alia*, that the price per bushel obtained by the Wheat Board for wheat sold overseas was not in any true sense a market price; whether, operating independently and in view of the competition the applicant would not have done nearly as well as the board in the matters of transport, shipping and storage space. The net return to the grower would be affected by those considerations. Further, it was for the applicant to make out its case that its wheat was worth more. That onus is not discharged by merely stating that because in normal times the local price of wheat followed the export price of wheat that was the value of its wheat in the then abnormal times. It was shown by one of the applicant's own witnesses that in time of emergency or wartime the local price did not follow the export price. The pool was never intended to perform the function of keeping prices down. It was used to keep the wheat market in relation to the community in exactly the same position as the general system of price fixing was used to control other commodities. It has long been established by this Court that the control of prices during wartime is a legitimate exercise of the defence power, and in fact it was so used under the machinery of the *National Security* (*Prices*) *Regulations*: see also *Prices Regulation Order* No. 1015 and s. 112 of the *Customs Act* 1901-1951. The question of value was very important, it affected many people and involved a great deal of money, but the circumstance to which regard had to be had for the purpose of determining value was an entirely Australian circumstance which involved the consideration of the whole economic set-up of this community during the war, a problem with which the members of this Court are much more familiar than could be the Lords of the Privy Council. That in itself is one reason why the matter should not go to the Privy Council. Their Lordships are, with respect, quite unfamiliar with marketing problems of this kind which do not arise in England. The claim by the applicant is not the only claim which is involved. To pay other claims would entail a vast sum of money and it would mean scrapping the whole of the pooling arrangements after five members of this Court

have approved in principle of the value of the wheat and have said that the Wheat Board did pay at least the full value of the wheat. The s. 74 point was raised by counsel for the applicant at a very early stage of the proceedings before the Privy Council. All that was said concerning the *inter se* point was by counsel for the respondent, who said that the point was so inextricably mixed up with the appeal itself that it might avoid two hearings if the appeal itself was debated and the argument on the *inter se* point were taken during the general argument. To that counsel for the applicant agreed. The validity of reg. 19 became, in effect, the essential point in the case. The point arose directly upon the analysis of the judgments of this Court in the *Nelungaloo Case*. The applicant was not put in the position of being an applicant merely because of a curial error. If a small verdict had been returned for the applicant it still would have been dissatisfied. If it had appealed on the ground that the trial judge had undervalued the wheat then the whole question would have been open to appeal, and it would have been open for the respondent to say that his Honour did that on a wrong basis ; it would have been open to the respondent to cross-appeal on that point. So the present applicant would have been the one to appeal to the Privy Council because of the estimate of value. The question of the definition of an exclusive legislative power in the Commonwealth does involve an *inter se* point. Their Lordships' attention was drawn to the fact that this Court had held that s. 51 (xxxi.) was the sole power under the Constitution to make laws with respect to acquisition of property, and they did not indicate any disagreement with that. They were referred to *Johnston Fear & Kingham & the Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1) and to *Bank of New South Wales* v. *The Commonwealth* (2). The attention of their Lordships also was drawn to the fact that this Court did decide that par. (xxxi.) of s. 51 of the Constitution does not only authorize the making of laws for the acquisition by the Commonwealth of property, but it authorizes laws affecting the transfer of property from one person to another person. They were referred to *McClintock* v. *The Commonwealth* (3) and *Bank of New South Wales* v. *The Commonwealth* (4). This question was discussed in *Collins* v. *Hunter* (5). The first question to be determined in this case is whether the Commonwealth had legislative authority to establish marketing pools or

(1) (1943) 67 C.L.R., at pp. 317, 318, 325.
(2) (1948) 76 C.L.R. 1, at pp. 265, 299.
(3) (1947) 75 C.L.R. 1, at pp. 23, 35, 36.
(4) (1948) 76 C.L.R., at p. 250.
(5) (1949) 79 C.L.R. 43, at pp. 74, 75, 80.

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whether that authority solely resided in the States, or whether, if the Commonwealth had power to make laws with respect to the establishment of marketing pools, this was a valid pool. Two questions really arose: first could the Commonwealth establish marketing pools at all, and, if so, whether this was a valid pool, and that was argued in the Privy Council. That judgment, however, does say that the question whether the power of a State will be impaired or not is not the test of an *inter se* question. The Privy Council took the view that the delimitation of concurrent Commonwealth legislative power does involve a delimitation of the area of a State exclusive of the concurrent power. Apart from the necessary consequence of the delimitation of Commonwealth power, it is not part of the Privy Council's function to define the ambit of State legislative power (*Nelungaloo Case* (1); *Jones' Case* (2)). The applicant was not put in its position by an unsatisfactory judgment of the Privy Council, which, in effect, entitled it to a certificate under s. 74. Section 74 was not devised for the purpose of enabling this Court to do what it conceived to be justice to the parties. It was intended to make this Court the final arbiter on s. 74 questions, otherwise there would not be any point in it. It is a stronger case for refusing a certificate where there have not been any pronouncements from this Court than where there have been such pronouncements. The Privy Council obtains some assistance and guidance from pronouncements of this Court, but where there have not been any such pronouncements this Court binds itself for all time on questions on which this Court is supposed to be the final arbiter. The importance of the general questions have to be strong to carry the *inter se* question. If s. 74, however wide it may be, represents a matter of high policy as the cases have said, there should be reserved for the consideration of this Court all those questions which fall within it. In such cases the Court is the final court of appeal where the *inter se* point arises directly or is involved with other questions and s. 74 recognizes this is the final court of appeal however that question arises. Allied to that is the idea that some *inter se* matters may get to the Privy Council by appeals from the Supreme Courts of the various States, but that possibility is not any reason why the gates should be opened, or that this Court should grant certificates. The fact that there have not been any decisions of this Court on this point is a reason why a certificate should not be granted. The *inter se* point is essentially an Australian problem with an essentially Australian

(1) (1951) A.C., at p. 50; 81 C.L.R., at p. 157.

(2) (1917) A.C. 528; 24 C.L.R. 396.

background. The question of value is also set up against a background which is essentially Australian. Section 74 does not mean that this Court was to be the final court of appeal only where an *inter se* point arises directly, or that in cases where the *inter se* point did not constitute the central point of the case the Privy Council was to be regarded as the ultimate court of appeal. The decision of this Court on all *inter se* points should be final and conclusive. It is the grave responsibility of this Court to decide those matters, and it is guilty of a breach of trust if it declines to accept that responsibility. All matters arising under s. 74 are of great importance (*Deakin* v. *Webb* (1); *Baxter's Case* (2); *Flint* v. *Webb* (3)). Those cases provide the only illustrations of circumstances in which it has been suggested that it would be proper to give a certificate: where the rights or interests of other parts of the Empire were concerned were rights which incidentally involved or showed signs of serious disturbance between the States. In *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (4) it was necessary to certify in order to end a deadlock between the four effective members of the Court. The question involved in that case was not really an *inter se* point, but the application was made for more abundant caution. An equal division of opinion in this Court is not of itself a ground for the granting of a certificate (*Nelson's Case* (5)). In the case now before the Court there was not any equal division on matters of principle. On the allied question, the question of value, the decision was five to two against. A certificate was refused in *New South Wales* v. *The Commonwealth* [*No.* 2] (6), which concerned a most important question which arose during the time of the financial emergency. The primary matter was that the responsibility was cast upon this Court. That view was adhered to in the *Airway's Case* (7). All questions which fall within s. 74 are matters of considerable gravity and importance. If those are the tests for determining whether a certificate should be granted in relation to *inter se* points, and if those tests were evolved to cover matters which are thought to be within s. 74, at the times when the principles were evolved there would not be any reason for apprehending a different set of principles, when it is found *inter se* points can arise in ways that previously were not thought possible, and the importance of the *inter se* point, the function and responsibility of this Court must remain the same. The only test in all those cases is whether the Court is not prepared to take the

(1) (1904) 1 C.L.R., at pp. 622, 625, 627.
(2) (1907) 4 C.L.R., at p. 1118.
(3) (1907) 4 C.L.R. 1178, at p. 1192.
(4) (1912) 15 C.L.R., at pp. 233, 234.
(5) (1929) 42 C.L.R., at p. 265.
(6) (1932) 46 C.L.R., at p. 239.
(7) (1946) 71 C.L.R., at pp. 119, 123.

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responsibility of deciding *inter se* questions itself, or whether the Court thinks for some very special reason such as ex-Australian interests or rights a certificate should be granted; otherwise the whole purpose and effect of s. 74, the high policy behind it, would be completely defeated. If one worked on one set of principles where the *inter se* point happened to be the central point of the case, and on another set of principles when the same point happened to be involved with a number of other important questions, one would have a body of authority in this Court and a body of authority in the Privy Council. That was the very thing which s. 74 was intended to prevent.

Cur. adv. vult.

March 14.

The following written judgments were delivered :—

DIXON J. Special leave to appeal from the decision of this Court in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1) was obtained from the Privy Council by the plaintiff in the suit. The appeal was argued before the Board, but it was dismissed on the ground that a question was involved as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States and that s. 74 of the Constitution operated to exclude the appeal from the jurisdiction of the Sovereign in Council (*Nelungaloo Pty. Ltd.* v. *The Commonwealth* (2)). The plaintiff has now applied to this Court for a certificate under s. 74 that the question so involved is one that ought to be determined by His Majesty in Council.

The " *inter se* question " arises upon s. 51 (xxxi.) of the Constitution. To understand why any such question should arise it is necessary to recall the general reasoning forming the basis of the cause or causes of action upon which the plaintiff depended. The considerations governing the existence and nature of the cause or causes of action are explained, even though perhaps variously explained, in the judgments delivered in this Court (1).

The chief case of the plaintiff now is that the plaintiff is entitled to compensation for the compulsory acquisition of its wheat by the Commonwealth and that the compensation must be assessed on ordinary principles, with the result that parity to export prices affords the measure of the compensation. Regulation 14 of the *National Security* (*Wheat Acquisition*) *Regulations* ends by stating that the rights and interests of every person in the wheat acquired are converted into claims for compensation. The plaintiff's primary cause of action is based upon this concluding part of the regulation on the footing that it confers an unqualified title to a

(1) (1948) 75 C.L.R. 495. (2) (1951) A.C. 34.

money equivalent for the plaintiff's wheat assessed according to the ordinary principles of the law of compensation. The plaintiff sues to enforce such a claim. At one stage the plaintiff alleged, as an alternative to its primary cause of action, that the notice of acquisition was not in conformity with the statutory power and was void. This meant that the wheat had passed into the possession of the defendants either wrongfully or upon some basis of implied contract, that is, on a footing which would not give rise to a claim under reg. 14 but to some form of claim under the law of tort or contract. But the plaintiff does not seem now to persist in this alternative. No doubt the plaintiff would fall back upon it if regs. 14 and 19 were considered inseparable and constitutionally void.

An essential step in the cause of action which the plaintiff bases upon reg. 14 is that the regulation operates to vest in the plaintiff without qualification a right to compensation assessed on ordinary principles. But there is much to be said for the view that reg. 14 was intended to do no such thing; that the chief purpose of the part of the regulation in question was to turn claims against the wheat into claims against the proceeds of the wheat and that otherwise it was meant to be introductory to reg. 19, the office of which was to prescribe the compensation to which the wheat grower should be entitled. In other words, there is a strong ground for saying that reg. 14 is not a provision conferring a general right of compensation at all; if and so far as it confers a right to compensation it is to the compensation provided for by reg. 19. Regulation 19 contemplates the establishment of a wheat pool or pools and the payment of the grower by the familiar advances and final dividend after making the appropriate dockages.

Now it is evident that for the plaintiff to make out its claim for general compensation based upon reg. 14 it was necessary for the plaintiff to get rid of reg. 19 in some way or other.

If the plaintiff could show that as a matter of interpretation reg. 19 provided a form of compensation which the plaintiff need not accept, that reg. 14 gave a primary right which the plaintiff could pursue unless it chose to accept what reg. 19 gave it in satisfaction of that right, then that might be one way in which the plaintiff could get rid of reg. 19. Such an interpretation would attribute to the regulations an intention to allow every wheat grower in the Commonwealth to make a claim for compensation for his wheat against the Treasury, the measure of compensation being undefined and depending on the general law of compensa-

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tion. It would at the same time attribute to the regulations a further intention of pooling wheat and enabling every grower if he so chose to accept a ratable distribution from the pool in place of such compensation. Whether the wheat of growers who took general compensation would go into the pool and if so whether it would swell the surplus for those who did claim on the pool or whether on the other hand it would be taken to a separate account are questions that are unanswered. To me it appears that it should be very difficult for the plaintiff ultimately to succeed in getting rid of reg. 19 by interpreting the regulations in any such manner. But unless the plaintiff could get rid of reg. 19 by interpretation, the plaintiff must, in order to escape from it, show that it is invalid. Further, it is not enough for the purpose of the plaintiff's claim to compensation that reg. 19 should be invalid, it is necessary also that it should be severable from reg. 14 and that, when severed, it should leave reg. 14 operating in such a manner that it would confer an unqualified right upon growers to compensation assessed upon ordinary principles, a manner in which otherwise it would not operate. But for the time being the question of the severability of reg. 14 from reg. 19 can be put on one side. What is important is that it is essential to the plaintiff's main or primary case that reg. 19 should be invalid.

Now the question whether reg. 19 is valid or invalid arises upon s. 51 (xxxi.) of the Constitution. It is a question which involves the meaning and operation of s. 51 (xxxi.) and then the interpretation and application of reg. 19. The question would be whether, properly interpreted and applied, reg. 19 affords just terms to the growers for the acquisition of their wheat. It was because this was considered to involve a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States that the appeal was dismissed by the Privy Council. The expression "question . . . as to the limits inter se of the constitutional powers of the Commonwealth and . . . of any State or States" clearly includes within its denotation cases where the definition of a Federal power involves as a necessary consequence a proposition forming part of the definition of State power. When the question relates to powers which are both legislative this is best seen where the Constitution in bestowing a power upon the Commonwealth Parliament withdraws it completely and absolutely from the Parliaments of the States. In such a case to affirm that, within a defined area of subject matter, a legislative power belongs to the Commonwealth is necessarily to deny that within that area any legislative power exists in the States. For example, to

affirm that a particular class of benefit granted to manufacturers of an article is a bounty upon the production of goods and so falls within the Federal legislative power conferred by s. 51 (iii.) is, because of s. 90, necessarily to deny that the States possess any power to give that particular class of benefit to manufacturers. There is thus a mutual relation between the two powers consisting of a common boundary. But the existence of Federal legislative power usually does not mean the complete absence upon the same subject matter of State legislative power. Usually it does mean that by virtue of s. 109 State power upon that subject matter is not absolute. Where such a Federal power exists any legislation affecting that subject matter by a State Parliament in the exercise of the residuary legislative power of the States is liable to be defeated by an exercise by the Federal Parliament of its legislative power upon that subject matter. Of this very many examples have come before the Court in consequence of ss. 38A and 40A of the *Judiciary Act* 1903-1950, but it is perhaps best to illustrate the statement by an imaginary case. Suppose that it was sought to legislate under s. 51 (xvii.), bankruptcy and insolvency, for the winding up of corporations unable to pay their debts. To interpret the power as extending to the winding up of insolvent corporations would not deprive the States of legislative power with respect to that matter. But it would mean that State legislation touching the subject would be liable to invalidation by the adoption by the Federal Parliament of an inconsistent law. In the case of Federal legislative powers made paramount in this way by s. 109, to advance or retract the apparent boundary of the power by judicial decision is not to diminish or to enlarge the area of legislative power possessed by the State. It is but to affect the quality, the absolute quality, of State power. For the legislative power retained by the States may be considered as falling into two parts possessing different qualities. The State legislative power which is concurrent with Federal legislative power may be described as being by virtue of s. 109 subordinate or conditional. But where there is no paramount concurrent legislative power in the Commonwealth State power is exclusive and absolute. To advance or retract Federal legislative power by interpretation, where by virtue of s. 109 it is a paramount concurrent power, is therefore to diminish or enlarge the area of State absolute or exclusive legislative power. There is a common boundary between Federal legislative power and State absolute power and this has been considered to provide a sufficient mutual relation between the legislative power of the States and that of the Commonwealth to involve the limits *inter se* of such

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powers. The decision of the Privy Council in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) was taken to establish so much: see *Ex Parte Nelson* [*No.* 2] (2); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (3).

The very general statement has been thought warranted that the interpretation of any paramount concurrent legislative power of the Commonwealth always involves a question of the limits *inter se* of State and Federal constitutional power. This is not the same thing as saying that all questions whether the Commonwealth has exceeded a power conferred by s. 51 are questions *inter se*. For it is not all powers conferred by s. 51 that are in every respect paramount. Paragraph (xxxvi.) confers a power by reference to a number of sections of the Constitution concerning matters with respect to which the Parliament may provide: see ss. 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 87, 96, 97. They are not matters with which the States could have any concern and, if a common boundary between the Federal power over them and State power is conceivable at all, it would, I suppose, be found to be a boundary between a State power and a Federal exclusive power. Then the power with respect to bounties conferred by par. (iii.) is made exclusive by s. 90. The power to impose taxation which forms part of the power to make laws with respect to taxation conferred by par. (ii.) has been regarded as parallel and concurrent with the taxing power of the States, though no doubt par. (ii.) extends to incidental matters over which the Federal power may be paramount. In the same way, except as to incidental matters, it is not easy to see how any exercise of the powers conferred by pars. (x.), (xxviii.), (xxx.), (xxxiii.) and (xxxiv.) could affect State law as a result of the application of s. 109. However s. 51 (xxxi.) confers a concurrent power, but if a conflict of legislation passed in its exercise with State legislation arose s. 109 would undoubtedly apply. Nevertheless there are certain features about a power to make laws with respect to the acquisition of property upon just terms which made it uncertain whether in all respects its interpretation did involve an *inter se* question. The central purpose of the power, the acquisition of property, is not calculated to bring about a collision of Federal and State authority until both the Commonwealth and a State set about acquiring the same property. Legislation upon matters incidental to the acquisition of property might be of a more general character and raise questions about a common

(1) (1917) A.C. 528.
(2) (1929) 42 C.L.R. 258, at pp. 270, 271.
(3) (1946) 71 C.L.R. 29.

boundary line between Federal and State power. Further, the condition that the purpose of the acquisition must be one in respect of which the Commonwealth Parliament has power to make laws imports a criterion which itself may involve *inter se* questions. But the condition that the acquisition must be upon just terms is not so clearly part of the definition of the extent of the power providing a common boundary line between the absolute legislative power of the State and the paramount legislative power of the Commonwealth. There was a question whether it was not rather a fetter upon the manner in which the power might be exercised than part of the definition of the extent to which it took the paramount Federal legislative power into the field of State power, the extent to which it exposed an exercise of State power to a possibility of defeat under s. 109, if the Commonwealth Parliament should authorize the acquisition of the same property as the State sought to acquire. The conclusion of the Privy Council that a question *inter se* arose upon s. 51 (xxxi.) is inconsistent with the acceptance of this view of the condition that the acquisition must be upon just terms. That condition must be regarded as entering into the definition of the extent of the power of the Commonwealth so that it affects, as much as any other part of the definition of the power, the question where the boundary of the State subordinate power ends, subordinate by reason of s. 109, and State absolute power begins.

As the validity of reg. 19 involved a question *inter se* the plaintiff-appellant stood in the position of having either to make its case on the footing that reg. 19 was valid or, if the plaintiff depended on its invalidity, of having to seek from the Privy Council a decision based on a conclusion or at least an assumption with respect to the question *inter se*.

When the action was before this Court, both at the trial and on appeal to the Full Court, the defendants did not contest the assumption which the plaintiff's case adopted, namely, that the effect of reg. 14 was to give a right to compensation assessed on general principles and independently of reg. 19, which did not operate to confine growers to participation in a pool. The assumption was not contested because it was based upon the decision of this Court in *Australian Apple and Pear Marketing Board* v. *Tonking* (1), which was treated as applicable to the *National Security* (*Wheat Acquisition*) *Regulations*. The result thus reached by the parties in this Court meant in substance that an interpretation of the regulations was tacitly adopted which was based upon the view

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

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that, to avoid the invalidation of reg. 19 as affording terms that were not just, they must be taken to mean that participation in a distribution under reg. 19 should not be the only means of obtaining compensation but that growers might, unless they chose to accept payments under reg. 19 in satisfaction, recover in proceedings at law compensation assessed on ordinary principles. It will be seen that although the interpretation was influenced, if not determined, by the view that if reg. 19 provided the only means of compensation it would be invalid, nevertheless, an actual conclusion that reg. 19 was invalid was not involved. But what was necessarily involved was a construction of regs. 14 and 19, which made reg. 14 confer a right to compensation independently of reg. 19, which was interpreted as affording only an optional means of obtaining satisfaction of the right so conferred.

Before the Privy Council the defendants-respondents did not adhere to the position they had accepted in this Court. On the contrary, they contended that the meaning of the regulations was that growers should obtain compensation by participation in a pool formed in pursuance of reg. 19 and not otherwise and that reg. 19 was not invalid. This meant that the statement found at the end of reg. 14 that the rights and interests in the wheat were thereby converted into claims for compensation did not confer any right to compensation assessed on ordinary principles but was simply introductory to reg. 19. Nevertheless, the defendants conceded before the Privy Council that if reg. 19 were invalid it was severable from reg. 14, so that reg. 14 would give, in that event, a right to compensation assessed according to ordinary principles. I do not understand how in point of law this concession can be reconciled with the interpretation placed by the defendants upon the regulations. If reg. 14 does not intend to confer a right to compensation on ordinary principles, I cannot see how the invalidity of reg. 19 can result in its doing so : cf. *Bank of New South Wales* v. *The Commonwealth* (1). It is of course easy enough to understand why the practical interests of the defendants should make them prefer to concede the correctness of the plaintiff's claim that reg. 14 was severable rather than risk the total collapse of the regulations.

Faced with the contention that the true effect of regs. 14 and 19 was to confine the claims of the growers to distributions pursuant to reg. 19, it was open to the plaintiff to dispute this interpretation of the regulations and to stake its case upon the correctness of the construction which made reg. 14 confer a right to compensation

(1) (1948) 76 C.L.R., at p. 374.

assessed on ordinary principles and reg. 19 do no more than afford an optional means of obtaining satisfaction of the right.

If the plaintiff had done this and had refused to contest the validity of reg. 19, there might have been a possibility of their Lordships holding that no question *inter se* was involved in the case. For myself I doubt whether a concession that reg. 19 was valid would have made any difference. For it must be borne in mind that the interpretation of regs. 14 and 19 upon which the plaintiff must have fallen back was adopted in *Tonking's Case* (1) partly in consequence of a view that otherwise reg. 19 would be incompatible with s. 51 (xxxi.), and such a view necessarily implies that a meaning and effect were ascribed to s. 51 (xxxi.), which would, it is apprehended, be considered to amount to the decision of a question *inter se*.

Further, having regard to the operation given to s. 74 in the *Banks' Case* (2), in this case (3) and in the case of *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (4), the question whether s. 74 applies seems to depend much less upon what the parties choose to raise than upon what is inherent in a decision of the matter, in point of law and logic.

But the plaintiff elected against conceding that reg. 19 was valid and said that it was void, if it gave the exclusive means of compensation, because it did not afford just terms. When the action was before the Full Court on appeal I gave my reasons (5) for thinking that, independently of *Tonking's Case* (1), the regulations could not be interpreted so as to enable the plaintiff to succeed in the action as framed ; nothing short of the invalidity of reg. 19 would enable it to recover on the footing of any of its claims.

The validity of the regulations appeared to me to be a very serious question. If the effect of the regulations was to leave the payment of any compensation consisting of a dividend or dividends in the pool to the mere discretion of the Minister or was to authorize the Minister or the Board to dispose of wheat upon terms which were unfair or unjust to the growers, and to give no indemnification to the pool but to leave the growers without remedy in respect of the loss suffered by the pool, then the constitutional requirement would not be fulfilled that an acquisition of property must be on just terms. It appeared to me that, if this were the effect of the regulations, not only reg. 19 but reg. 14 would be inseverably void and the growers would be left to recover from the Commonwealth

(1) (1942) 66 C.L.R. 77.
(2) (1950) A.C. 235.
(3) (1951) A.C. 34.
(4) (1951) A.C. 53.
(5) (1948) 75 C.L.R., at pp. 558-566.

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in whatever cause of action in contract or in tort might be found to arise from the circumstances of the taking or surrender of their parcels of wheat (1).

I say this because it still appears to me that the basal question in the case really was the validity of reg. 19 and so of reg. 14. If that were answered in the plaintiff's favour the issue then became how you assessed the amount the plaintiff should recover upon its cause of action in tort or contract in respect of its parcels of wheat.

If it were found possible to hold reg. 19 to be invalid and at the same time to construe reg. 14 as validly conferring an independent right to compensation then the issue would relate to a statutory right to compensation. Otherwise the issue would relate to a *quantum valebat* or damages at common law.

As I see the matter, the basal issue whether reg. 19 as an exclusive provision of the means of compensating growers is valid depends upon the question whether it is possible to work out an interpretation of the regulations which would sufficiently protect the interests of the growers in the pool. Such an interpretation must rest upon the use of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1950 and upon implications arising from the fact that the regulation is an exercise of the legislative power to acquire property on just terms. If it is legitimate by these means to give to the regulations an effect which would make it the Board's duty to bring forward a recommendation based upon the results of the pool, which would limit the grounds upon which the Minister could reject the recommendation, and which would require that for wheat disposed of for the use of the Commonwealth or for domestic consumption a recompense to the pool must be made which was honestly fixed or estimated as a fair and reasonable value, if such an effect might properly be attributed to the regulations, then their validity might be supported. Their validity might then be supported, provided that in s. 51 (xxxi.) the expression " upon just terms " is not given the same meaning as " subject to payment of full (or adequate) compensation " : cf. *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2).

The plaintiff maintains that no such effect can properly be given to the regulation. If not, then for my part I would concede the invalidity of both regs. 14 and 19. But to say that does not make the validity of these regulations any less an issue on which the fate of an appeal (if one were open) might, if not must, turn. What is of great importance in considering this application for a certificate

(1) (1948) 75 C.L.R., at p. 567. (2) (1946) 72 C.L.R. 269.

is to see what are the various interpretations of s. 51 (xxxi.) upon which the validity of the regulation might be affirmed or denied in the Privy Council. If the whole question of the validity of the regulations were thrown open by a certificate for decision on appeal, it would be possible, in support of the denial of the validity of the regulations, to rely on any one of the following grounds arising upon s. 51 (xxxi.).

First the words "upon just terms" might be interpreted as requiring compensation consisting of the money value ascertained under the judicial power. Secondly, they might be interpreted as requiring such compensation however ascertained or assessed. Thirdly, the words might be interpreted as not necessarily requiring payment of the money value of the commodity but as admitting of recompense by a distributable share in a commodity pool, if the pool was so constructed as to exclude the possibility of any governmental administrative discretion with reference to one or other of certain matters. The matters are (a) the conduct of the pool, (b) the considerations governing the amounts available for distribution from time to time and the occasion when an amount available for distribution should actually be distributed and (c) what charges should be made against the proceeds of the commodity. Fourthly, the words "upon just terms" might be interpreted as being inconsistent with the acquisition of a commodity for the purpose of a pool for disposal unless the pool is conducted by a body or persons standing in a fiduciary relation to the suppliers of the commodity or placed under duties analogous to those of a fiduciary.

On the other hand there is more than one conceivable interpretation of the Commonwealth's legislative power upon which it would be possible on such an appeal to affirm the validity of regs. 19 and 14.

For example it would be possible to affirm their validity on the ground, which would suffice whatever might be the interpretation and operation of reg. 19, that s. 51 (xxxi.) is not the exclusive source of the power of the Commonwealth Parliament to authorize the acquisition of property and that the defence power in itself is enough to support the regulation. Such a ground would, of course, be quite contrary to the view which this Court has adopted that s. 51 (xxxi.) is the only source of the power of the Commonwealth to acquire property (*Johnson Fear & Kingham and the Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1)). It would

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

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be contrary also to a dictum of the Privy Council in this case (1), but the view neverthelsss remains open, if a certificate were given.

It will be seen from the foregoing that a certificate covering the entire question *inter se* would throw open in the Privy Council constitutional questions which might be decided on grounds of great legal and practical consequence. They are essentially matters the product of federalism and fall within the principle or policy animating s. 74, namely, that questions characteristic of federalism should prima facie be decided finally in this Court, habituated as it is to the conceptions and considerations governing such questions, conceptions and considerations peculiar to Federal systems and appearing strange and exotic to those who have enjoyed only a unitary form of government.

This principle or policy is reinforced by s. 39 (2) (*a*) and ss. 38A and 40A of the *Judiciary Act* 1903-1950. Section 74 itself provides that a certificate that the question ought to be determined by the Privy Council may be given only if this Court is satisfied that for a special reason the certificate should be granted.

The Court has hitherto acted upon the view that nothing but some very exceptional element in a case should lead it to grant a certificate. Experience has confirmed the wisdom of the course the Court has pursued.

Accordingly the plaintiff's application for a certificate begins with a very strong prima-facie presumption against its success. This presumption the plaintiff seeks to destroy or displace in a number of ways. Not only does it point to exceptional features in the case, but it says that the view upon which the Court has hitherto acted in applications for certificates under s. 74 has lost its validity, or at all events, much of its rationale since the decisions in the *Banks' Case* (2), in this case (3) and in the case of *Grace Bros.* (4). There is a further point made for the plaintiff which should be mentioned before examining its main contentions. It is that there is no need to grant a certificate in a form which would throw open the entire question of the constitutional validity of reg. 19, still less of regs. 14 and 19 together.

The plaintiff says it would be content with a certificate which would exclude from the consideration of the Privy Council some of the possible grounds I have mentioned for invalidating reg. 19. As to this it may be remarked that there is an underlying inconsistency between, on the one hand, the view adopted in the Privy Council, which in effect is that if a question *inter se* is inherent in

(1) (1951) A.C., at p. 50.
(2) (1950) A.C. 235.
(3) (1951) A.C. 34.
(4) (1951) A.C. 53.

the case s. 74 applies to deny the possibility of an appeal, and, on the other hand, the proposal that a certificate should not cover the whole *inter se* question inherent in the case. But for myself I think that it would be quite wrong at one and the same time to throw upon the Privy Council the responsibility of deciding the validity of the regulation as an *inter se* question and at the same time to attempt to fetter the Judicial Committee in the performance of the task by limiting the grounds upon which they might proceed. Besides nothing is so apt to promote confusion and difficulty as an attempt to dissect out of an entire legal question one of the component issues it involves and to submit it for decision in artificial isolation.

The contention that this Court should abandon the principles which hitherto have governed its determination of applications for certificates under s. 74 is based upon the fundamental change which, so it is said, the three recent decisions of the Privy Council have caused in the operation attributed in this Court to s. 74. The changes which it is claimed have been made in the accepted understanding of the meaning and application of s. 74 fall under two headings. The first concerns the scope of the words " no appeal shall be permitted . . . from a decision of the High Court upon any question (*sc.* of the required description) howsoever arising ". The second relates to the description of question. It concerns the words " any question . . . as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States ".

As to the first head, the position taken in this Court in *Baxter* v. *The Commissioners of Taxation* (*N.S.W.*) (1) had been that " an appeal from a decision " covered any proceeding by way of appeal to the Privy Council, whether from a decree, order, judgment, or sentence of the High Court or of some other Court, a purpose of which was to call in question the opinion judicially adopted by the High Court as part of its *ratio decidendi* in the course of disposing of any case whether that under appeal or some other case, if that opinion dealt with a question of the required description. This interpretation has been overruled and the dissenting view of *Higgins* J. in *Baxter's Case* (2) has been sustained.

For the view that s. 74 forbade attempts by any route to obtain from the Privy Council any review of the ruling of the High Court on the abstract question of law as to the powers *inter se* of State and Commonwealth, there has been substituted an interpretation

(1) (1907) 4 C.L.R. 1087.

(2) (1907) 4 C.L.R., at pp. 1161-1177.

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of the section by which the proceeding which is not permitted is an appeal from a judgment, decree, order, or sentence of the High Court whenever, in order to pass upon the correctness of the judgment, decree, order, or sentence pronounced or made by the High Court, it is or it may be necessary to decide a question of the required description. The *Banks' Case* (1) decides, for example, that where the judgment pronounced by the High Court may be sustained upon one or other of two or more grounds one of which does not involve a question *inter se* while such a question is involved in the other ground or grounds, an appeal is forbidden from the judgment, although the *ratio decidendi* of the High Court was limited to the first ground; this is so because the judgment could not be reversed without deciding against the correctness of all the grounds for sustaining it and so deciding a question or questions *inter se*.

In the present case (2) the question of the validity of reg. 19, and (apart from the concession of the parties that it was severable) of reg. 14 would arise only if the interpretation of the regulations adopted by this Court was rejected, that is, unless in order to support that interpretation it was found necessary to fix upon s. 51 (xxxi.) some meaning involving such a question and to use it as a controlling factor in pursuance of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1950.

It thus appears that the curial order of the High Court is not to be appealed from, without a certificate, not only where the High Court has based the order upon a decision of an *inter se* question but where in point of law it might have, but has not, based it on the decision of such a question, and this is so whether or not the *inter se* question was actually raised or contested before the High Court. Moreover, the *inter se* question need not be directly involved; it is enough if the need to decide it arises only because under s. 15A or s. 46 (*b*) of the *Acts Interpretation Act* or otherwise the interpretation of a statutory instrument is affected by the restrictions which constitutional definitions of subject matter place on legislative power: cf. per *Isaacs* J., *Pirrie* v. *McFarlane* (3).

I do not regard the establishment of this view of the operation of s. 74 and the displacement of the view adopted by the majority of the Court in *Baxter's Case* (4) as affording any sound ground for departing from the principles or standards by which hitherto this Court has determined applications for certificates under s. 74. The scope of the operation of the words "no appeal shall be permitted

(1) (1950) A.C. 235.
(2) (1951) A.C. 34.
(3) (1925) 36 C.L.R. 170, at p. 188.
(4) (1907) 4 C.L.R. 1087.

. . . from a decision of the High Court upon any question" (of the required description) has in one way been restricted, in another way enlarged. The consequence of the change that is immediately relevant is that an appeal to the Privy Council may be precluded although the question *inter se* has never been decided by the High Court either in the particular case or in any other case and although, upon some views of the case, the possibility exists of avoiding a decision upon the *inter se* question altogether. If the course hitherto pursued by the Court in dealing with applications for certificates had been adopted only because the existence of a decision of this Court on a question of the distribution or demarcation of powers was regarded as the reason for excluding the jurisdiction of the Privy Council, there being otherwise no reason why the responsibility of interpreting the Constitution with reference to such questions should not be thrown upon the Judicial Committee, then the change would make a reconsideration of the practice of the Court necessary. But the fact is that the basal purpose of s. 74 and of the principles upon which this Court has proceeded has been to confine the final decision of the characteristically Federal questions described by s. 74 to a jurisdiction exercised within the Federal system by a Court to which the problems and special conceptions of federalism must become very familiar, not without the hope, perhaps, that thus a body of constitutional doctrine might be developed. In such a view the fact that this Court has not given any decision upon the question *inter se* cannot be a reason for remitting it to the Privy Council for decision.

Next must be considered the changes said to have been made, by the Privy Council by the decisions cited, in what has been the accepted understanding in Australia of the category or description of questions covered by s. 74.

Under this head the first matter perhaps to mention is the statement of their Lordships that when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any State. It does not appear to be of any relevancy to the present application, whether this states new doctrine or not. It certainly states new doctrine if it means that no question *inter se* can exist where the legislative power of the Commonwealth over a subject matter is exclusive up to the exact limits of the power, so that the very boundary line of Federal exclusive legislative power is necessarily the boundary line of State legislative power. Of this a ready example is the Federal power with respect to bounties: s. 51 (iii.) and s. 90. Assuming that bounties could

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not be granted under a power found in ss. 81-83 (cf. *Attorney-General for Victoria*; *Ex rel. Dale* v. *The Commonwealth* (1)), the definition of a bounty on the production or export of goods marks at once the boundary of State power and Federal power, and in such a case a question where the boundary ran was, it was considered, the most conspicuous example of a question of the limits *inter se* of the constitutional powers of State and of Commonwealth. But the judgment of the Privy Council may very well refer to another type of exclusive power. If a Federal legislative power is conferred over a subject matter and the power over part only of the subject matter is made exclusive, then the definition of the exclusive power does not give a common boundary between State power and Federal power. The boundary of Federal legislative power extends beyond the boundary of so much as is exclusive. The boundary of the exclusive power tells you nothing about the extent of Federal power. It tells you only that within the boundary there is no State power. This is the case with customs and excise (s. 90), which form the exclusive part of the power to make laws with respect to taxation.

When the view prevailed in this Court (*W. & A. McArthur Ltd.* v. *Queensland* (2)) that s. 92 did not bind the Commonwealth it was given an operation which amounted to making exclusive so much of the Federal power with respect to trade and commerce among the States (s. 51 (i.)) as enabled the Federal parliament to restrict the freedom of inter-State trade, commerce and intercourse. The citation which the judgment of the Privy Council makes with reference to the proposition about exclusive powers is to a passage directed to showing that this operation ascribed to s. 92 did not have the result of giving to a question about s. 92 the character of a question as to the limits *inter se* of constitutional powers, directed to showing that it could not have that result because the boundary of the Federal legislative power under s. 51 (i.) extended beyond that area included within s. 51 (i.), which would be made exclusive by s. 92 on the footing that s. 92 did not bind the Commonwealth. In view of this citation and of the distinction between the two classes of exclusive powers, I take the proposition in the judgment of the Privy Council to relate to an exclusive power of the Parliament forming part only of the full legislative power of the Commonwealth over the subject matter.

It is, however, claimed that the decisions of the Privy Council have made a much more relevant change in the received interpretation of the description of question covered by s. 74. It is said that

(1) (1945) 71 C.L.R. 237.

(2) (1920) 28 C.L.R. 530.

the decisions deny the appropriateness of the consideration that the boundary of a Federal concurrent legislative power marks the boundary of that State legislative power which is absolute, that is, the power the exercise of which is free from liability to defeat by paramount Federal legislation (under s. 109).

There is more than one passage in the judgment given in the present case (1) relied upon for this assertion. But it is enough to quote the following, which appears the strongest statement (2) :— " The appellants' argument that no inter se question arises unless a decision that the impugned exercise of a Commonwealth power was valid would result either in the annihilation of a State power or in the subordination of a State power, by virtue of s. 109 of the Constitution, to the impugned enactment, is inconsistent with the *ratio decidendi* of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3). Their Lordships in that case refused to consider what the power of the State was, because that was itself a question for the High Court, and because the question whether the powers of the State would be impaired was not the test". It is important to notice the argument attributed to the appellant (plaintiff). The argument denies that a question as to the limits *inter se* can exist unless the condition it proceeds to state is fulfilled. It does not say that if it is fulfilled a question *inter se* does exist. The latter proposition may, I think, still be maintained. The former proposition was never tenable.

That it was not tenable is made evident by the consideration that the mutual interaction between legislative and judicial powers, between legislative and executive powers and, probably between Federal and State executive powers may involve questions of the limitations *inter se* of constitutional powers : see *Ex parte Nelson* [*No.* 2] (4).

The expression " a decision that the impugned exercise of a Commonwealth power was valid " I take to refer to the construction put on Federal power so as to sustain the impugned exercise. It is only the interpretation of the power which would operate inimically to State power. " Subordination of State power, by virtue of s. 109 " must, of course, refer to the liability of any exercise of State legislative power to be rendered inoperative by an inconsistent exercise of the Federal power. The difficulty lies in what follows. What is the *ratio decidendi* of *Jones' Case* (3) with which the appellant's argument was inconsistent ? It is

(1) (1951) A.C. 34.
(2) (1951) A.C., at pp. 50, 51.
(3) (1917) A.C. 528.
(4) (1929) 42 C.L.R., at pp. 271, 272.

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stated in a passage from Lord *Loreburn's* reasons (1), which is set out earlier in their Lordships' judgment in the present case (2). Their Lordships, as I understand, interpret that passage as meaning that the powers of the President of the Court of Conciliation and Arbitration were constitutional: cf. per *Isaacs* J. in *Pirrie* v. *McFarlane* (3). If so it may be assumed that a decision as to the ambit of their operation within a State would determine the limits of an inconsistent use of State power. But ultimately that would come back to the effect of s. 109 applied to valid Federal legislation conferring powers upon the President. Validity involves the interpretation of Commonwealth legislative power. It is not easy to apply Lord *Loreburn's* observation that the existence of State power was for the High Court to decide. Independently of s. 109 no question of the existence of State power could arise except as to matters outside the territory of the State, and then it is not a matter falling within the original jurisdiction of this Court unless it arises incidentally to some Federal question. There is no trace in the substantive proceedings, *R.* v. *Commonwealth Court of Conciliation and Arbitration* (*Builders' Labourers' Case*) (4) of any question about the positive existence of State power. The words "however much or little the Commonwealth may be required to conform to State laws or State awards" is evidently an echo of the argument, which must have been advanced before the Judicial Committee, but had sometime earlier been rejected in this Court, that a Federal industrial award cannot be made inconsistently with State law because of the connotation of "arbitration". The expression "however much or however little the State may impose laws upon its own subjects" can refer only to territorial limitations and limitations arising from the existence of Federal power. The statement that the question whether the powers of the State would be impaired was not the test must mean that, even though a decision as to the extent of Federal powers might not imply or involve any impairment of State power, there might yet be a question *inter se*. For it can hardly be doubted that if a decision as to the extent of Federal power would necessarily involve or imply a derogation of State power there is a question *inter se*. This seems to be clearly contemplated by the passage immediately preceding (5). Referring to the compound conception of acquisition-on-just-terms the judgment of the Privy Council says "So far the Commonwealth is authorized, beyond that it has no authority

(1) (1917) A.C., at p. 532.
(2) (1951) A.C., at p. 49.
(3) (1925) 36 C.L.R., at p. 195.
(4) (1914) 18 C.L.R. 224.
(5) (1951) A.C., at p. 50.

to acquire property in any State. The exercise of the power is conditional on the observance of the constitutional limitation, just as under placitum xxxv. the exercise of the power is conditional on the existence of the constitutional limitation that there should be a dispute extending beyond the bounds of any one State. Under either placitum the question whether the constitutional limitation of the Commonwealth power had been exceeded raises the question how far the constitutional power of the Commonwealth reaches into the State and how far, if at all, the State's power has been affected by the Commonwealth power. Each of these questions requires the court to determine, on a construction of the Constitution, the limitations of the powers of the Commonwealth and of the States inter se."

When Lord *Loreburn* in the passage cited speaks of the frontier of the Commonwealth power reaching into the State, he must mean into the Constitution or powers of the State. He cannot be speaking of the State territorially. Commonwealth powers operate territorially within the States because the States with the Northern Territory geographically form the Commonwealth and read in a geographical sense the statement would be absurd.

The references in the judgment in this case to *Ex parte Nelson* [*No.* 2] (1) and *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (2) suggest rather a preparedness to accept the doctrine of these decisions, not to overrule it.

Notwithstanding the difficulties that were pointed out I do not think that the judgments of the Privy Council in the three cases demand any radical revision of the conception which has prevailed in this Court of what are questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States.

The constitutional question in this case arises upon the requirement of just terms in s. 51 (xxxi.) and the actual decision of the Privy Council upon so much of s. 74 as relates to the description of question covered by that provision is simply that a question depending on the meaning and application of the power of acquisition upon just terms falls within the description.

There is nothing new or surprising in such a conclusion. The distinction between marking out the boundaries of a power and regulating the manner in which, within the boundaries, it may be exercised may be refined and metaphysical. But, unless the view were taken that the words " upon just terms " did no more than control or regulate the manner of exercising a power the boundaries

(1) (1929) 42 C.L.R. 258. (2) (1946) 71 C.L.R. 115.

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of which were marked out by the words " acquisition of property for any purpose in respect of which the Parliament has power to make laws " then to me it would appear inevitable that the interpretation of " just terms " should be regarded as involving a question *inter se*, at all events according to the understanding of s. 74 hitherto prevailing. It is said, however, that no conflict with State power arises. That, I think, is a mistake. It is, of course, true that no conflict in the actual exercise of authority has arisen between State and Commonwealth over the acquisition of wheat. But the conflict with which s. 74 is concerned relates to measuring power. To measure Federal power in such a way that reg. 19 is void means that the establishment of a wheat scheme which does offend against the interpretation placed upon just terms is within the province of the States alone. *E converso*, if it is valid, it is within the province of the Commonwealth to establish such a scheme to the exclusion of the States.

Considered in an abstract way the question of the ambit of the power to acquire property on just terms is one to which, as I think, the prima-facie rule that it should be decided finally here should be applied. But as against the prima-facie rule the plaintiff makes a case, with which I have been much impressed, based upon the real purpose and nature of the action in which the *inter se* question has intruded, the amount of legal significance that ought to be attributed to that question in the actual context of the cause or causes of action and the course the proceedings have taken.

I shall state very briefly the considerations which appear to me particularly to claim attention as giving an exceptional character to the present case.

In the first place I think that it is correct that upon the view adopted by *Williams* J. at the trial the plaintiff was technically entitled to judgment for a balance of compensation not actually paid. Unfortunately it did not ask that judgment should be so entered. If there had been such a judgment for the plaintiff its appeal might have been restricted to quantum, and it is probable, although I am not prepared to say certain, that to raise the *inter se* question the defendants would have been put to a cross appeal. For such a cross appeal presumably they would have required a certificate. Next, I think that weight should be given to the circumstance that in substance the plaintiff went to the Privy Council with a decision in its favour upon the question *inter se*, namely, the invalidating effect of s. 51 (xxxi.) upon reg. 19, if that regulation meant to provide an exclusive means of compensation. For that

I think is the effect of the reasons of *Williams* J. applying *Tonking's Case*, and the judgment of *Williams* J. was affirmed as a result of what was treated as an even division of opinion in the Full Court, but what perhaps should have been treated as a majority for affirming it, except in form. It does not matter that the decision of the *inter se* question in *Tonking's Case* was worked out by interpretation of the regulations. Substantially it was the respondents who raised the *inter se* question for decision or for possible decision by the Privy Council by insisting for the first time in the course of the litigation that reg. 19 (with reg. 14) validly provided an exclusive means of compensation.

Until this position was adopted the validity of reg. 19 had not been treated as a question between the parties, who had actually refused to respond to my suggestions, made during the hearing of the appeal, that the question should be treated as of importance. It is not an improbable conjecture that but for s. 74 the question never would have been raised by the defendants before the Privy Council. My own view has been that reg. 19 can be valid only if there was an obligation on the part of the Wheat Board (for breach of which I imagine there would be a liability in the Commonwealth) not to dispose of the wheat, whether for the uses of the Commonwealth or for domestic consumption, otherwise than in return for a recompense to the pool which was honestly fixed or estimated as a fair and reasonable value (1). Had any such defence of the validity of reg. 19 been put forward at or before the trial, it would have been open to the plaintiff to reconsider the manner in which its action is framed and to seek to make an alternative claim on the basis of such an obligation.

The plaintiff had every reason for regarding the real issue as the right measure of compensation according to ordinary principles and the amount per bushel at which the compensation ought to be assessed. On that issue I shall say no more than that I have expressed my conclusions already and that they favour the plaintiff's view (2). It may be desirable to add that, on the hypothesis that reg. 14 gives, as the result of the invalidity of reg. 19 or otherwise, an independent right to compensation assessed on ordinary principles, the circumstance that property in the wheat passed to the Commonwealth is a most material consideration upon the question whether the plaintiff had precluded itself from claiming such compensation and had bound itself to claim only a distribution from the pool.

(1) (1948) 75 C.L.R., at pp. 568, 569. (2) (1948) 75 C.L.R., at pp. 571-584.

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It is hardly necessary to say that, if an appeal to the Privy Council had succeeded and the result governed the rights of growers generally who delivered their wheat to the Board a very great sum of money would have been involved. It is right to add that in this Court the plaintiff was defeated by a combination of reasons none of which separately commanded the assent of any four of the seven judges who passed judgment upon the plaintiff's claims.

The foregoing is a brief account of some of the considerations advanced for treating this case as presenting special reasons which demanded the grant of a certificate that the question *inter se* ought to be determined by the Privy Council. They were elaborated by subsidiary arguments and the addition of further elements in the case, but I have said enough to show that, if it did not contain the question *inter se*, there is strong reason for desiring that the case should be reconsidered by the Privy Council.

There is thus an opposition between the undesirability of throwing open the constitutional question or questions for final decision in the Privy Council and the desirability of a review otherwise of the decision of this Court.

After much consideration of the course we ought to take in resolving this dilemma I have come to the conclusion that the obligation of the Court to accept the responsibility for the final interpretation of the Constitution in its distribution of powers should be treated as paramount. The interpretation and application of s. 51 (xxxi.) has provided a major difficulty which not only has not yet been resolved by the decisions of this Court: it is a difficulty which in many respects has not yet received the full examination and consideration of the Court. If a certificate were granted it is impossible to say whether a wide or narrow ground would be taken for the decision of the question *inter se* or what that ground would be. The whole question of s. 51 (xxxi.) involves very important consequences and not the least of these is the ascertainment in the light of this power what course or courses are open to the Commonwealth with respect to commodity pools and commodity control in time of war. All these matters must remain the final responsibility of this Court.

I have therefore reached the conclusion that we ought to refuse the certificate.

The result of the proceedings, unsatisfactory as it may appear, is to leave undisturbed the administration of a wheat scheme for which very inadequate regulations were made at the outset of the war in all the confusion and difficulties of the time. I have little doubt myself that regulations properly conceived and drawn would

have precluded claims of the character made in this action, notwithstanding that they established a system of pooling. But such regulations must have produced consequences as to the disposal of wheat used for home consumption and governmental needs which perhaps might have removed or alleviated the root causes of complaint. In other words, the availability to the plaintiff of the causes of action actually put in suit was, in my view, an unintended and unnecessary consequence of the establishment of the scheme.

These are considerations which it may be right to note, but they do not affect the result of this application, which, in my opinion, must be refused with costs.

McTIERNAN J. This is an application for a certificate under s. 74 of the Constitution. The application relates to the order whereby this Court dismissed the applicant's appeal from the judgment in the action between it and the respondents to the present application. (*Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1)). The Judicial Committee dismissed an appeal brought by the applicant from the same order because the applicant had not obtained a certificate under s. 74 : the appeal was dismissed for want of jurisdiction, although it was brought by the special leave of the Privy Council. As a sequel to an unsuccessful appeal to the Privy Council, the present application is novel. The effect of granting a certificate under s. 74 is that with its aid an appeal may be brought to the Judicial Committee without further leave, even if questions which are not *inter se* questions under s. 74 would arise for decision in the appeal (*Commonwealth of Australia* v. *Bank of New South Wales* (2)). The order whereby the Judicial Committee dismissed the appeal which the applicant brought from the order of this Court in respect of which the present application is made, not only dismissed the appeal, but also affirmed the order of this Court. The order of the Privy Council, in my opinion, should not be regarded by this Court as a bar to the present application. If it were granted the Judicial Committee would decide what was the effect of its order dismissing the appeal and affirming the order of this Court.

The judgment of the Judicial Committee given upon the applicant's unsuccessful appeal establishes that the order of this Court from which the appeal was brought is a " decision " of this Court " upon " a question as to the limits of the Constitutional powers of the Commonwealth and those of the States to which s. 74 applies. That question is whether reg. 19 of the *National*

(1) (1948) 75 C.L.R. 495. (2) (1950) A.C. 235.

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Security (*Wheat Acquisition*) *Regulations* is ultra vires s. 51 (xxxi.) of the Constitution, for the reason that the provision which the regulation makes for the payment of compensation does not satisfy the condition of just terms which qualifies the power of the Commonwealth to acquire property. Section 74 vests a discretion in the High Court to certify that this *inter se* question is one which ought to be determined by the Sovereign in Council, if the Court is satisfied that for any special reason it should so certify.

The applicant is confronted with the line of decisions, cited in argument, which this Court has given upon applications under s. 74. In all these cases, except one, the applications were refused. The grounds upon which the applications were rejected are expounded in well-known passages contained in the judgments delivered in those cases. The central principle of these dicta is that the policy of the Constitution is to place upon the High Court the special responsibility of being the arbiter in all disputes as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States. This policy is ingrained in s. 74 and it is the duty of the Court to exercise the discretion vested in it by s. 74 in accordance with that policy. It is argued that it is an innovation to hold that the question whether the regulations provide just terms falls within s. 74 because its determination would not resolve any conflict between Commonwealth powers and State powers ; that the Court would not impair the policy of s. 74 or renounce the responsibility imposed upon it by the section if it granted this application ; and that its rejection could not be warranted upon the principles hitherto applied in deciding applications made under s. 74.

It was unsuccessfully contended for the applicant before the Judicial Committee that the attack on reg. 19 did not raise a question as to which s. 74 gives jurisdiction to the High Court to certify that it ought to be determined by Her Majesty in Council. In arriving at the conclusion that this contention was erroneous the Judicial Committee applied the established criteria for identifying such a question. Those criteria were laid down in the *Builders' Labourers' Case* (1), and enunciated in the reasons of *Dixon* J. in *Ex Parte Nelson* [*No.* 2] (2), and in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 2] (3). The words " just terms " are part of the grant of power which, so it is contended, is exceeded by reg. 19. The Judicial Committee said that the con-

(1) (1917) A.C. 528.
(2) (1929) 42 C.L.R., at p. 272.
(3) (1946) 71 C.L.R., at pp. 122, 123.

tention that this limitation upon Commonwealth power was exceeded raises the question " how far the constitutional power of the Commonwealth reaches into the State and how far, if at all, the State's power has been affected by the Commonwealth power " : *Nelungaloo Case* (1). That is a true test for determining whether the question is one as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States.

In my opinion no new conception of an *inter se* question under s. 74 emerges from the reasons given by the Judicial Committee for dismissing the applicant's appeal. Even if the contrary view that a new conception does emerge be correct, that is not a reason why the Court should be more ready to grant the present application. The most important consideration is that the Judicial Committee has decided that the question as to which the Court is asked to certify falls within s. 74. It follows that the Court should not decide this application upon principles different from those it applied in previous applications made under s. 74. Accordingly the Court should maintain the position that the Constitution makes it the arbiter of the question which the applicant has raised as to limits of the power granted to the Commonwealth Parliament by s. 51 (xxxi.).

The regulations now in question were made during the last war and are to be justified by their relation to the defence and security of the Commonwealth during war time : that also is the constitutional basis upon which rests the validity of the discretions which the regulations placed in the Board or the Minister as to the sale price of the wheat and as to its use and disposal. The main grounds on which the applicant contended in the previous appeal, that reg. 19 does not provide just terms, were summarized in the judgment of the Judicial Committee in these words : " the Board (Australian Wheat) was not bound to obtain the best possible price for the wheat handled by it and was subject to ministerial control both as regards the use and disposal of the wheat and as regards the payments to be made to wheat growers " (2). It was decided by the High Court, during the last war, that the only power granted to the Commonwealth to acquire property of any kind for the purpose of defence is s. 51 (xxxi.), and any acquisition of property made for the purpose of defence is not valid if not made on just terms. According to this interpretation of the Constitution, s. 51 (vi.), the defence power, can play no other part in the acquisition of property except to supply a lawful purpose

(1) (1950) 81 C.L.R., at p. 157; (1951) A.C., at p. 50.

(2) (1950) 81 C.L.R., at p. 153; (1951) A.C., at pp. 46, 47.

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for which property may be taken. Upon this interpretation of the constitutional powers of the Commonwealth no acquisition of property for defence, either in war or peace, is valid unless it is made upon " just terms " in accordance with the meaning of that expression in s. 51 (xxxi.). A distinction has been drawn between just terms and just compensation: the interests of the Commonwealth as well as of the subject enter into the question whether the terms of a law expropriating the owners of property are just terms. National interest must be accommodated to private interests.

In war time inflationary pressure raises the level of domestic prices and in peace time defence expenditure has the same tendency: shortages abroad influence export prices. It is a question of extreme importance to the Commonwealth and the States whether an essential commodity, such as wheat, acquired for the purpose of defence, either in war time, or, if constitutional, in peace time, would not be taken upon just terms unless the law providing for acquisition secured to the expropriated owners compensation measured according to " the best possible " price at which the wheat could be sold and, besides, excluded the Executive Government from the control of the use or disposal of the wheat. I apprehend that " the best possible price " means the best possible price obtainable overseas or in Australia. It would be difficult to reconcile excluding the Government from all control of the use or disposal of a commodity, with the avowed purpose of its acquisition, if that purpose were defence. The Judicial Committee would not be bound by the doctrine of this Court on par. (xxxi.) or the interrelation of this paragraph and par. (vi.), if an appeal were brought in pursuance of a certificate granted as to the present *inter se* question. The judgment of the Judicial Committee would bind this Court and would in effect become the charter of the powers granted by s. 51 (xxxi.) to the Commonwealth and the standard of the rights of the owners of property in Australia implied by the expression " just terms ". The determination of the present *inter se* question involves, besides matters of strict law, national, economic and social problems and considerations which arise out of the Australian scene and naturally are more within the cognizance of the High Court than an external tribunal. So far as the application depends upon the nature of the *inter se* question, I think that there are more substantial reasons for refusing it than for granting it.

The applicant also relies upon the circumstance that this Court did not decide the *inter se* question. This is not, in my opinion, a

special reason why the Court should certify that the question is one which ought to be determined by the Privy Council.

It is contended for the applicant that the reasons given in this Court for the order from which the applicant wishes to appeal are not satisfactory and the certificate should be granted, in order to enable it to appeal. The applicant had the opportunity of appealing from this Court but lost it because it would not abandon the contention that reg. 19 is invalid. It is not desirable for this Court to express any opinion on the reasons for which the Court arrived at its conclusion. The Judicial Committee granted special leave to appeal from the order. The grounds upon which a certificate may be granted are different from those upon which special leave to appeal is granted. The order of this Court is final and conclusive, subject to the grant by the Privy Council of special leave or by the High Court of a certificate under s. 74. The Court must presume that its order is right; and it cannot therefore certify that the *inter se* question ought to be determined by the Privy Council for any reason depending upon an argument that the decision of the Court upon some other question is wrong.

I should dismiss the application.

WILLIAMS J. This is a motion for a certificate under s. 74 of the Constitution certifying that certain questions ought to be determined by Her Majesty in Council. The questions asked in the notice of motion, the form of which could be varied if necessary, are (1) Whether on the footing that the acquisition of the applicant's wheat was valid the amount of compensation to which the applicant was entitled should be determined under reg. 19 of the *National Security* (*Wheat Acquisition*) *Regulations* as the exclusive method of determining the same or whether it should be determined upon common law principles because of the invalidity of reg. 19 construed as providing the exclusive method of determining compensation; (2) or, in the alternative, whether upon the footing that the acquisition of the applicant's wheat was valid the said reg. 19 validly provided the exclusive means of determining the amount of compensation payable. The application follows upon the dismissal by the Privy Council of an appeal to their Lordships by special leave from an order of this Court dismissing an appeal from the dismissal by me of an action in which the applicant claimed against the respondents' compensation for its wheat acquired by the Commonwealth and, *inter alia*, a declaration that reg. 19 of the *National Security* (*Wheat Acquisition*) *Regulations*, 1939, was invalid.

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The proceedings in the action which led to the appeal to the Privy Council are reported in this Court in (1) and in the Privy Council in (2). As these reports show the applicant's wheat had been acquired by the Commonwealth under the provisions of the *National Security* (*Wheat Acquisition*) *Regulations*. The text of the material regulations appears in the reports and need not be repeated. Regulation 14 converted the rights of persons interested in the wheat so acquired into claims for compensation. Regulation 19 provided that such persons should forward claims for compensation to the Australian Wheat Board and that they should be paid such amount of compensation as the Minister, on the recommendation of the Board, determined. Regulation 19 contained certain provisions relating to the manner in which compensation should be assessed. In this Court, both before me and the Full Court, the constitutional validity of reg. 19 was not attacked, and the action proceeded on the basis that regs. 14 and 19 provided alternative methods of assessing compensation, so that a person whose wheat had been acquired had the choice of having his compensation assessed on common law principles or accepting what he was paid under reg. 19.

But, on the appeal to the Privy Council, the applicant was not content to accept the validity of reg. 19, first because there was the danger that the Privy Council might hold that reg. 19 provided the only means of assessing compensation and that even on this basis it was not necessarily inconsistent with just terms and was valid, and secondly because *Latham* C.J., *McTiernan* J. and *Webb* J. had found that the applicant had elected to accept compensation under reg. 19 and, whilst this finding might be shown to be unjustified on the evidence, another obvious answer to the defence of election was that reg. 19 was null and void and there was therefore no scope for election. Accordingly the applicant pressed the constitutional invalidity of reg. 19 and would not abandon the point, but at the same time contended on various grounds, which are discussed in the judgment of the Privy Council, that no *inter se* question was involved and that in any event the appeal was competent without a certificate of this Court under s. 74 of the Constitution. The effect of the judgment is epitomized by the Privy Council itself in *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (3): "It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 was an

(1) (1949) 75 C.L.R. 495.
(2) (1950) 81 C.L.R. 144; (1951) A.C. 34.
(3) (1950) 82 C.L.R., at p. 363; (1951) A.C., at p. 61.

inter se question. It was decided also that, though the appellant might have succeeded in the appeal without obtaining a determination on the *inter se* question, yet unless he acquiesced in the High Court's determination on it or obtained a certificate from the High Court, the jurisdiction of His Majesty in Council was excluded ". Accordingly the appellant has been compelled to apply to this Court for a certificate before it can prosecute an appeal in the Privy Council. It was submitted that the real issue between the parties is the amount of compensation the Commonwealth should pay the applicant for its wheat, whereas the question of the constitutional validity of reg. 19 is a minor and subsidiary issue and not a question upon which the Privy Council would be likely to give a judgment upon the meaning of s. 51 (xxxi.) of the Constitution of general constitutional importance. I cannot agree. It is impossible to forecast how far the argument on the constitutional question might travel. I would have no hesitation myself in holding that reg. 19 does not of itself provide just terms. Left to myself I would have preferred the construction of the regulations that reg. 19 was invalid but severable, leaving reg. 14 as the sole method of assessing compensation. But I felt that I should apply the decision of the Full Court in *Tonking's Case* (1) and hold that regs. 14 and 19 provided alternative methods of compensation. The acquisition of the wheat was not to my mind in essence a scheme for the compulsory marketing of the commodity. The purpose was to acquire the wheat as a war measure so that the Commonwealth could supply its own internal needs and send the surplus to its allies. This was the purpose stated in reg. 14. It is such an overriding purpose that s. 46 (*b*) of the *Acts Interpretation Act* 1901-1948 would have saved reg. 14 despite the invalidity of reg. 19. On the other hand, *Dixon* J. said in this Court: " 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 " (2). *McTiernan* J. said :—" 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 " (3). It is apparent from these differences of opinion that the argument

(1) (1942) 66 C.L.R. 77.
(2) (1948) 75 C.L.R., at p. 559.
(3) (1948) 75 C.L.R., at p. 585.

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on the constitutional question could open up a far-reaching vista. Their Lordships said that they "need not, for the purpose of deciding the question of their jurisdiction, say more than that the argument against the validity of reg. 19 was formidable and that it could not have been disposed of without the most serious consideration" (1). The argument could involve a complete examination of the extent to which Commonwealth legislation can direct compulsory marketing schemes under which the owners of goods, particularly producers of primary commodities, can be compelled to pool their goods and share the proceeds of sale. That is a most important aspect of s. 51 (xxxi.) of the Constitution, upon which this Court as a whole has never given a considered decision. It is the very type of question which is reserved by the Constitution for final decision by this Court unless this Court chooses to grant a certificate under s. 74.

There are, in my opinion, no special reasons in this case why a certificate should be granted. The *inter se* question is not in any sense a subsidiary question. The Privy Council said that the finding on election by the Chief Justice and *McTiernan* and *Webb* JJ. brought the question of the validity of reg. 19 into the foreground of the appeal. The amount of compensation to which the plaintiff is entitled is, of course, the important question for the plaintiff. We listened to severe criticism of the reasoning that led us to our various conclusions. The purpose of the criticism was to persuade us that the result of the proceedings in this Court was so unsatisfactory that only an appeal to the Privy Council could give the plaintiff justice. I was not impressed with most of the criticism and it is irrelevant to discuss it. It can at least be said that five Justices out of seven were not satisfied that the amount that the applicant could recover under reg. 14 would exceed the amount the Commonwealth proposed to pay it under reg. 19—a not indecisive majority. Even if it could be said that the constitutional validity of reg. 19 is a subsidiary question in this particular action it could give rise to an important *inter se* decision of general application. The Constitution places the duty of deciding such questions initially, and subject to a certificate finally, fairly and squarely on the shoulders of this Court. In *The Commonwealth* v. *Bank of New South Wales* (2) the Privy Council said that it was clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se*

(1) (1950) 81 C.L.R., at p. 153; (1951) A.C., at p. 47.

(2) (1949) 79 C.L.R., at p. 624.

questions which were of such vital importance to Commonwealth and States alike. This passage was repeated by the Privy Council in the present case. The Privy Council has given a wide meaning to s. 74. But that should not, in my opinion, lead this Court to alter its traditional approach to applications for certificates. The mere importance of a case has never been considered a special reason for granting a certificate. Cases which raise constitutional issues are nearly always cases of gravity and importance. The applicant's difficulty is self created. It could have pursued its appeal in the Privy Council if it had been satisfied, as it was in this Court, not to impeach the validity of reg. 19. But it was not.

I would dismiss the motion.

WEBB J. In *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1) the Judicial Committee decided that: " the attack on the validity of reg. 19 on the ground that it does not provide just terms within the meaning of s. 51 placitum (xxxi.) raises an *inter se* question ".

Their Lordships then repeated the following passage from their judgment in the *Banks' Case* (2):—" in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike ". Their Lordships added:—" Section 74 in fact was part of that bargain to which the members of the Federation gave their consent when they entered the Federation, and it ought to be construed, as it was construed in the *Banks' Case*, broadly and so as to give effect to the purpose for which it was enacted. Their Lordships are not disposed to allow exceptions to the broad construction which they have already adopted, that an appeal involving the determination of any *inter se* question is excluded from the jurisdiction of His Majesty in Council unless the appellant has obtained a certificate from the High Court " (3).

The applicant now seeks a certificate under s. 74, and, as the Judicial Committee saw fit to give the applicant company special leave to appeal against the judgment of this Court, I think the certificate should be granted if that can properly be done.

Section 74 reads:—" No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional

(1) (1950) 81 C.L.R., at p. 158; (1951) A.C., at pp. 51, 52.
(2) (1950) 79 C.L.R., at p. 624; (1950) A.C., at p. 293.
(3) (1950) 81 C.L.R., at p. 159; (1951) A.C., at p. 52.

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powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave ".

In deciding whether a certificate should be granted this Court has taken into consideration the nature of the particular *inter se* question, and the " special reason " that has led to the granting of a certificate related to the *inter se* question itself, or to its proper determination. In no instance, so far as I am aware, was the nature or importance of the other questions arising in the litigation pressed, or suggested, as proper to be taken into account. The opportunity to do so may not have occurred. If the *inter se* question was merely an Australian question it was considered that this Court should finally determine it (*Flint* v. *Webb* (1)); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (2), although *Higgins* J. suggested in *Flint* v. *Webb* (3) that " signs of dangerous disturbance between States, or between a State and Commonwealth, such as a decision of the High Court would not allay " might render it advisable that the Judicial Committee should determine the question. In the *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (4), where there was an equal division of opinion of this Court on an *inter se* question, it was unanimously decided that it could be satisfactorily disposed of only by the Judicial Committee, and a certificate was granted. If the determination of the *inter se* question would have affected " the public interests of parts of the Empire external to this Commonwealth " (*Deakin* v. *Webb* (5), per *Barton* J.), or if " extra-Australian rights were incidentally involved " (*Flint* v. *Webb* (6), per *Higgins* J.), this was regarded as a ground for granting a certificate. But from the explanation of the origin of the expression " any special reason " in s. 74 given by *Barton* J. in *Deakin* v. *Webb* (7) it might seem that a certificate might also properly be granted where extra-Australian rights would be affected by or involved in the determination of another question in the case. The explanation given by his Honour is, I think, consistent only with this view. It could hardly have been intended that the

(1) (1907) 4 C.L.R. 1178.
(2) (1946) 71 C.L.R., at p. 121.
(3) (1907) 4 C.L.R., at p. 1192.
(4) (1912) 15 C.L.R. 182.
(5) (1904) 1 C.L.R. 585, at p. 627.
(6) (1907) 4 C.L.R., at p. 1193.
(7) (1904) 1 C.L.R. 585.

extra-Australian interests should be taken into account only where they were involved in or affected by the decision of the *inter se* question itself, which would be seldom the case.

If the correct view be that an *inter se* question, although always important, whether or not a conflict of powers is involved, may be treated as subordinate for a special reason, then it is contended by counsel for the applicant that a special reason is to be found in this case.

Here, however, not only the *inter se* question, but all the other questions arising in the litigation are Australian questions. As to the relative importance of the *inter se* question, on the one hand, and of the other questions, on the other hand, it may be that the *inter se* question involves no conflict of powers and is simply whether reg. 19, which is a very special type of regulation and may never again be resorted to, provides just terms ; whereas the decision of the other questions affects, directly or indirectly, the pecuniary interests of practically all Australian wheatgrowers for many years, and involves sums of money amounting to tens of millions of pounds. Moreover, this *inter se* question has not been decided, and cannot be decided, by this Court in this litigation. Indeed it may not be necessary for the Judicial Committee to decide it. But, although the *inter se* question is confined to the question of the validity of a single regulation, and no question is raised, or intended to be raised, as to the validity of the acquisition of the Australian wheat crop, or of pooling in the true sense to pay for the wheat acquired, still it is impossible to anticipate the reasons of the Judicial Committee for deciding against the validity of reg. 19, if their Lordships do so decide. Those reasons might indicate the invalidity of pooling as a defence measure. In that event this Court, having granted the certificate, would, I think, be bound to respect not only the decision but also the reasons given for it. Thus a departure from the high policy above referred to might occur in a matter of vital importance to Australia and of no concern to other parts of the British Commonwealth.

This high policy has not disappeared with the conditions largely, if not wholly, responsible for it.

In *Baxter* v. *Commissioners of Taxation* (1) *Griffith* C.J., *Barton* J. and *O'Connor* J. in a joint judgment said :—" The questions referred to in s. 74, while in one sense matters of purely domestic concern, are matters of supreme importance to the working of the Australian Constitution. They are questions likely to arise from day to day, and demanding immediate and authorita-

(1) (1907) 4 C.L.R., at p. 1118.

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tive decision. In our opinion, the intention of the British legislature was to substitute for a distant Court, of uncertain composition, imperfectly acquainted with Australian conditions, unlikely to be assisted by counsel familiar with those conditions, and whose decisions would be rendered many months, perhaps years, after its judgment has been invoked, an Australian Court immediately available, constant in its composition, well versed in Australian history and conditions, Australian in its sympathies, and whose judgments, rendered as the occasion arose, would form a working code for the guidance of the Commonwealth ".

This statement appears to contemplate the continuance indefinitely of a condition of affairs very different from the present. At that time (in 1907) the only means of rapid transmission of news was by submarine cable, and the only mode of travel overseas was by ship. Australian counsel, when they took the risk of losing practice by going to London for lengthy periods to appear before the Privy Council, mostly did so as juniors to English counsel, and were not heard by their Lordships. But for some years past the Judicial Committee has been able speedily to hear and decide constitutional cases from the Dominions, and because of the vast, widespread, and rapid dissemination, by wireless and otherwise, of all news of general interest throughout the British Commonwealth, it is to be supposed that their Lordships are well versed in Dominion affairs; and, due mainly to air transport, they have also the advantage of hearing leading counsel from the Dominions on all appeals on constitutional questions.

Nevertheless the high policy still exists to reserve for the jurisdiction of this Court the solution of those *inter se* questions which are of such vital importance to Commonwealth and States alike, whether or not they involve a conflict of powers, although some of the reasons for the policy may have disappeared. Because of this high policy I think this application should be dismissed.

FULLAGAR J. I agree with the judgment of *Dixon* J. in this case.

KITTO J. This is an application for a certificate under s. 74 of the Constitution to enable the applicant to prosecute before Her Majesty in Council an appeal from the decision of this Court in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1). By that decision an appeal from a judgment of *Williams* J. was dismissed pursuant to s. 23 (2) (*a*) of the *Judiciary Act* 1903-1947, the Court being

(1) (1948) 75 C.L.R. 495.

evenly divided in opinion on the question whether the appeal should be allowed. The Privy Council granted the applicant special leave to appeal. On the hearing of the petition for special leave, the argument did not reveal that any question as to the limits *inter se* of the constitutional power of the Commonwealth and the States was involved; but when the appeal came on to be heard it was contended on behalf of the Commonwealth that the appeal was an appeal from a decision of the High Court upon an *inter se* question, according to the meaning of s. 74 as expounded in the *Banks' Case* (*Commonwealth* v. *Bank of New South Wales* (1)), and that, as no certificate under that section had been granted by this Court, their Lordships had no jurisdiction to proceed. This contention was upheld, and the appeal was dismissed. It is to remove the obstacle which thus precluded the applicant from obtaining a decision on the merits of the case that this application is made.

Section 74 empowers the Court to grant a certificate in respect of an *inter se* question if it is satisfied that for some special reason it should certify that the question is one which ought to be determined by Her Majesty in Council. No rule has been or should be laid down by this Court as to what may constitute "some special reason" for granting a certificate. The character of the litigation and its history in the courts are relevant matters, though they may have much or little weight according to circumstances; and the same, I think, is true of the fact, where it exists, that the Privy Council has already held, on a petition for special leave, that the questions involved in the projected appeal, other than the *inter se* question, are of sufficient importance to be submitted to their Lordships. But it is of fundamental importance to remember that "in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to the Commonwealth and States alike": *Banks' Case* (2). Accordingly, whatever weight may be conceded to the circumstances of the particular case, in the end the Court must decide whether it is satisfied that there is some reason sufficiently special to warrant a departure from the normal method which the Constitution envisages for the determination of *inter se* questions.

The litigation which has led to this application was concerned with the ascertainment of the amount which the applicant should

(1) (1949) 79 C.L.R. 497; (1950) A.C. 235.

(2) (1949) 79 C.L.R., at p. 624; (1950) A.C., at p. 293.

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recover in respect of the compulsory acquisition by the Commonwealth of certain wheat under the *National Security* (*Wheat Acquisition*) *Regulations*. By reg. 14 of those regulations the Minister was empowered to make provision by order for the acquisition by the Commonwealth of any wheat described in the order; and it was provided that wheat should, by force of and in accordance with the provisions of the order, become the absolute property of the Commonwealth, and that the rights and interests of every person in that wheat were converted by the regulation into claims for compensation. Regulation 19 provided that every person having any right or interest in the wheat might forward to the Board constituted by the regulations a claim for compensation in accordance with a prescribed form, and should be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determined. The regulation also contained other provisions which are set out in the judgment delivered by the Privy Council.

The applicant, whose wheat was acquired under an order made pursuant to reg. 14, sued the Commonwealth in this Court, claiming either compensation in excess of the amount to which reg. 19 would entitle it, or, if the regulations should be held invalid, damages for conversion, or a fair price for its wheat as under a contract of sale. The action was tried by *Williams* J. On the authority of *Andrews* v. *Howell* (1) and *Australian Apple and Pear Board* v. *Tonking* (2), his Honour held, in effect, that reg. 19 was not definitive of the compensation to which reg. 14 entitled the owners of wheat acquired under that regulation, and that regs. 14 and 19 provided alternative bases for computing that compensation. His Honour assessed the applicant's compensation independently of the provisions of reg. 19 and, coming to the conclusion that the compensation so assessed would be less than the amount which he thought the applicant would receive under reg. 19, he gave judgment for the Commonwealth.

Neither before *Williams* J. nor before the Full Court on appeal was it contended on behalf of the Commonwealth that the regulations should be so construed that reg. 19 provided the only means by which the applicant might obtain compensation for the acquisition of its wheat. The applicant, therefore, had no need to develop in this Court any argument (although it did make a formal submission) to the effect that reg. 19 failed to bring the regulations within the power of the Commonwealth Parliament under s. 51 (xxxi.) of the Constitution to make laws with respect to the

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

acquisition of property on just terms. But some members of the Court took the view that either reg. 19 provided the only means of determining compensation, in which case it was binding upon the applicant, or it provided only an optional means, in which case the applicant adopted it. Underlying the first of these alternatives was the proposition that reg. 19, if it provided the only means, provided just terms of acquisition. In order to challenge this proposition, the applicant submitted to the Privy Council that in so far as the validity of the regulations might become material in the appeal, reg. 19 was invalid. It was by reason of this submission which, as their Lordships held, raised a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, that the absence of a certificate from this Court was held fatal to the jurisdiction of the Board.

The argument presented in support of the present application commenced with a submission that, in view of the judgments of the Privy Council in the *Banks' Case* (1), in this case (2) and in *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (3), there should now be a greater readiness to grant certificates than the Court has shown hitherto.

These judgments have no doubt placed upon s. 74 a construction which brings within the prohibition of the section a considerably wider class of appeals than many people had supposed to be precluded by it. It may be that when applications for certificates have been considered in the past they have been dealt with on the supposition that the only class of cases in which a certificate is necessary is that in which this Court has given a ruling upon an *inter se* question and the appellant seeks to have that ruling reversed. Suppose that it is so; it does not follow that the recent decisions of the Privy Council have made any difference which we should regard as having a bearing upon the attitude to be adopted towards certificate applications. In the *Banks' Case* their Lordships held that an appeal falls within s. 74 " whenever the appellant cannot obtain the relief he claims without the determination of an *inter se* question by the Privy Council ". This was said in a case in which the *inter se* question had been raised by the respondents as one of several alternative grounds of opposition to the appeal. The appeal therefore could not have been upheld without a decision being given upon the *inter se* question; and the result was, in accordance with their Lordships' formula, that the appeal was held to be incompetent. In the two later cases the *inter se* question

(1) (1950) A.C. 235.
(2) (1951) A.C. 34.
(3) (1951) A.C. 53.

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was raised by the appellant as one of several alternative grounds of appeal. The possibility that the appeal might succeed on another ground, so that a decision of the *inter se* question might be rendered unnecessary, was not regarded as sufficient to prevent s. 74 from excluding their Lordships' jurisdiction to entertain the appeal. Only by the appellant's abandoning his *inter se* point could the appeal be converted into one to which s. 74 did not apply; and as the appellant would not abandon it, the appeal was dismissed as incompetent.

I take it that two propositions are now laid down: first, that a certificate is necessary whenever an appeal cannot be upheld without the decision of an *inter se* question; and, secondly, that a certificate is necessary whenever an appeal cannot be dismissed without the decision of an *inter se* question. These propositions cover the two classes of cases in which an appeal may have the character which s. 74 is seen to describe when the expression "upon any question" is construed as meaning "involving any question". Both classes may include cases in which the *inter se* question has never been debated or decided in the High Court, and emerges only in the final stage of litigation, to disappoint the hope of a decision by the Privy Council upon the questions which until then have been the subject of controversy. There might be some strength in the applicant's submission if, for this reason, it were true to say that the operation of s. 74 has outrun the policy behind it, and that a greater freedom in granting certificates would provide a needed corrective. But this is not so. It is the policy of s. 74 to preclude, save in exceptional cases, not only any review by the Privy Council of an answer which the High Court has given to an *inter se* question, but also any decision by the Privy Council which will take such a question out of the hands of the High Court. It would be inconsistent with this policy to hold that the fact that in the particular litigation an *inter se* question has emerged for the first time in the Privy Council has any real bearing upon the way in which we should look at an application for a certificate. The question is not the less on that account one which, in the absence of any special reason to the contrary, this Court must accept the responsibility of deciding at the appropriate time.

I am therefore of opinion that the Court should not accept the contention that applications for certificates should be more readily granted now that the Privy Council has given to s. 74 a wider construction than in earlier days was generally conceded to it. It is necessary to turn now to a contention which was strongly urged, to the effect that a certificate should be more readily granted

when the *inter se* question relates to par. (xxxi.) of s. 51 than when it relates to other paragraphs of that section. It was said that although a question under par. (xxxi.) must be conceded to be an *inter se* question since the Privy Council has so decided, it is not one which in any important degree affects the powers of the States. The argument commenced with an assertion that the Privy Council had rejected the view, formerly accepted by this Court, that an *inter se* question exists where there is a question as to the extent of a power of the Commonwealth which is paramount over the concurrent powers of the States. It was said that their Lordships had held that a question as to what amounts to "just terms" within the meaning of s. 51 (xxxi.) is an *inter se* question, but not because the answer to it decides anything as to the scope of a paramount Commonwealth power. From that the argument proceeded to the submission that the power of acquisition under s. 51 (xxxi.) exists concurrently with, but is not paramount over, State powers, and that therefore a question as to its limits, although it is an *inter se* question by decision, is a question of a kind to which the "high policy" that lies behind s. 74 has little or no application.

I am unable to assent to any of the steps in this argument. In the first place it was with evident approval that the Privy Council quoted the statement of *Dixon* J. in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (1) that the crucial words of s. 74 cover any decision upon the extent of a paramount power of the Commonwealth. Their Lordships proceeded to examine the nature of the power conferred by s. 51 (xxxi.), and held that a question as to the limits to which that power is subject by reason of the use of the words "upon just terms" as part of the description of its subject matter was an *inter se* question, for the reason that the question was raised "how far the constitutional power of the Commonwealth reaches into the State and how far, if at all, the State's power has been affected by the Commonwealth power". I do not understand their Lordships to have intended to convey, by using this form of words, anything different from the proposition which they had quoted from the judgment of *Dixon* J. in the *Airways Case*. I cannot see any other meaning to be given to their language than that the question to be considered was an *inter se* question because it asked what is the extent to which a constitutional power of the Commonwealth, placed by s. 109 in a position of predominance over State power, is exercisable so as to affect persons or property subject to State power.

Their Lordships proceeded to answer a particular argument of the appellant which, as stated in the judgment, was that no *inter*

(1) (1946) 71 C.L.R., at pp. 122, 123.

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se question arises unless a decision that the impugned exercise of a Commonwealth power was valid would result either in the annihilation of a State power or in the subordination of a State power, by virtue of s. 109 of the Constitution, to the impugned enactment. The judgment rejects this argument as being inconsistent with the *ratio decidendi* of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1), and it proceeds to point out that in that case their Lordships had refused to consider what the State power was, for two reasons. The first reason was that that was itself a question for the High Court. Perhaps this indicates a view on the part of their Lordships that the question in *Jones' Case* was one as to the limits *inter se* of the constitutional powers of two or more States; but, however that may be, it treats the question as outside their Lordships' province and it is not the reason that matters in this case. The second reason was stated to be that the question whether the powers of the State would be impaired was not the test. This, as a proposition which is at once a part of the *ratio decidendi* of *Jones' Case* and contrary to the argument their Lordships were rejecting in the present case, can only mean, I think, that the test of an *inter se* question is not whether the powers of the State would be extinguished or subordinated by upholding the validity of the particular enactment under consideration. That is to say, it is not the proper method of approach to commence by defining the ambit of State power in a given field and then to see whether that power would be destroyed or reduced in scope by the impugned Commonwealth enactment if it were held to be valid and therefore to have overriding force by virtue of s. 109. The method thus rejected had been espoused by the appellants in *Jones' Case*. They said first, that the State power over industrial disputes was confined to disputes which did not extend beyond the borders of the State, and, secondly, that a power so confined would not be affected by a decision that, contrary to the assertion which provided the ground of attack upon the Commonwealth award in question, the dispute which that award settled was a two-State dispute—in other words, the decision would be only that the particular dispute was outside State power and not that the award overrode State power. A similar approach seems to have been advocated by the appellant before the Privy Council in this case. Apparently the contention was this: the State power of compulsory acquisition never extended to property belonging to the Commonwealth; the operation of reg. 14 if valid is only to vest certain property in the Commonwealth and thus to take it outside the scope of State power; therefore to uphold

(1) (1917) A.C. 528.

reg. 14 would not be to annihilate a State power or to subordinate it, by virtue of s. 109, to reg. 14. In answer to such arguments as these their Lordships have insisted, unless I misread their judgments, that an *inter se* question is one which must be decided by reference to the manner in which constitutional power is divided between Commonwealth and States, recognizing that this includes every question as to the scope of a Commonwealth power which, though not exclusive, has, by reason of s. 109, predominance over State power.

It is on this view that I understand their Lordships to have held that a question as to the ambit of the power of acquisition under s. 51 (xxxi.) is an *inter se* question. Such a question is, just as surely as any other *inter se* question, within the policy, and not only the language, of s. 74. The possibility of an inconsistency between Commonwealth legislation under s. 51 (xxxi.) and State legislation is real and of practical significance. One example will suffice. The power of a State to provide for the acquisition by a State authority of the wheat of a future season upon its being harvested, must be subject to the power of the Commonwealth to provide, within the limits of s. 51 (xxxi.), for the acquisition by a Commonwealth authority of the same wheat, upon its being harvested. In my opinion it is not possible to see in the nature of the power conferred by s. 51 (xxxi.) any reason for a greater readiness to grant a certificate in respect of a question as to the limits of that power than should be shown in respect of other *inter se* questions.

For reasons already stated this application must be considered on the footing that the applicant would not be able to succeed before the Privy Council without obtaining a decision that reg. 19 does not give just terms of acquisition. The necessary conclusion from such a decision would be that reg. 14 is beyond power, since the Privy Council has accepted the view that the power conferred by s. 51 (xxxi.) " is a power *sub modo*, for it is a power to acquire on just terms and not otherwise ". The *inter se* question involved in the proposed appeal would therefore have to be in substance (however it may be expressed), whether reg. 19, having regard to all the provisions, or to some particular provisions, contained in that regulation and others associated with it, fails to give to the acquisition for which reg. 14 provides the character of an acquisition on just terms within the meaning of s. 51 (xxxi.). A certificate that such a question ought to be determined by Her Majesty in Council would enable the parties to canvass in argument the whole conception of acquisition on just terms in the sense of the Constitution. In all probability, indeed I should think inevitably, the Privy Council would be involved in the decision of questions of principle,

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vastly important to Australia, which it is primarily the responsibility of this Court to answer, but to which the Court has not yet been called upon to give full consideration. The decisions of the Court on s. 51 (xxxi.) have been comparatively few, and the judgments that have been delivered have revealed the existence of serious problems still to be faced.

The standard of justice postulated by the expression "just terms" is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence. When we are asked to invite from the Privy Council a binding pronouncement concerning that standard, we must not be unmindful of its specially Australian character. It was at an earlier stage of these proceedings that *Dixon* J. said: "When the question is one of fairness in any community the standard must depend upon the life and expeience of that community, rather than upon the changing fortunes of other countries and the exigencies which beset them" (1). This being so, the determination of the limits imposed upon the power of acquisition by the requirement of just terms must be regarded as a matter to which the policy of s. 74 applies with peculiar force. A situation may arise in which the Court can be satisfied that its endeavours to interpret and apply the words "on just terms" ought to be supplemented by a ruling of the Privy Council; but it seems to me to be essential that the meaning and application of the phrase should first be worked out in this country more fully than there has yet been occasion to do.

For these reasons I think it would not be consistent with a proper appreciation of the place entrusted to this Court in the Australian federal system to grant a certificate in this case. Although to the applicant and others with similar claims it will inevitably seem a great misfortune that they should be denied an opportunity to obtain the Privy Council's decision of the questions upon which special leave was granted, I am convinced that, for reasons transcending all considerations of private interest, the Court cannot but refuse the application.

Application by the plaintiff for a certificate under s. 74 of the Constitution refused with costs.

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

Solicitor for the respondents, *D. D. Bell,* Crown Solicitor for the Commonwealth.

J. B.

(1) (1948) 75 C.L.R., at p. 569.