[HIGH COURT OF AUSTRALIA.]

WILCOX MOFFLIN LIMITED AND OTHERS PLAINTIFFS,

AND

THE STATE OF NEW SOUTH WALES AND OTHERS . . . . . DEFENDANTS.

BIRDSALL BROTHERS PROPRIETARY LIMITED AND ANOTHER . . . PLAINTIFFS,

AND

THE STATE OF NEW SOUTH WALES AND OTHERS . . . . . DEFENDANTS.

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SYDNEY, 1951, *Dec.* 4-6.

MELBOURNE, 1952, *March* 17.

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

Constitutional Law (Cth.)—Hides and leather—Control—Joint statutory scheme by Commonwealth and States—Appraisement and acquisition of hides—Prohibition of sales—Freedom of inter-State trade or commerce—Saving clause—Validity of statutory provision—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92 *—Hide and Leather Industries Act* 1948-1949 (*N.S.W.*) (*No.* 42 *of* 1948—*No.* 30 *of* 1949), *ss.* 6, 7, 8, 9.*

Sections 6, 7, 8 and 9 of the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) are as follows:—" 6. (1) Subject to subsection two of this section, a person shall not sell or offer for sale any hides which have not been appraised in accordance with section seven of this Act. (2) The prohibition contained in subsection one of this section shall not apply to any sale of hides by a person other than a licensed dealer to a licensed dealer.

7. All hides, other than hides salted and treated in a meatworks, shall be submitted to a person or place appointed or approved by the Board or by the Committee for appraisement—(a) in the case of hides which do not come into the possession of a licensed dealer within twenty-eight days after being salted and treated—within twenty-eight days after being so salted and treated; and (b) in the case of hides in the possession of a licensed dealer—within twenty-eight days after coming into the possession of that licensed dealer.

8. (1) The Board may license a person firm or company, subject to such conditions as are specified in the license, to buy sell and otherwise deal in hides on behalf of the Board and to buy sell and otherwise deal in hides on his or its own behalf to such extent as is specified in the license, and may cancel or suspend any such license.

The provisions of ss. 7 and 9 of the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) requiring all hides to be submitted for appraisement and acquiring compulsorily all such hides, other than those intended or required for inter-State trade, are not invalid as infringing s. 92 of the Constitution.

So *held* by *Dixon*, *McTiernan*, *Fullagar* and *Kitto* JJ. (*Williams* and *Webb* JJ. dissenting).

Section 6 of the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) which forbids sales of hides which have not been appraised is invalid as infringing s. 92 of the Constitution.

So *held* by *Dixon*, *McTiernan*, *Williams*, *Webb* and *Fullagar* JJ. (*Kitto* J. dissenting).

Per Kitto J.: Section 6 is inoperative in those cases only in which its application would conflict with s. 92.

Application of s. 92 of the Constitution to marketing schemes involving compulsory acquisition of vendible commodities discussed.

REFERENCE by *Williams* J.

Wilcox Mofflin Ltd., Best and Butler Pty. Ltd. and T. A. Field Pty. Ltd. proceeded by writ of summons in the High Court against the State of New South Wales, the Attorney-General for the State of New South Wales, and the Australian Hide and Leather Industries Board, a board constituted under the *Hide and Leather Industries Act* 1948 (Cth.) for, *inter alia*, a declaration that the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) contravened s. 92 of the Constitution, or, alternatively, a declaration that ss. 6, 7 and 9 of the State Act and all other sections which were ancillary to those sections were invalid as being in contravention of s. 92 of the Constitution; and an injunction restraining each of the defendants from taking possession of any hides of or belonging to any one or more of the plaintiffs.

(2) In so far as any license granted under subsection one of this section licenses any person firm or company to buy sell and otherwise deal in hides on behalf of the Board, the license shall specify the remuneration payable by the Board to the licensee for his services and for any facilities made available by him for the storage protection treatment handling transfer and shipping of hides, and for any expenses properly incurred by him. (3) A person firm or company licensed under the Commonwealth Act shall be deemed to be licensed under this section.

9. (1) All hides which on or after the date of the commencement of this Act are salted and treated in a meat-works or are submitted for appraisement in accordance with section seven of this Act shall thereupon, by force of this section, be acquired by and become the absolute property of the Board freed from all mortgages, charges, liens, pledges, interests and trusts affecting those hides, and payment in respect of those hides shall be made in accordance with section eleven of this Act. (2) Nothing in subsection one of this section shall apply to any hides the subject of trade commerce or intercourse between States or required or intended by the owners of the hides for the purpose of trade commerce or intercourse between States."

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In the statement of claim the first-named plaintiff alleged that it had for many years carried on, on an organized Australia-wide basis, the business of tanners of hides and of a licensed dealer in, and a licensed exporter of, hides.

The second-named plaintiff alleged that it had for many years carried on business as a tanner and fancy leather manufacturer at Botany, New South Wales, specializing in the tanning of, and the manufacture of leather from, sheep skins and goat skins, and that it had also tanned calfskins and at all material times had been engaged in selling and delivering leather to, *inter alia*, persons and companies resident and carrying on business in other States of the Commonwealth.

The third-named plaintiff alleged that it had for many years been a producer of large quantities of hides within the meaning of the State Act, the hides being derived from its cattle slaughtered upon its own properties and at divers meatworks in New South Wales. Before 1939 it had carried on a large inter-State trade in hides within the meaning of the State Act and but for that Act would, at the date of the statement of claim, have been more extensively engaged in the inter-State trade with respect to such hides.

The first- and third-named plaintiffs each further alleged that the provisions of the State Act had seriously impeded and interfered with their inter-State trade in that those provisions precluded or purported to preclude each of them respectively from dealing with or selling in the course of its inter-State trade hides which did not fall within s. 9 (2) of that Act.

The second-named plaintiff further alleged that leather manufactured from sheep skins was inferior to that manufactured from hides within the meaning of the State Act, and, prior to the commencement of that Act, could be manufactured at less cost and sold at a less price than leather manufactured from hides; and that the cost of sheep skins had greatly increased since the commencement of the State Act yet by reason of the operation of that Act the cost of hides within the meaning of that Act was, at the date of the statement of claim, much less than the cost of sheep skins, and its business had accordingly suffered greatly by reason of the operation of that Act.

The plaintiffs further alleged that but for the passing of the State Act large quantities of hides would in fact be available for sale and would in fact be sold to persons carrying on business in other States of the Commonwealth and transactions of sale with respect to those hides would take place across State boundaries.

The defendants did not admit, *inter alia*, the allegations relating to inter-State trade and the effect of the State Act, and said that the matters so alleged did not afford any ground for the relief sought by the plaintiffs or either of them.

In a summons taken out by Birdsall Bros. Pty. Ltd. and Birdsall Bros. (Export) Pty. Ltd. against the defendants mentioned above, the plaintiffs, in addition to allegations substantially similar in all material respects to the allegations referred to above, particularly those by the abovementioned second-named plaintiff, alleged in the statement of claim that all hides within the meaning of the State Act in the possession or under the control of the first-named company had been duly appraised and dealt with under the provisions in that behalf contained in that Act ; that large quantities of hides the property of the second-named company had been stored by it in premises owned by the first-named company and with its permission but without any interest in those hides ; that the leather obtained from such hides after treatment was intended to be sold in other States of the Commonwealth ; that the defendant board had suspended the first-named company's allocation of hides ; that that suspension had seriously impeded and interfered with that company's inter-State trade in that it had prevented that company from obtaining hides necessary to enable it to continue to carry on such trade ; that the defendant board threatened and intended to seize and had caused to be issued a warrant under s. 16 of the State Act authorizing the taking and removal of all hides within the meaning of that Act in the possession or under the control of the first-named company which, as a consequence, had suffered and would suffer irreparable loss and damage ; and that the defendant board threatened and intended to take possession of all hides then in and about the first-named company's premises including the hides belonging to the second-named company, the defendant board claiming that all those hides were the property of that board or in alleged contravention of s. 7 of the State Act had not been submitted for appraisement.

In addition to the relief sought as above, the plaintiff companies claimed an injunction restraining the defendants and each of them and their respective servants and agents from issuing or proceeding upon any warrant under s. 16 of the State Act with respect to any hides the property of either of those companies.

As in the suit mentioned above the defendants did not admit the allegations and said that they did not afford any ground for the relief sought by the plaintiff companies or either of them.

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Upon the suits coming on for hearing before *Williams* J. evidence was given on behalf of the plaintiffs in each suit but the defendants did not tender any evidence.

At the request of the parties *Williams* J. referred to the Full Court of the High Court pursuant to s. 18 of the *Judiciary Act* 1903-1950, the question whether the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) or any and if so which sections of that Act was or were invalid because it or they contravened s. 92 of the Constitution, and ordered that a transcript of the pleadings, evidence, a statement and an order made by his Honour be placed before the Full Court.

Further material facts are set forth in the judgment of *Dixon*, *McTiernan* and *Fullagar* JJ.

G. E. Barwick K.C. (with him *J. W. Smyth* K.C. and *I. C. Black*), for the plaintiffs in each suit. The *Hide and Leather Industries Act* 1948-1949 (N.S.W.) shows that there is only one scheme, a scheme for acquisition by the board, which is the Federal board, and the disposal of the hides by the board by two principal ways, namely, by auction, and sale without auction. The board is in actual control of the trade in the sense that a person cannot buy the skins he wants, or as many as he wants: they are allocated and he is given a quota, and is not permitted to have a stock of skins. When his skins are due for appraisement he cannot say that they are subject to inter-State trade because the Act forbids him having such a contract. He has to be able to say, if he desires to retain his skins, that he requires them for the purpose of inter-State trade or commerce. The skins constitute a commodity wherein of necessity there is an inter-State traffic by reason of the very nature of the commodity. Also in the nature of the commodity it is inevitable that persons who deal in the commodity will acquire stocks as to which it cannot be predicated that at a given moment specific parcels will be required for one purpose rather than another. Bearing in mind that this is such an industry the submission is that if sub-s. (2) of s. 9 of the Act were omitted the Act would unquestionably infringe s. 92 of the Constitution in several respects. The Act is not limited to hides produced in the State of New South Wales. There are, perhaps, three ways in which it would offend s. 92, because it combines all the vices of ss. 20 and 28 of the *Dried Fruits Act* 1924-1927 (S.A.). The scheme is that only a certain quota shall be sold, and it is enforced by acquisition. That binds *James* v. *South Australia* (1) and *James* v. *Cowan* (2)

(1) (1927) 40 C.L.R. 1.

(2) (1932) A.C. 542; (1930) 43 C.L.R. 386.

together. The scheme is that one prevents a sale of more than a certain quantity in Australia by determining how much is for export and how much is to be retained locally. How much is sent inter-State and how much is not sent inter-State is determined by a quota, and in order to achieve it the whole is acquired. The export price being higher than the internal price this is the reverse of *James* v. *The Commonwealth* (1). The fact that matters is that the persons who would deal inter-State are precluded from dealing. The right protected by s. 92 is the right of the person concerned to determine for himself whether he will sell his goods inter-State, and he must be left with that right until he himself puts it beyond his own reach (*The Commonwealth* v. *Bank of New South Wales* (2)). The Act does not give the person concerned any liberty to decide where he will sell his goods. The law as laid down by *James* v. *South Australia* (3) and *James* v. *Cowan* (4) is that an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or an intra-State transaction, was bad (*Banks' Case* (5)). The mere existence of the power is a burden on the trade. A law which directly operates to restrict trade, is bad. An acquisition may directly operate to restrict trade, and it clearly does so if it is found in marketing legislation (*New South Wales* v. *The Commonwealth* (6) ; *Peanut Board* v. *Rockhampton Harbour Board* (7) ; *James* v. *South Australia* (3) ; *James* v. *Cowan* (4) ; *Banks' Case* (8)). In an Act which vests property in a trading board, the result of the acquisition is direct (*Peanut Board* v. *Rockhampton Harbour Board* (9); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (10)). The test of the Privy Council in the *Banks' Case* (8) is satisfied by an acquisition in legislation like this Act, and the only question which remains is whether the proviso is adequate. The Act offends s. 92 because, firstly, it does permit really a quota system, inasmuch as it enables those quotas to be fixed arbitrarily ; secondly, in so far as it requires the submission to appraisement, it is a burden on the inter-State trade ; there is not any proviso to s. 7 such as there is to s. 9, and there is not any reading down provision ; and, thirdly, that as an acquisition

(1) (1936) A.C. 578 ; 55 C.L.R. 1.
(2) (1950) A.C. 235, at pp. 303, 304 ; (1949) 79 C.L.R. 497, at pp. 633, 634.
(3) (1927) 40 C.L.R. 1.
(4) (1932) A.C. 542 ; (1930) 43 C.L.R. 386.
(5) (1950) A.C., at p. 305 ; (1949) 79 C.L.R., at p. 635.
(6) (1915) 20 C.L.R. 54.
(7) (1933) 48 C.L.R. 266, at pp. 274, 275.
(8) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.
(9) (1933) 48 C.L.R. 266.
(10) (1945) 71 C.L.R. 29.

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per se it directly burdens the inter-State trade, because by the acquisition it does precisely what was done by s. 20 under consideration in *James* v. *South Australia* (1). There is an unqualified interference with a person's liberty to dispose of his produce at his will by an inter-State or an intra-State transaction. His liberty lasts until he has made his choice, but having made his choice, in some irrevocable fashion, to enter into an intra-State transaction and appropriated the goods therefor, he would fall within State control (*Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (2)). The proviso is inadequate. It differs from the proviso to s. 11 (3) of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.) considered by the Court in *R.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (3). The specific hides have to be the subject of trade or commerce. The ability to make an inter-State contract with respect to specific hides is forbidden by s. 6 (1) and, apparently, because of s. 15 (1), (3), no contingent contract would do. The word "required" means the specific hides are specifically required for some specific transaction at the moment of appraisal. The exception that the hides be intended by the owner for the purpose of trade or commerce is an intention attached to specific hides. The owner must be able to segregate them and not merely hold some hides in stock generally for inter-State trade. That does not answer the requirements of *James* v. *Cowan* (4) or *James* v. *South Australia* (1): see *Banks' Case* (5).

G. Wallace K.C. (with him *B. P. Macfarlan* and *P. A. Leslie*), for the State of New South Wales and the Attorney-General of the State of New South Wales. The general objects of the two Acts—State and Federal—are not only to effect equalization in respect of prices, between export and home consumption, but also to prevent shortages and to apportion in some proper manner hides as between the export and home consumption trades. The general scheme is that the State purports to acquire the hides on submission for appraisement and purports to vest them in the Federal board, and then the Federal Act, in effect, accepts them on behalf of the board, or they are accepted; they become vested in the board and a price is payable in accordance with the State Act originally, but the price is fixed by the Federal Act and that vesting is subject to s. 9 (2). Prior to vesting there has to be an appraisement. In those circumstances the appraise-

(1) (1927) 40 C.L.R. 1.
(2) (1939) 62 C.L.R. 116.
(3) (1952) 85 C.L.R. 467.
(4) (1932) A.C. 542; (1930) 43 C.L.R. 386.
(5) (1950) A.C. 235; (1949) 79 C.L.R. 497.

ment really is a mere postponement of the right to sell inter-State ; a necessary and reasonable regulation to implement the overall objectives and in no way directed to prohibiting, or restraining, or interfering with inter-State trade as such. It is a mere temporary interference of a regulatory nature which is not only desirable but also requisite for the achievement of the general objectives, all of which are well within power. In practice the appraisements take place at convenient centres ; centres where they were appraised or catologued prior to 1939. The power, procedure and practice so far as appraisement is concerned is not so much an interference as was the direction to pack fruit considered in *Hartley* v. *Walsh* (1). The seven Acts, that is the Federal Act and the Acts of the various States, should be regarded as interposing appraisement into the ordinary course of trading in skins and putting it into the place where selection and inspection used to take place before the auction, the consequence being that property passes to the board before the auction. The proceeds then belong to the board and there is control over the person who buys or to whom an allocation has been made to buy for export. People who have received quotas from the board receive their allocation at the so-called first auction up to or even in excess of their quota according to availability. The procedure followed gives the equalization element to the scheme with compulsory return of the difference between the appraised price and the second auction price to the producer, and the submission is that at the time when vesting takes place there is full power to acquire the property ; that the appraisal is merely regulatory, and, as to vesting, s. 9 (2) safeguards the position from the s. 92 viewpoint. Section 6 is a restraint in a sense, but it falls within the wording of the *Banks' Case* (2) in that it is not directed towards prohibiting. Under s. 6 the restraint on the sale before appraisal prevents any passing of the property before appraisement ; and under s. 9 when the skins are submitted for appraisement the property passes. In sub-s. (2) there is intended to be an exception from the vesting of all types of commodities which have been included in any part of inter-State transactions, whether by agreement for sale or otherwise ; so that, under sub-s. (2), once there is a mere agreement, which possibly is not struck at by s. 6, which refers to a sale, that also would be excepted by sub-s. (2). That is one way of reconciling, as a matter of construction, ss. 6 and 9. The words " the subject of trade commerce or intercourse " in s. 9 (2) refer to actual goods in transit or actual movement, but the

(1) (1937) 57 C.L.R. 372.

(2) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.

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words " required or intended " would safeguard the position and ensure that the exception was sufficiently wide to cover the field of immunity granted by s. 92. The exception in sub-s. (2) of s. 6 gives practical freedom to the owner of the hides, from any normal commercial viewpoint, and he is at full liberty to sell before appraisal to a licensed dealer. Then the licensed dealer himself would be included in the provisions of s. 7, he having bought from the producer would then have to go to appraisement. The language is as wide in its terms as the wording in the *Marketing of Primary Products Act* 1935 (Vict.) considered in *Matthews* v. *Chicory Marketing Board (Vict.)* (1). The provisions of ss. 6 and 7 are not invalid. They merely enable the board to know what hides and what quantity of hides are available for the purpose of carrying out the objects of the Act. Ownership is not changed by the mere acts of appraisal. There is a critical difference between the scheme of this Act and the *Dried Fruits Act* considered in *James* v. *South Australia* (2) and *James* v. *Cowan* (3). The latter Act had the effect of driving surplus fruit off the Australian market, but the effect of the *Hide and Leather Industries Act* 1948-1949, is not to put an end to any inter-State trade or business, or to force the commodity in question off the Australian market, but merely to regulate intra-State trade having regard to the ordinary flow of inter-State trade. Section 9, and particularly sub-s. (2), only regulates the residue of trade remaining after the inter-State element has been subtracted from it. It also supplements inter-State trade out of such residue of intra-State so far as it is necessary to bring about as fair a distribution of the commodity as circumstances from time to time, and in different areas, require. Section 9 (2) results in the safeguard that the export provision or control is not at the expense of inter-State trade. That sub-section is a full recognition of s. 92, and therefore of s. 9 (1) (*Matthews* v. *Chicory Marketing Board (Vict.)* (4)). Sub-section (2) of s. 6 has a very wide, practical effect, and permits, but does not prevent, the producer or the owner or the person referred to, to sell to both an intra- and an inter-State licensed dealer. It does not really affect the matter if the words " the subject of trade commerce or intercourse " have no direct practical or working effect. They comply with the requirements of s. 92. Even if that be wrong, the word " required " of itself, as a pure matter of grammar, is sufficient to give the immunity required by s. 92. That word has a very wide meaning, and,

(1) (1938) 60 C.L.R. 263.
(2) (1927) 40 C.L.R. 1.
(3) (1932) A.C. 542; (1930) 43 C.L.R. 386.
(4) (1938) 60 C.L.R. 263.

standing alone, would be a sufficient exception. Section 92 in its terms deals with actual inter-State trade, commerce and intercourse, not projected trade or the possibilities at some unknown date in the future of there being such. On its fair construction s. 92 is intended to deal with what it says, namely, trade, commerce and intercourse, which means "existing," provided, doubtless, that it has some measure of flexibility.

[KITTO J. referred to the *Banks' Case* (1).]

It was affirmed in that case (2) that s. 92 does not create any new juristic rights. Instances of where the individual's so-called guarantee of freedom was subjected and subordinate are to be found in *R.* v. *Vizzard*; *Ex parte Hill* (3); *Riverina Transport Pty. Ltd.* v. *Victoria* (4); *McCarter* v. *Brodie* (5); *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (6) and *Hartley* v. *Walsh* (7). A person who has not contemplated inter-State trade, be he trader or non-trader, is not protected by s. 92 (*Carter* v. *Potato Marketing Board* (8)). "Appraisement" is not defined in the Act, but the evidence shows what appraisement is, and according to the evidence it is very similar to what took place before 1939. The theme running through the various cases to which reference has been made, is proper regulation. In all those cases the State has acted within its power by regulating inter-State trade, commerce and intercourse in a permissible manner. *McCarter* v. *Brodie* (5) coming as it did after the *Banks' Case* (9), should not be interpreted on any restricted basis; the same principle caused the majority to go the way it did in that case. The only point at which inter-State trade was purported to be interfered with in any way whatever, was the submission for appraisal. The desire is to have all the skins put through the process of appraisal whether or not they go into inter-State trade, for the reason that a knowledge of what skins are submitted for cataloguing and appraising is some assistance in allotting both quotas and allocations, and without a full knowledge of what was happening in the trade the board could not arrive at a proper quota or a proper allocation under the quota. That still does not touch inter-State trade. Alternatively, if s. 6 be invalid, which is disputed, it can be severed from the Act even though there is not any reading down clause (*Bank of New South Wales* v. *The Commonwealth*) (10)). Section 6 is only a sort of restraint to perfect

(1) (1950) A.C., at pp. 305, 306; (1949) 79 C.L.R., at pp. 635, 636.
(2) (1950) A.C., at p. 305; (1949) 79 C.L.R., at p. 635.
(3) (1933) 50 C.L.R. 30.
(4) (1937) 57 C.L.R. 327.
(5) (1950) 80 C.L.R. 432.
(6) (1939) 62 C.L.R. 116.
(7) (1937) 57 C.L.R. 372.
(8) (1951) 84 C.L.R. 460.
(9) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(10) (1948) 76 C.L.R. 1, at p. 370.

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the easy working of the Act, but even if it be severed the Act would work quite well in its absence.

A. R. Taylor K.C. (with him *R. Else-Mitchell*), for the Australian Hide and Leather Industries Board. It is impossible in these proceedings to determine whether any particular parcel of hides or skins is affected by the legislation. The subject legislation is the result of the facts that, firstly, there was a disparity between world price and domestic price of hides and goods manufactured from leather, a feature which was seen not only in relation to this commodity but also with respect to many others; and, secondly, there was a necessity for securing supplies for the domestic requirements of the Commonwealth because the price was controlled, and producers no doubt would have sold all of their hides to overseas merchants who were in a position to pay a much higher price. Therefore it was necessary to ensure a local supply in order to obviate the necessity of paying famine prices induced by shortages overseas for hides in Australia where there was a surplus of hides. However, at all times there has been an exportable surplus. In order to determine out of one year's production what surplus there was available for export it was necessary not only to know the number of hides which had been produced during the season, but, also, their various classifications and the quantity in each classification, because unless that was done it would be quite impossible for any person to determine what hides or what portions of the season's production were available for export. The mechanics of the production of hides; their delivery to a centre, and their final disposal, have not been altered; the mechanical process remains precisely the same. The course of business has remained completely unaltered, and there is not any question of delay. The material matter in s. 9 of the Act is whether the acquisition does infringe s. 92. That acquisition is very different from the acquisition considered in *James' Case* (1). It is not an acquisition of all goods, but is, to use the language of s. 9, an acquisition of goods which are not the subject of inter-State trade, and which are neither acquired nor intended for the purposes of inter-State trade. The exclusion in s. 9 (2) is sufficiently wide to obviate a collision with the terms of s. 92 (*Matthews* v. *Chicory Marketing Board (Vict.)* (2)). The language of the exception is co-extensive with the provisions of s. 92. Whether goods are the subject of inter-State trade, or acquired, or intended for that purpose, must, in every case, be a simple

(1) (1932) A.C. 542; (1930) 43 C.L.R. 386.

(2) (1938) 60 C.L.R., at pp. 270, 273, 283.

question of fact. One cannot put an end to the banking business because one cannot deal with the inter-State aspect without infringing s. 92 (*Banks' Case* (1)). Section 92 does not afford protection to a person who is in possession of goods concerning which he has not made up his mind (*Carter* v. *Potato Marketing Board* (2)). It matters nothing that the person having the custody is the agent, because the ultimate disposal depends not on his determination but on the determination of his principal. There was not any suggestion in the passage in the *Banks' Case* (3) that s. 92 gives to any person a right at his will to engage in inter-State or intra-State trade. It suggests, in effect, that apart from any interference, that is a right which a person normally enjoys and one does not concern himself, so far as s. 92 is concerned, with actual cases of interference but if an unqualified power is given by Parliament to a Minister to interfere with a right or liberty which a person would otherwise have, then the purpose of the creation of that power is invalid. Section 6 has not only a transitory operation, but has also a permanent operation and its object is to prevent the sales of unappraised hides and to prevent people from selling unappraised hides or offering them for sale. It is quite competent for any person, notwithstanding the terms of s. 6, at any time before the hides are submitted for appraisement, to make an offer to sell hides or to enter into a contract to sell hides subject to appraisement. Under that section any person may buy hides. Upon submission for appraisement the hides become the property of the board unless it can be said with truth that the hides are the subject of inter-State trade, or are required or intended for it. The reference in s. 6 to hides which have not been appraised is intended to be a description of hides which may not be sold or offered for sale in that condition. There is plenty of room for transactions which would bring the hides concerned well within the description of goods the subject of inter-State trade where the arrangements made were inter-State arrangements. There is quite a considerable body of other transactions which may be effected notwithstanding the terms of s. 6. Hides and skins produced at a meat-works are entirely outside s. 6 because such hides and skins never have to be submitted for appraisement. Those hides and skins may be bought and sold freely by any person and if they are going to inter-State trade or to be purchased for the inter-State trade they are excepted from acquisition. They

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1951) 84 C.L.R., at p. 485.
(3) (1950) A.C., at pp. 305, 306; (1949) 79 C.L.R., at pp. 635, 636.

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represent a very large proportion of the season's production. Even if s. 6 were invalid it would not touch the scheme; the scheme could still function, and s. 6 could be omitted as a separate and independent provision because s. 7, even now, must deal with hides in some circumstances which are neither the property of the producer nor of a dealer. Section 6 is perfectly valid, but if it be invalid, it is completely severable. Assuming that the excluding provision in s. 9 (2) is sufficient to prevent all collision with s. 92, the acquisition is perfectly good and it adds nothing to the objection to the Act to say that the acquisition was for the purpose of establishing quotas, because a State Parliament may legislate for the purpose of establishing a marketing scheme and imposing quotas as long as it does not come in conflict with s. 92. If the producer wishes to sell his goods in inter-State trade he is free to do so and his sale becomes effective no later than it would have been by selling them to a broker. If, however, they are going into inter-State trade they become the property of the board at the same time as they would have become the property of a purchaser under the old scheme. There is really not any delay, or alteration in the procedure, or extra expense. The question of whether or not s. 16 (3) was intended to be penal is immaterial because it is on the fringe of this case, and is completely severable from the remainder of the Act. The substantial matter for decision is whether the language of s. 9 (2) is sufficiently wide. It does not depend to any extent upon matters which may arise under the Federal Act. If *Matthews* v. *Chicory Marketing Board (Vict.)* (1) is right, and the clause be wide enough, that is an end of the matter because s. 7 does not impose any further burden.

H. A. Winneke K.C. (with him *J. K. Manning*), for the States of Victoria and Queensland, intervening. The general submissions made on behalf of the Australian Hide and Leather Industries Board are, to a large extent, adopted on behalf of these intervenants. For the purposes raised in this case the various State Acts are in identical terms. The Acts are aimed at ensuring an adequate supply of the commodity for the domestic purposes of the State, and to providing that supply at reasonable prices. To secure those objectives the Acts provide a system of acquisition which is intended to be limited to the commodity which has no inter-State element about it. The degree of legislative control which is imposed by this legislation is not inconsistent with the freedom of trade which is guaranteed to individuals by s. 92. The key section is s. 9. That

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

section has the immediate effect of acquiring goods which are not the subject or intended subject of inter-State trade, and the further immediate effect of excluding from s. 9 hides which are either the subject or intended subject of inter-State trade. In framing s. 9 (2) in the way it is framed, each State legislature has disclosed an obvious intention to endeavour to avoid its Act coming into conflict with s. 92. Legislation framed in the terms of s. 9 (2) does prevent a provision of that nature from coming into collision with s. 92 (*Matthews* v. *Chicory Marketing Board (Vict.)* (1)). In so far as this legislation is legislation of an expropriatory nature, it is not legislation which conflicts with s. 92. Sections 6 and 7 in so far as they are applicable to hides which are the subject or intended subject of inter-State trade or commerce, do not go beyond the legitimate realm of regulation for the purpose of putting the scheme into operation. The extent of the legislative interference is to be judged by the factor that it was a process which in fact had existed for a long time to a very substantial degree, and consequently any measure of interference, which is required by s. 7 is not such a burden or a fetter or an interference as would make the section inconsistent with the freedom which is given by s. 92. The matter of grading and sorting hides is a pure regulation and does not constitute an interference. Section 7 leaves the ultimate disposition of the hides perfectly free to go into inter-State trade. The evidence does not justify a finding that in fact the facts on which this legislation is being applied has shown a restriction which would impose a burden which would go beyond the limits of regulation. The onus is upon the plaintiffs to prove that the immunity given by s. 92 has been infringed. That onus has not been discharged. The plaintiffs have not shown that the system of appraisement which is in use extends beyond legitimate regulation for the purposes sought to be achieved by this legislation. All that they have shown is that in their trading with hides which they require for inter-State purposes, the hides go through the same mechanical process, namely grading, sorting and cataloguing, that they went through before the legislation was enacted. What was previously done voluntarily is, by the Act, required to be done compulsorily. That does not constitute interference beyond legitimate needs. If there be a case where the regulation may be administered in an extreme way, or in a way that involves but little interference, the burden of proof that he has been prejudiced lies upon the individual who claims that the particular transaction which he desires to carry out has been stopped in violation of his

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

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rights under s. 92. It is conceded that ss. 6 and 7 do apply to the residue of hides never acquired by the board under s. 9. The inter-State part is not allocated by the board, but the justification for the appraisal system being applied to these hides is that the board does need notice of what they are, and of what qualities and kinds they are, in order that it may effectively allocate the hides that have become the property of the board and fix an export quota. It is a legitimate State purpose to endeavour to provide the citizens of the State with an assured supply of hides and leather, and at a reasonable price. It is a form of inspection and would not be held to be invalid because it occasions the imposition of some delay upon the process of trade. The power is given to a committee which consists almost exclusively of persons engaged in the trade. The prohibition in s. 6 (1) only applies to unappraised hides. It does not mean that hides cannot be sold before they have been submitted for appraisement; if so sold they must be sold subject to that condition. Hides produced from meatworks are not subject to the prohibition contained in s. 6 (1). It is conceded that s. 6 does impose a legislative fetter on those hides intended for inter-State trade but that fetter does not go beyond the bounds of legitimate regulation. Even if s. 6 be invalid, the scheme can work quite well so long as s. 7 is retained. Section 9 is a valid acquisition section (*Matthews* v. *Chicory Marketing Board* (*Vict.*) (1)). Neither s. 6 nor s. 7 goes beyond the stage of legitimate regulation for the basic purposes sought to be achieved by the Act. The absence of a present intention as to the disposal of a commodity was considered in *Cam & Sons Pty. Ltd.* v. *Chief Secretary* (*N.S.W.*) (2). Section 92 does not protect potential trade as well as trade. There is no such thing as trade in the abstract.

G. E. Barwick K.C., in reply. The board can and does in practice distribute the acquired property on a quota system for export, inter-State and intra-State activities. To say where and in what quantities commodities should be distributed offends s. 92. To admit that this was a restriction and then to attempt to excuse it on the ground that it is only a little one, is basically fallacious. The Privy Council said concerning regulation, not that restrictions if little could become regulation, but that there was something different in character and in quality. There was a qualitative difference between restrictions and regulations, and it was necessary to ascertain whether the law in its character, in its nature, was

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

(2) (1951) 84 C.L.R. 442.

regulatory (*Banks' Case* (1)). The regulatory character of the law was a law accommodating free individuals in a society to each other (*Duncan* v. *Queensland* (2)). Trade and commerce must be regarded in the commodity, not in the abstract. The exception or proviso to s. 9 (2) is inadequate. The scheme of the Act, taken as an Act, is one integral scheme. Sections 6-9, 11 or 16 are all necessary parts of that scheme which has acquisition as its pivotal point. The purpose of the acquisition as provided in the Act itself is to enable the board to enforce a quota. Instead of doing that by direction to the people who own commodities, the scheme that the whole commodity, subject to the proviso, is to be in the hands of the board so that the board may do those things. Assuming that " export " in s. 3 means to and beyond the bounds of Australia, the scheme is to enable the board to quota the hides over export, inter-State and intra-State operations. The power is an absolute and unqualified power to fix those quotas and determine who shall buy, whether he be inter-State on the one hand or intra-State on the other hand. It is not possible to say the State takes the residue after all inter-State trade has been satisfied. Whether or not a person sells his goods inter-State is a matter for his sole decision. Until actually sold an owner of goods may not know, due to outstanding offers, whether his goods will be required for inter-State trade. There need not have been a single inter-State transaction in the commodity for s. 92 to strike out an Act. In *James* v. *South Australia* (3) there was not any evidence of any specific inter-State transaction, or of any goods committed to inter-State trade. A power which tells a producer where he must sell his goods necessarily includes the power to tell him to whom he is to sell those goods, or where, in relation to inter-State trade, and therefore the existence of such a power offends s. 92. The determinations that were made in *James* v. *The Commonwealth* (4) were no more than indications of the width of the power. Section 20 of the *Dried Fruits Acts* 1924 *and* 1925 (S.A.) there under consideration would have been just as bad if there had never been any determination. A direction cannot be given before an owner has made his decision (*James* v. *South Australia* (3)). Acquisition in a marketing or rationalizing Act fetters trade. [He referred to *James* v. *Cowan* (5) ; *New South Wales* v. *The Commonwealth* (*The Wheat Case*) (6) ; *Peanut Board* v. *Rockhampton Harbour Board* (7) ;

(1) (1950) A.C., at pp. 309, 313 ; (1949) 79 C.L.R., at pp. 639, 641, 642.
(2) (1916) 22 C.L.R. 556, at p. 593.
(3) (1927) 40 C.L.R. 1.
(4) (1936) A.C. 578 ; 55 C.L.R. 1.
(5) (1932) A.C., at p. 558 ; 47 C.L.R., at p. 396.
(6) (1915) 20 C.L.R. 54.
(7) (1933) 48 C.L.R. 266.

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Clements and Marshall Pty. Ltd. v. *Field Peas Marketing Board (Tas.)* (1).] If the acquisition is itself a means then its result is direct and not consequential. What is regulatory necessarily must take its character to some extent from the state of the community whose freedom in the trade is being preserved. The whole acquisition in *James* v. *Cowan* (2) was bad although it was intra-State fruit, not inter-State. Section 8 authorizes the granting of licences to buy and sell hides on an owner's own behalf or on behalf of the board. Prima facie that means that his licence would be limited to New South Wales operations. If that be right, sub-s. (3) does not add anything because the licence under the Federal Act is expressly limited by s. 15 of that Act to buying in a Territory. Dealers themselves cannot have inter-State transactions. Section 6 is a prohibition on sale. The object of s. 6 was to make certain that there would not be any dealing in hides and skins prior to appraisement, and s. 9 (2), because of the remarks in *Matthews* v. *Chicory Marketing Board (Vict.)* (3), was inserted in the hope that they would escape the consequences. Sections 6 and 7 are not good or bad merely according to the way they are administered. It is no answer to say that these were regulations because they did not involve very much interference, and are not more than the owners previously did. As to whether a provision was a regulation was considered in *McCarter* v. *Brodie* (4). The decision in *Hartley* v. *Walsh* (5) does not support the respondents or the intervenants. That case was decided on the ground that the provision in question was a regulation in the nature of a policeman controlling traffic. Section 9 (1) catches in its net property which in fact does come into inter-State trade simply by the device of drawing a temporal line. The Court should declare invalid substantially the whole Act, but in particular ss. 6-9 and 16. They are all so integrated in the scheme that one cannot exist without the others.

Cur. adv. vult.

March 17, 1952.

The following written judgments were delivered :—

DIXON, MCTIERNAN AND FULLAGAR JJ. The question for our determination was reserved at the hearing of these two suits for the consideration of the Full Court under s. 18 of the *Judiciary Act* 1903-1950.

The question is whether the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) or any, and if so, which sections of the Act

(1) (1947) 76 C.L.R. 401.
(2) (1932) A.C., at pp. 553, 554; 47 C.L.R. 386, at pp. 392, 393.
(3) (1938) 60 C.L.R. 263.
(4) (1950) 80 C.L.R. 432.
(5) (1937) 57 C.L.R. 372.

are invalid because they contravene s. 92 of the Constitution. In passing the *Hide and Leather Industries Act* the Parliament of New South Wales was acting in co-operation with the Commonwealth Parliament and the Parliaments of the five other States. The seven governments agreed upon concerted measures for the control of the hide and leather industries to succeed the control which had been established at the commencement of the war by means of the *National Security* (*Hide and Leather Industries*) *Regulations*. The plan the seven governments adopted closely resembled that embodied in the regulations and was designed to deal with an analogous situation by like means. At the beginning of the war the overseas demand for hides and leather rose and, with the demand, price. Price fixing had of course been established and to fix the price of leather with a view to keeping down the price of footwear and other leather goods meant that the price which tanners could afford to give for hides was restricted. It was seen that if no measures were taken the consequence would be that great quantities of hides would be exported and tanners would be unable to obtain supplies of hides at any price they could afford to give. To meet this position the regulations were promulgated. They set up a Hide and Leather Industries Board. The members were persons engaged in the production of hides, in the hide trade, in the tanning industry or in the manufacture of footwear. The plan of control which this body was to administer is substantially reproduced in the Federal and State statutes of 1948 the provisions of which it will be necessary to describe. To give an account of the provisions of the regulations would therefore mean in the end some repetition. It will suffice at this point to state what it was they sought to effect.

The board took the property in all hides in the first instance. An appraisement system was established. The appraisement prices were fixed for the various types or classifications of hide and doubtless these would at once provide the basis of distribution of the returns among suppliers of hides and the basis of the price to the tanners. The hides acquired by the board were then disposed of at two different prices. Sales at home consumption prices were made to the tanners. Later each tanner received a quota, which it may be supposed represented the proportion his quantitative requirements bore to those of other tanners, and allocations were made to fill the quotas. Sales of the exportable surplus of hides were made at export parity prices to merchants and exporters.

Leather could be exported only under licence and when leather was sold for export the board seems to have obtained some part of the excess of the export price over the home consumption price

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and to have added it to the net amount produced by the export sales of hides. The suppliers of the hides acquired by the board were paid the appraisement prices together with a distributive share of the net excess provided by the net amount arising from these two sources. It will be seen that the purpose was to conserve hides for domestic requirements, keep down the home consumption price and at the same time equalize the returns to the producers or suppliers of hides and distribute the supplies retained in Australia among tanners according to a just proportion.

The regulations continued in fact to govern the trade in hides until 1st January 1949, when the legislation contained in the statutes of the Commonwealth and States, all called Hide and Leather Industries Acts, came into force. It is evident that small, if any, hope existed of sustaining any longer the validity of the regulations under the defence power of the Commonwealth. But the overseas prices of hides remained very high. Soft currency countries would not want to provide dollars for hides. It would be impossible to retain the price of footwear and leather goods at the then level if tanners could obtain hides only at export parity prices. The responsibility for price fixing had passed to the States on 20th September 1948. (See Act No. 26 of 1948 (N.S.W.): Act No. 5310 (Vict.): Act No. 2 of 1948 (S.A.): Act No. 34 of 1948 (Q.): Act No. 33 of 1948 (Tas.): Act No. 3 of 1948 (W.A.). Commonwealth *Gazette* 17th September 1948.) In these conditions the six States and the Commonwealth combined to place the control on a new statutory basis. The six States adopted uniform legislation. The plan involved the establishment of one board as before. This was left to the Commonwealth enactment to do. Where compulsive provisions were necessary, they were made in the State Acts, except in the case of Federal Territories. The Commonwealth Act contained the like compulsive provisions with respect to the Territories.

The State Acts undertook to vest the hides in the Commonwealth board, while the Federal Act provided the machinery for appraisement and for making the payments or distributions to the suppliers. In deference, no doubt, to s. 92 of the Constitution, the State Acts did not attempt, as the regulations had done with the old Hides and Leather Industries Board, to give the new board a title to all hides. An exception was made of hides the subject of trade, commerce, or intercourse among the States and of hides required or intended by the owners for such trade, commerce, or intercourse. But otherwise the plan of control provided much the same means as before for accomplishing the same ends. For,

although in the beginning the demand and high price overseas for hides arose from the war the same conditions existed. So long as it was considered necessary to keep the price of leather for domestic consumption much below export parity, it logically followed that a statutory control of hides must be maintained to insure that sufficient supplies of hides remained in Australia available to tanners and at prices the fixing of which might be incompatible with competitive bidding for the domestic supply, so that a means of equitable apportionment among tanners would be necessary. Of course, with differential prices, a means of equalizing the return to the suppliers of hides was a consequential necessity. As in the case of most war-time controls of trade and industries the then existing organization of the hide trade and the common course of business in the trade are accepted as the basis of the plan of control. Unfortunately the parties did not enter into formal or full proof of these and other matters which would have enabled us, at all events, to obtain an understanding which we felt more adequate of the real significance, effect and operation of the statutes, information of a kind that we have come to think almost indispensable to a satisfactory solution of many of the constitutional problems brought to this Court for decision; though we are bound to say that it is not an opinion commanding much respect among the parties to issues of constitutional validity, not even those interested to support legislation, who, strange as it seems to us, usually prefer to submit such an issue in the abstract without providing any background of information in aid of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation. But from what appears in evidence, from the inferences to be drawn from the regulations and statutes themselves, from the statements made at the bar and from general knowledge and experience of Australian affairs, some picture of the industry can be constructed.

The source of supply of hides fall under three main heads. We include under the word hides, as the statutes do, yearling and calf skins. There are first the large abattoirs at which beasts are killed for meat for domestic consumption. Meat companies and butchers whose killing is done at such abattoirs are the suppliers of the hides. Then there are the meatworks where beasts are slaughtered chiefly for the meat export trade. Thirdly, there are the butchers and others throughout the country who kill oxen and cows in a smaller way. A great part of their hides are bought by dealers. Hides are salted and treated shortly after the beast is killed and they are largely dealt in green. For the most part they

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are dried only for the export trade. The ordinary course of trade in hides except in the case of the hides of meatworks was to market them through brokers. The hides were sorted, graded and classified according to recognized types and they were catalogued. This sorting and classifying would be done by the dealers or the owners or in brokers' stores where they were catalogued. Auction sales were then held by the brokers by reference to the catalogues. Tanners and hide merchants bought at such sales. No doubt dealers also sold hides to tanners and merchants directly. The classification according to types depended in a considerable degree upon the kind of beast from which the hide came. Meatworks thus produced hides the classification of which was necessarily largely an automatic consequence of the course of operation of the works. Merchants bought for export, as well as for resale. Dealers and merchants made inter-State sales and moved hides from one State to another for the purpose of selling them. In the manufacture of boots and shoes the leather produced from calf skins and yearling cattle is used for uppers and that produced from the hides of older cattle is used for soles, and for uppers in the cheaper and heavier classes of boots. Linings are made from sheepskin leather. Kid shoes were made from leather produced from goat skins, which for the most part were imported. But owing to the great rise in recent years in the price of goat skins, and more recently still to the very great increase in the price of sheep skins, there has been a widespread substitution of calf skin. The place of origin may determine the fitness of hides for particular uses. For example hides from New South Wales are usually free from tick and those from parts of Queensland are not. Tick marks show in the surface of the leather, which makes it unsuitable for any use in which the surface is left plain. Both Queensland and New South Wales produce more hides than are tanned within those respective States and the tanneries in some other States rely for part of their supplies upon hides originating in New South Wales and Queensland.

The body established in succession to the war-time board for the control of the industry so carried on is called the Australian Hide and Leather Industry Board. The board is set up by the Commonwealth Act (No. 71 of 1948). It consists of a chairman and eleven members who are appointed by the Minister, but six of the members must be cattle-raisers or actively engaged in that pursuit and nominated respectively by the Ministers of the six States. Of the remaining five one must be a hide broker, one a hide merchant or exporter and one a master tanner or leather manufacturer or they must be respectively engaged or concerned in those businesses.

A fourth must represent a meatworks and the fifth must represent the Australian Leather and Allied Trades Employees Federation: (s. 4). It is thus a trade body with an official chairman. The Commonwealth Act requires the board, for the purpose of appraising hides according to description, to cause to be prepared a table of limits containing lists of appraisement types of hides and the prices of those types: (s. 14 (1)). The prices appearing in the table of limits in relation to hides acquired under a State Act are to be such prices as are fixed by the authority empowered under the law of the State to fix those prices: (s. 14 (2)). This may seem to suggest a separate table of limits for each State, but it must be borne in mind that in price control the price commissioners of the six States and of the Commonwealth act in collaboration and it may be supposed that the intention was to have a uniform table of limits for the various appraisement centres. Indeed the provisions of the Federal as well of the State Acts speak of the table of limits. No doubt the function was confided to the price commissioners because of the close connection between the price of hides and calf skins and the price of leather and of footwear and other leather goods.

The acquisition of hides by the board was left, necessarily for want of Federal power, to the State Acts, if the hides were obtained in a State as distinguished from a Federal Territory. But the Commonwealth Act provided for the payment to be made by the board for such hides. Section 18 (1) enacts that where under a State Act relating to the hide and leather industries, the payment to be made by the board in respect of hides required by the board in pursuance of the State Act is to be fixed in accordance with the provisions of this Act, the board shall pay for those hides the appropriate price specified in the table of limits or such amount in excess of that price as the board, subject to any direction by the Minister, determines. The amount in excess of the price in the table of limits represents a distributable amount of the net moneys arising from the sale of hides by the board for export or for tanning for export and from the amount payable to the board by exporters of leather when the leather was tanned from hides sold for domestic consumption. The board is given authority to determine which hides acquired by it shall be sold at home consumption sales and which hides acquired by it shall be sold at export sales (s. 20 (1)). An export sale is a sale by the board either at an auction at which any buyer of hides may bid or at prices which the board decides to be equivalent to prices being

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realized at auction sales of that type: (s. 3). A home consumption sale is a sale of hides by the board either at an auction at which only buyers may bid who have satisfied the board that they will use the hides in Australia or at prices which the board decides to be equivalent to prices realized at that type of auction sale: (s. 3). It is evident that, if the price of leather is fixed on the basis of costs which take in hides at the prices in the table of limits, the margin within which competitive buyers might safely bid against one another at a home consumption auction sale would not be wide. At all events no such auction sales are held in practice and the board's hides are sold for home consumption at appraisement prices. The power to license exports of hides, if they have been purchased at any export sale is given to the board subject to the directions of the Minister (s. 21), together with a parallel power to license, subject to conditions, the export of leather (s. 22 (1)). In the latter case the board is to ensure that the quantity of leather for which it grants a licence for export is not disproportionate. The quantity is to bear to the total quantity manufactured by the licensee the same proportion as his purchases of hides for export bear to his total purchases of hides (s. 22 (2)). The State and Federal legislation contain identical provisions enabling the board to license dealers. The Federal Act is expressed to authorize the board to license dealers for the Territories (s. 15 (1)), and the State Acts give a similar authority without any express territorial restriction. But all the State Acts make a licence of the board under the Federal Act sufficient for the State Acts. A person licensed under a State Act is deemed to be licensed under the Federal Act. So that means in effect that the board's licence runs throughout Australia. There is in the Commonwealth Act a number of provisions relating only to hides in the Territories which are the counterparts, for Territories, of provisions made in the State Acts for hides in the States. These evidently represent the provisions the validity of which it was considered Federal legislative power did not or might not suffice to sustain if they were enacted by the Commonwealth Parliament as laws operating throughout Australia. Finally the Federal Act contains a section the purpose of which is to prevent any of its provisions operating under s. 109 of the Constitution to the prejudice of the validity of the State Act: (s. 32 (1)). Further it is provided that the board shall be subject (without express mention) to any law of a State fixing, or providing for the fixing, of prices for the sale of hides, except in relation to sales of hides for export, and to any other law of a State which is expressly applicable to the board: (s. 32 (2)).

The purpose of the State Acts, which are all in the same form, is to complement the Federal Act and to confirm, by the exercise of State legislative power, the legal position of the Federal board. It is unnecessary to refer to the sections of the Acts of the other five States. It is enough to give the citations of the Acts and to deal in detail only with the statute actually under attack, that of New South Wales. The Acts of the other States are the following: Victoria Act No. 5353; Tasmania No. 66 of 1948; South Australia No. 43 of 1948; Queensland No. 15 of 13 Geo. VI; Western Australia No. 42 of 1948.

The carrying out of appraisements according to the table of limits is entrusted to a committee set up in each State. Section 3 of the New South Wales Act provides that there shall be an appraisement committee consisting of six persons appointed by the Minister, three engaged in divisions of the tanning industry, two hide brokers and one hide exporter. The powers and functions of the appraisement committee are such as are conferred upon it by the board and they are exercisable subject to the direction of the board: (s. 3 (9)). No doubt the appraisers who make the appraisements are immediately responsible to the committee. When hides are to be submitted for appraisement, they must be "submitted to a person or place appointed or approved by the Board or by the Committee for appraisement": (s. 7). We take the person to be the appraiser. As to the place, the existing trade organization has been used. The appraisements are done at the brokers' stores where the hides are sent. They are sorted, graded, catalogued and displayed (cf. s. 19 (a)) in the same manner as before the war would have been done for an auction. Hides thus come forward through the ordinary trade channels. Dealers may buy them and submit them for appraisement or the suppliers may send them to their brokers in whose store they will be appraised. The process of appraisement consists of cataloguing them under the appropriate appraisement types, which are based on trade usage in grading and classification.

Section 7 provides that all hides other than hides salted and treated in a meatworks shall be submitted to a person or place appointed or approved by the board or the committee for appraisement within certain times which the section proceeds to prescribe. This is one of the chief points at which the validity of the enactment is attacked. The section makes no exception in favour of hides sold or to be sold or consigned in inter-State trade. The exception of hides salted and treated in a meatworks accords with the trade practice by which meatworks did not usually sell their hides through brokers and is doubtless based upon the almost automatic

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grading and classification of hides at such a meatworks. Meatworks is defined to mean an establishment at which stock is slaughtered and treated principally for export: (s. 2).

The times prescribed by the section for submitting hides for appraisement vary in their commencing point according as the hides do or do not come through a licensed dealer. If they do not, the time within which they must be submitted is twenty-eight days after they have been salted and treated; if they do, twenty-eight days after they come into the possession of the licensed dealer. No doubt a dealer's licence will often be held by a broker and by a merchant. A dealer may be licensed to buy and sell hides on behalf of the board and to buy, sell and otherwise deal in hides on his own behalf: (s. 8).

Except to a licensed dealer, no person may sell or offer for sale any hides which have not been appraised in accordance with s. 7: (s. 6). There is some dispute as to the precise meaning or application of this provision. On the one side it is said that it means that until hides have been appraised they may not be offered for sale or sold. On the other it is maintained that it only means that the subject of sale made or offered must not be unappraised hides and that hides may be sold or offered for sale subject to appraisement before delivery. This is based partly on the purpose or policy ascribed to the provision and partly on the view that the words "which have not been appraised" are merely descriptive. For ourselves we would interpret the provision as forbidding a sale of specific hides or an offering of specific hides for sale unless the hides have already been appraised. But we do not think that it forbids an agreement to sell hides by description and the performance of the agreement to sell by the delivery of hides which have been appraised after the agreement to sell was made. Apparently the prohibition is inapplicable to hides in meatworks which are not covered by s. 7 and so could not be submitted for appraisement in accordance with that section. The provision (s. 6) is another of the chief points at which the enactment is impugned. It contains no exception in favour of sales or offers to sell in the course of inter-State trade. The passing of property in hides to the board is brought about by s. 9 but that section does contain an exception or exclusion of inter-State trade. Section 9 (1) provides that all hides which are salted and treated in a meatworks or are submitted for appraisement in accordance with s. 7 shall thereupon by force of the section be acquired by and become the absolute property of the board freed from mortgages charges &c., and payments in respect of the hides shall be made in accordance with s. 11. Sub-

section (2) provides that nothing in sub-s. (1) shall apply to any hides the subject of trade, commerce or intercourse between the States or required or intended by the owners of the hides for the purpose of trade, commerce or intercourse between the States. The validity of s. 9 is attacked and in support of the attack it is contended that sub-s. (2) is not wide enough to protect the freedom of inter-State trade from impairment by sub-s. (1). Section 11 (1) provides that the person who would have been entitled to receive the price of the hides if the hides had been lawfully sold to the board at the time of their acquisition by the board shall be entitled to be paid in respect thereof such amount as is fixed in accordance with the Commonwealth Act.

There is a number of provisions which, in order to gain the confirmatory benefit of State legislative power, repeat provisions contained in the Commonwealth Act relating to the powers, functions and duties of the board and to these it is needless to refer. But there are two sections of a different character which bear upon the validity of the enactment in its restrictions upon dealings in hides before appraisement. Section 15 avoids any contract relating to the sale of hides acquired by the board entered into before the acquisition of the hides in so far as the contract has not been completed by delivery and any transaction or contract with respect to such hides. This means in effect that if hides are submitted for appraisement and are not the subject of inter-State commerce or required or intended for such commerce no contract in relation to their sale made before submission for appraisement is valid. It is unnecessary to speak of hides from meatworks, the property in which passes so soon after slaughter of the beasts that the hides could hardly be sold specifically beforehand. The tendency of s. 15 is to negative the interpretation of s. 6 which would allow sales of hides and offers of hides for sale subject to appraisement. Any such contract of sale would be void unless property in the hides failed to pass to the board because they fell within the exception of hides devoted to or destined for inter-State commerce. Section 16 authorizes subject to certain formalities the seizure of hides which in contravention of s. 7 have not been submitted for appraisement and provides that hides so seized become the property of the board. This is expressed in terms wide enough to include hides the subject of inter-State commerce if they have not been appraised.

Once the hides become the property of the board, it is for the board to determine what quantity shall be sold at export sales and what at home consumption sales: (s. 13 (1) of the New South Wales Act; s. 20 (1) of the Commonwealth Act). It will be noticed

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that there is no legal obligation upon a person who buys hides at export sales to export the hides. It is a question only of the price paid; and the increased price at an export sale results from the fact that anybody may purchase. But at a home consumption sale no one may buy unless he satisfies the board that he will use the hides in Australia (s. 13 (2)). To impose this limitation upon the use that the purchasers may make of the hides and at the same time to fix the price of leather, would be enough, without more, to keep down the price paid for hides at home consumption sales, if home consumption sales were made by auction. But in practice home consumption sales by auction are not carried on by the board. The sales appear to be made by a system of quotas and allocations at prices based upon appraisement. In each State an allocation committee is set up. In Tasmania it is combined with the appraisement committee. The constitution of the allocation committee is left to the Minister: (s. 5 (1)). The committee must exercise its powers and functions subject to any direction of the board: (s. 5 (9)). What the powers and functions of the committee are in practice is not clear, for the statute describes them in a provision which in terms only applies to sales of hides by auction: (s. 5 (8)). It provides that the allocation committee shall distribute on an equitable basis the hides which may be sold to tanners at auction and, for that purpose, it may assess a quota of hides which may be bought at each sale by tanners. It has not been made plain how, in fact, the quantity of hides obtainable by a tanner is fixed. There is some indication that a quota is assessed for each tanner by the board and allocations are made by the State committees, presumably from the appraisements, to the tanner to fill his quota. It is of course apparent that in such a system of control the board and the allocation committee must be completely informed concerning the hides available. Apart from hides in meatworks the compulsory appraisement of hides contributes to this purpose. But there is a statutory provision for returns. Section 14 (1) requires returns from meatworks and from owners of hides submitting them for appraisement, but in a form following a form of return to be prescribed under the Federal Act and no such form has yet been prescribed. Section 14 (2) however enables the board to notify persons that returns of hides or leather must be made and we were informed that the board uses this power.

The grounds upon which it is said that the plan of statutory control we have described cannot be sustained as constitutionally valid are limited to s. 92 of the Constitution. No question is raised, at present at all events, as to the sufficiency of Commonwealth

legislative power to sustain the provisions of the Federal Act which are not confined in their operation to the Territories and none is raised as to the effect of s. 51 (xxxi.) under the decision in *P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (1), with reference to ss. 9 and 11 of the New South Wales Act having regard to ss. 14 and 18 of the Federal Act.

The questions arising under these provisions unlike those turning upon s. 92 fall within s. 74 of the Constitution and it is possible that the plaintiffs have abstained from raising them in the hope that by a sectional treatment of the validity of the legislation they may, in case they fail in this Court, avoid the operation of s. 74.

The contention that the statutory plan involves an impairment of the freedom of trade, commerce and intercourse among the States depends upon grounds which may be divided as follows: (1) That the prohibition of selling hides or offering hides for sale before appraisement would prevent inter-State sales or offers for sale. (2) That the licensing of dealers exempted from the prohibition left it in the hands of the board to restrict the freedom of dealers to buy inter-State by refusing a licence. (3) That the requirement that hides should be submitted for appraisement, even although the subject of inter-State commerce, hampered inter-State trade and could be used to make inter-State sales of the hides impossible. (4) That the compulsory acquisition of hides upon submission for appraisement, or in the case of hides in meatworks upon salting and treating, deprived the owners of their freedom to sell or otherwise deal with the hides in inter-State commerce notwithstanding the exception in favour of hides the subject of or required or intended for such commerce, an exception which, so it was said, failed to cover the field protected by s. 92. (5) That the plan embodied in the statutes, or specifically the New South Wales statute, was one of marketing control effected by expropriation and by administrative determinations as to the quantity to be marketed inside and outside Australia and carried out by means of quotas restricting one party's right to choose what he would buy in another State and another party's to choose whether and what he would sell in inter-State commerce.

In stating the view we have formed with respect to the plaintiffs' contention it is as well to begin with the last of these five heads, because it comprehends almost the entire plan of control. But it cannot be dealt with independently of the fourth head, which necessarily affects the conclusion.

(1) (1949) 80 C.L.R. 382.

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Now we concede at once that the use of expropriation as a procedure for controlling the marketing of a product is not inconsistent with an invasion, by means of such a plan of marketing control, of the freedom of inter-State commerce. That is illustrated by the decision in the case of *Peanut Board* v. *Rockhampton Harbour Board* (1) and it is an essential part of the reasoning of *Dixon* J. in *Field Peas Marketing Board (Tas.)* v. *Clements and Marshall Pty. Ltd.* (2). But that does not settle the question whether a plan does invade freedom of inter-State commerce. It certainly does not mean that every expropriation of a vendible commodity is invalid, because it deprives the owners of property which otherwise they might sell from one State into another. Section 92 confers an immunity from interference upon acts and transactions of a given description not upon ownership.

The important thing is to see what the marketing plan does in the restriction of inter-State commerce, and to keep steadily in mind that only the freedom of trade, commerce and intercourse between the States is the concern of s. 92, not freedom of commercial dealing, freedom of choice between one course of trade and another or any other liberty. It has been said before that it was part of the purposes of s. 92 to remove from the possibility of legislative and governmental restriction activities conducted across State boundaries and to do so rather because of their inter-State character than of any special claim to immunity from interference that particular activities might have except their inter-State character (2). It is easy to slip into the error of treating commercial dealings as having a special claim to immunity as such and of regarding the requirement that they shall be or perhaps include inter-State transactions as nothing but a further condition of the application, or a restriction upon the operation, of the immunity. The important thing therefore is to exclude from consideration any operation of a marketing plan except its bearing upon inter-State transactions.

The marketing plan in question in *James* v. *South Australia* (3), *James* v. *Cowan* (4), and *James* v. *The Commonwealth* (5) was one for restricting the amount of the commodity to be sold in Australia and, by its quotas and by the use against James of the power to acquire dried fruit, the plan sought to prevent the sale in any State of dried fruit lying in South Australia, or in the last case the sale of dried fruit anywhere, across any State boundary. In the present case the purpose and effect of the statutory plan

(1) (1933) 48 C.L.R. 266.
(2) (1948) 76 C.L.R. 414.
(3) (1927) 40 C.L.R. 1.
(4) (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386.
(5) (1936) A.C. 578; 55 C.L.R. 1.

is not to restrict but to increase the amount of the commodity available for sale in Australia. Further what is sold for home consumption is allocated according to a quota because it is distributed at an artificially low price. If exports were free the price of hides must reach export parity. If there were no quota for tanners, a tanner who outbid other tanners at a home consumption sale by auction, were such an auction held, would give good ground for the suspicion that either he was evading price control of leather or he was manufacturing a stock of leather to retain until price control was lifted or prices of leather were increased. Because the New South Wales statute is a State Act an assumption seemed to be made for the plaintiffs that the quotas and allocations were made on the footing that New South Wales hides went only to tanners of that State. In the same way we suppose that under the Queensland Act the allocation of Queensland hides, would, by this reasoning, be confined to Queensland tanners. And correspondingly with each of the other four States. But to adopt any such assumption as to the State Acts is to misunderstand the whole plan of control. The necessity and the purpose of the State legislation is to supply a defect of power in the Commonwealth to sustain an Australian wide control. It is one plan of control administered by an Australian board uniformly and as a single whole. All the seven statutes are complementary and should be interpreted accordingly. The necessities of the trade would alone make the plan unworkable if each State by allocation retained its own hides. Queensland for example must have a surplus.

In the *Dried Fruit Cases* (*James' Cases*) (1), the restriction was upon sales within Australia so that the surplus must be exported. In the plan of control for hides there is no such restriction. What is exported in fact is sold in Australia at world parity, or at all events parity with prices in soft currency countries, and that is the price which all hides would reach, if they were not acquired and resold or distributed at artificially low prices. The only reason why the hides that are sold at export parity are exported is because the artificially low prices of the hides distributed at home consumption prices make it uneconomical to use them in Australia. There is no legal reason, as there was with the dried fruits.

The foregoing being the operation of the plan of control by means of the acquisition of hides, sub-s. (2) of s. 9 introduces an exception the evident purpose of which is to prevent the acquisition itself operating to impair the freedom of the owner to engage in inter-State commerce by means of his right of disposition in the

(1) (1927) 40 C.L.R. 1; (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386; (1936) A.C. 578; 55 C.L.R. 1.

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hides. It is expressed in terms taken apparently from the exception to the vesting provision in the statute considered in *Matthews* v. *Chicory Marketing Board (Vict.)* (1). Of the exception similarly expressed in that statute *Latham* C.J., with whose reasons *McTiernan* J. agreed, said (2) " It is difficult to suggest any provision which could more clearly show the intention of the Act not to interfere with inter-State trade in any commodities which become subject to the Act ". And *Rich* J. said (3) " So far from attempting to interfere with inter-State trade the statute on its face exhibits an earnest desire . . . to walk warily along paths which never lead to inter-State trade ". *Starke* J. spoke even more decidedly of the effect of the provision (4) " The object of the section is to avoid any contravention of s. 92 of the Constitution. And it should be construed so as to give effect to that intention. Consequently, the provision is coextensive with the requirement of the Constitution and enacts in effect that trade, commerce and intercourse among the States in respect of the proclaimed commodity shall be absolutely free. It thus leaves the producers and the commodity free to pass the frontiers of the States and to engage and be engaged in inter-State trade without any hindrance or restriction so far as the Act is concerned ". Now the expressions " the subject of trade commerce &c. " and " required or intended by the owners . . . for the purpose of trade commerce &c. " are not terms of art. They are wide and flexible in their application, and it is obvious that they were meant to cover every case in which to deprive the owners of the goods would involve a conflict with s. 92, a derogation of the freedom that provision guarantees. Unless it is found that s. 92 protects some transaction or some situation which none of these expressions is capable of covering and the transaction or situation may arise in connection with hides, we think the provision should be treated as excluding every hide the acquisition of which would be inconsistent with s. 92. Even if some such transaction or situation is discoverable we are by no means sure that an inference does not arise from sub-s. (2) that sub-s. (1) ought to be treated as divisible or distributable in its operation in so far as it is found to be incapable by reason of s. 92 of operating upon all transactions included in its words, so that it is not totally void.

The plaintiffs have not proved in evidence any actual transaction which falls outside sub-s. (2) and within s. 92 and is interfered with by acquisition. The argument is left to general reasoning and hypothetical cases. It is said with truth that, assuming s. 7 to

(1) (1938) 60 C.L.R. 263.
(2) (1938) 60 C.L.R., at p. 274.
(3) (1938) 60 C.L.R., at p. 280.
(4) (1938) 60 C.L.R., at p. 283.

be valid, an owner of hides has only twenty-eight days in which to make up his mind whether he will commit his hides to inter-State trade or not; and sub-s. (2) does not exempt them from acquisition unless he has made them subject to inter-State commerce or has so acted that the hides may be said to be required or intended by him for such commerce. Be it so. It is pressing s. 92 far beyond its meaning and purpose if the immunity it confers is extended to the preservation of movable property against compulsory acquisition, although no overt act has been done with reference to such property which will, or upon a contingency may, result in a dealing or movement inter-State. We cannot assent to the view that because ownership may be considered a prerequisite of the sale of goods, therefore no trader to whom inter-State trade in the goods would otherwise be open can be deprived of ownership consistently with s. 92. There may be many situations where to take a trader's goods is inconsistent with s. 92. But that depends on some closer connection with inter-State trade than the two facts that to engage in inter-State trade is open to him if he chooses and that the goods are his property.

Such a view would mean that all vendible commodities would be outside the effective reach of the powers of compulsory acquisition of States and Commonwealth in peace and in war. The reason why such a view cannot be sustained may be stated in a variety of ways. One simple reason is that s. 92 has provided for the freedom of inter-State trade, commerce and intercourse and has not extended the immunity to antecedent conditions. Another way of stating it is that the notion that what is ancillary to an immunity is covered by the immunity is a confusion between doctrines applicable to legislative powers and the principles which should govern the interpretation and operation of constitutional restraints upon power. Still another is that, unless by reason of circumstances, an acquisition of property does not directly or immediately interfere with the acts, transactions or movement constituting trade commerce and intercourse among the States but can at most effect them consequentially.

We take the expression "the subject of trade &c." to cover at least all cases in which the hides had been placed in a course of movement which, if continued, would result in the passage of a border; all cases in which the hides had been sold specifically for delivery inter-State, or for delivery to an inter-State carrier, and all cases where they had been appropriated to an agreement to sell hides by description for such delivery. But we think the expression would extend further and include hides which, if the

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ordinary course of business went forward without interruption or change would be so delivered, even although no actual contractual obligation had been incurred. The expressions "required" and "intended" go far beyond this. Even if they are interpreted as necessitating some overt act evidencing the requirement or intention, they probably go in some respects beyond the immunity given by s. 92. In any case we should regard them as sufficient to cover the case put during the argument of an owner of hides who has made an offer, which is outstanding and is as yet unaccepted, to sell hides by description for delivery into another State if he contemplated the delivery of the particular hides, or if he needed a portion of his stock of hides, to perform the contract should his offer be accepted.

There is much to be said for the view that s. 92 should be applied only for the protection of transactions actually existing which come within it and not to imaginary cases. But be that as it may, we are unable to conceive a case involving an infringement of s. 92 by reason of the acquisition of hides which would not be within sub-s. (2) of s. 9. In our opinion the acquisition under s. 9 does not, in view of the sub-s. (2), extend to any interference with the freedom of inter-State commerce.

We turn to the operation of s. 7, which, in the order we have stated them, is the third in the list of matters relied upon as contrary to s. 92. The contention is that the duty of submitting hides for appraisement, which s. 7 imposes, whether the hides are or are not devoted to or destined for inter-State commerce, involves such an impediment to inter-State commercial dealing as to amount to an infringement of s. 92. None of the plaintiffs adduced evidence to show that any actual inter-State transaction had been in fact prevented or defeated by the need to submit hides for appraisement. Again the appeal was to the reason of the thing and the possibilities to which s. 7 exposed the dealer or the owner of hides. On a literal reading of s. 7 the authority it bestows to appoint places of appraisement might enable the board to appoint places so remote as to make it impracticable to send hides there for appraisement and afterwards despatch them in inter-State commerce. That however would be an attempt to abuse power and to exercise a discretion for illegitimate objects which might be corrected on mandamus. We think the question whether the requirement that all hides, except those in a meatworks, must be submitted for appraisement must be divided into two. There is first the question whether, as appraisements have in fact been administered, the necessity of submitting hides, although they fall under s. 9 (2), involves

such a detraction from the freedom of inter-State commerce as to infringe upon s. 92. There is then the question whether s. 7 is wholly void on the ground that it is so wide that the board might administer the provision so as to interfere with inter-State commerce in hides.

The first of these questions should, we think, be answered in the negative. The appraisement system, as we understand it, is based upon the ordinary course of trade through which hides were handled. It is done in the brokers' stores through which hides passed and possibly in other establishments where hides were graded, catalogued and displayed.

The appraisement itself consists in essence in cataloguing hides according to appraisement types. The types are based on recognized trade classifications and sorting grading and cataloguing are always practised. The appraisements take place at regular intervals; in some brokers' stores every fortnight, in others more frequently.

The purpose of cataloguing in this way all hides (outside meatworks) including those required or intended for or the subject of inter-State commerce is to enable the board and the allocation committee to exercise their judgment properly in determining what is the surplus for export and in what grades and descriptions of hide, and how quotas and allocations should be settled. If large quantities of hides were dealt in outside these routine trade channels and there was no record of the quantity nature and classification it is easy to imagine the difficulties which would or might arise in the administration of the plan of control. It appears to us that no real interference with freedom of inter-State commerce in hides is involved in compelling the owners to submit them for appraisement within twenty-eight days of salting or treating or, in the case of a dealer, of their coming to his hands.

The second question depends upon the width of the discretion to appoint or approve appraisers and places of appraisement. Wide as it may appear, however, it is not uncontrolled. In the first place the board must exercise their discretion for the purposes for which it is conferred ascertained from the general scope and objects of the plan of control embodied in the statutes. Obviously the purpose of appraisement is to facilitate the carrying on of the hide trade controlled and regulated in the manner that has been described. If the board used its discretion in such a way as to hamper or impede trade, thus regulated, it might well be held a capricious exercise of its discretion. In any case an actual purpose of interfering with inter-State transactions would be beyond the

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limits of the discretion. It is true that the legal remedies, which probably come down to mandamus, may not afford an entirely satisfactory protection against abuse of power. But these are matters that must be taken into account, if it is suggested that s. 7 is invalidated because the board's discretion may be used in such a way that a substantial interference with inter-State transaction will result. Even if such a use of the discretion be possible, there is no ground for treating s. 7 as wholly invalid. It is now settled that s. 92 operates to prevent an impairment by executive authority of the freedom it guarantees. There are countless executive powers conferred, altogether *alio intuitu*, which conceivably may be so used by the authorities in whom they reside as adversely to effect inter-State commerce and intercourse. Anybody who cares to turn the pages of the volumes of the Manual of National Security Legislation will find example after example of war-time discretionary authorities susceptible of such possibilities of perverted exercise as imagination may attribute to s. 7.

In our opinion in the case of wide executive and administrative authorities depending upon statute, s. 92 does not operate to invalidate the whole statutory authority because, in the purported exercise of the authority, administrative measures may be taken which conflict with s. 92. Unless upon the face of the statute some purpose appears of authorizing some impairment of the freedom of inter-State commerce, the wide terms of the authority should not be read as attempting to do so. Section 92 excludes executive and administrative acts from interfering with the freedom of inter-State trade and wide general words conferring executive and administrative powers should be read as subject to s. 92. In our opinion the plaintiffs have not shown any title to relief in relation to the operation of s. 7 either on the ground that it is invalid or on the ground that it is administered inconsistently with s. 92.

The licensing of dealers, which is second upon our enumeration of complaints against the validity of the enactment, is a subsidiary matter, of not much importance to the plaintiffs. It is enough for us to say that we think that the considerations we have examined in relation to s. 7 apply to the authority given to the board by s. 8 of the New South Wales Act and by s. 15 of the Commonwealth Act.

There remains the question of the validity of s. 6 of the New South Wales Act which forbids a sale of hides and an offer to sell hides if they have not been appraised, sales to a licensed dealer being excepted unless the seller himself is a licensed dealer.

This provision takes what amounts in itself essentially to trade and commerce, intra-State or inter-State, and prohibits it pending the submission of the goods to appraisement. The exception is not extensive enough to deprive the prohibition of the substantial character the main provision wears. If the provision prohibited altogether the sale of hides or the offering of hides for sale, it is we think plain that, as to inter-State selling and offering for sale, it must be invalid. But to prohibit sale pending the performance by the owner of some duty or the doing of some act is not necessarily an impairment of the freedom of inter-State commerce. It depends upon the reality and operation of the impediment which it may place in the way of inter-State transactions. Here however the important fact is that the event, submission to appraisement, means the loss of the property in the goods unless they have before that event been committed to inter-State commerce or the purpose of so committing them has been indicated, or, it may be, formed. Now the natural and unequivocal way of committing them to inter-State commerce is to sell them for delivery or transportation to another State. Yet s. 6 attempts to prohibit that. In other words the presence of s. 9 gives to s. 6 a much greater significance as an obstacle to inter-State disposal of the hides. It prohibits sale or offering for sale during what will be the remaining period of ownership, unless by some other means the goods are made the subject of inter-State commerce or shown to be required or intended therefore. We are therefore of opinion that as to sales and offers for sale in the course of or amounting to inter-State commerce s. 6 is inconsistent with s. 92.

The question then arises whether s. 6 is wholly void or is to be treated as distributable and capable of operating to prohibit sale and offers for sale in trade confined to New South Wales. The corresponding s. 6 in the Victorian, South Australian and Tasmanian Acts would doubtless be held to be distributable or divisible because of the " severability clause " contained in the Acts Interpretation Acts of those States (s. 2 of the *Acts Interpretation Acts* 1930-1950 (Vict.), s. 22a of the *Acts Interpretation Act* 1913-1949 (S.A.): and s. 3 of the *Acts Interpretation Act* 1931 (Tas.)). But there is no such general " severability clause " in New South Wales. The presumption is therefore against divisibility and on the whole we think that the presumption must take effect. There is no sufficient indication of an intention that the provision should operate otherwise than over the whole field it is expressed to cover.

We are therefore of opinion that s. 6 is invalid.

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We do not think that the invalidity of s. 6 brings down the whole Act. The purpose it serves is subsidiary, namely, to exclude trafficking pending appraisement. It is not indispensable to the plan of control. Doubtless its invalidity makes the licensing of dealers less important except when they buy for the board. But that is a minor matter.

A point was made as to s. 16 (3) which vests in the board hides seized because of an unlawful failure to submit them to appraisement. This clause appears to us to be of a punitive or retributive character. Further it does not operate directly upon inter-State commercial transactions. In our opinion it is not invalid.

The result of the foregoing reasons is that we hold s. 6 to be void, but no other parts of the Act of New South Wales.

The form of the question reserved is whether the Act or any and if so which sections are invalid because they contravene s. 92.

We think the question should be answered that s. 6 is invalid but that the other provisions of the Act are not invalid because they contravene s. 92.

We would order that the costs of the reservation in each suit abide the order of the judge hearing and disposing of the suit.

WILLIAMS J. The question referred to the Full Court at the request of the parties pursuant to s. 18 of the *Judiciary Act* 1903-1950 is whether the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) or any and if so which sections of that Act are invalid because they contravene s. 92 of the Constitution. The Act in question is one of a series of complementary Acts passed by each of the States and the Commonwealth in December 1948. They came into operation on 1st January 1949 and were designed to supersede the *National Security* (*Hide and Leather Industries*) *Regulations* which were made under the *National Security Act* 1939-1940 and were continued in force until 31st December 1948 by the *Defence* (*Transitional Provisions*) *Act* 1946-1947. These regulations have been continued in force by the subsequent *Defence* (*Transitional Provisions*) *Act* but reg. 18 (the vesting regulation) and reg. 22 were omitted and s. 27 of the *Hide and Leather Industries Act* 1948 (Cth.) provided that the Australian Hide and Leather Industries Board constituted by that Act should be substituted for the board of the same name constituted under the regulations and should have and perform all the duties and have and exercise, in relation to hides and leather acquired before 1st January 1949, all the powers, authorities and functions, of the board constituted under the regulations.

It will be convenient to refer briefly to the regulations in the first instance. They came into force on 17th July 1940. Regulation 3

stated that their purpose was to control the dealings in hides and leather in order to secure the public safety and the defence of the Commonwealth and the efficient prosecution of the war, and to maintain supplies and services essential to the life of the community. This regulation was omitted when the regulations were continued in force by the *Defence (Transitional Provisions) Act* 1946. The regulations provided for the compulsory acquisition by the Commonwealth of all hides produced in Australia and for the distribution of these hides between Australian users and for export. The regulations in their original form or as amended provided for the constitution and incorporation of a board to be called the Australian Hide and Leather Industries Board to administer the regulations and for the constitution of appraisement committees and allocation committees for each State. Regulation 12 (9) provided that an appraisement committee should have such powers and functions as the regulations conferred or as the board thought fit but should exercise all its powers and functions subject to any directions of the board. Regulation 12B provided that (8) an allocation committee should distribute, in respect of the State for which it was appointed, all auction hides to tanners on an equitable basis and, for that purpose, it might assess a quota of hides to all tanners; (9) an allocation committee should exercise its powers and functions subject to any direction of the board.

Hides were divided by the regulations into two classes (1) hides salted and treated otherwise than in a meatworks and (2) hides salted and treated in a meatworks (defined to mean any establishment at which stock were slaughtered and treated principally for export). Regulation 14 provided that no person should sell or offer for sale any hides which had not been appraised to the satisfaction of a committee; provided that the prohibition contained in this regulation should not apply to any sale of hides by a person other than a licensed dealer to a licensed dealer. Regulation 15 provided that all hides, other than hides salted and treated in a meatworks, should be submitted for appraisement to a person or place appointed or approved by the board or by a committee—(*a*) in the case of hides which did not come into the possession of a licensed dealer within twenty-eight days of being salted and treated—within twenty-eight days of being so salted and treated; or (*b*) in the case of hides in the possession of a licensed dealer—within twenty-eight days of coming into the possession of that licensed dealer. Regulation 16 provided that for the purpose of appraising hides according to description the board should cause to

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be prepared a table of limits or lists of appraisement types of hides. Regulation 18 provided that all hides which (*a*) were salted and treated in any meat works; or (*b*) not being hides to which par. (*a*) applied, were submitted for appraisement in accordance with reg. 15, should be acquired by the Commonwealth and become the absolute property of the Commonwealth, freed from all mortgages &c., and the rights and interests of every person in those hides converted into claims for compensation. Regulation 19 provided that the board might determine which hides acquired by the Commonwealth should be sold at home consumption sales and which hides acquired by the Commonwealth should be sold at export sales, and that no person should buy any hides acquired by the Commonwealth at a home consumption sale unless he satisfied the board that he would use those hides in Australia. The regulations defined " home consumption sale " to mean (*a*) a sale of hides by the Commonwealth at an auction at which only buyers who the board was satisfied would use those hides in Australia might bid; and (*b*) a sale of hides by the Commonwealth other than by auction at prices which the board declared to be equivalent to prices being realized at the type of sale to which par. (*a*) referred. The regulations defined " export sale " to mean (*a*) a sale of hides by the board at an auction at which any buyer of hides might bid; and (*b*) a sale of hides by the board, otherwise than by auction, at prices which the board decided to be equivalent to prices being realized at the type of sale to which par. (*a*) referred. Regulation 20 provided for the licensing of persons to export from Australia hides which had been purchased at an export sale and that subject thereto no person should export any hides from Australia.

The *Hide and Leather Industries Act* 1948 (Cth.) constitutes and incorporates the Australian Hide and Leather Industries Board, and contains similar definitions of home consumption sale and export sale to those contained in the regulations. Section 12 provides that a person shall not in any Territory sell or offer for sale any hides which have not been appraised in accordance with the next succeeding section but this prohibition shall not apply to any sale of hides by a person other than a licensed dealer to a licensed dealer. Section 13 contains provisions similar to those contained in reg. 15 requiring all hides in a Territory other than hides salted and treated in a meatworks to be submitted to a person or place appointed or approved by the board or by an appraisement committee for appraisement. Section 16 provides that all hides in a Territory which are salted and treated in a meatworks or are submitted for appraisement in accordance with s. 13 shall thereupon, by force of this section, be

acquired by and become the absolute property of the board freed from all mortgages &c., and payment in respect of those hides shall be made in accordance with s. 18 of the Act. Section 20 contains similar provisions to those contained in reg. 19 with respect to the sale of hides at home consumption and export sales. Section 21 provides that, subject to the Act and to any direction of the Minister but otherwise in its sole discretion, the board may license any person to export from Australia, subject to such conditions as are specified in the licence, such hides as have been purchased at an export sale and as are specified in the licence and may cancel or suspend any such licence. Section 14 (1) provides that for the purpose of appraising hides according to description the board shall cause to be prepared a table of limits containing lists of appraisement types of hides and the prices of those types. (2) The prices appearing in that table shall be (*a*) in relation to hides acquired in pursuance of this Act, such prices as are fixed by the Commonwealth Prices Commissioner; and (*b*) in relation to those acquired in pursuance of a State Act such prices as are fixed by the authority empowered under the law of that State to fix those prices. Section 18 provides that where hides are acquired by the board in pursuance of this Act, or where, under a State Act relating to the hide and leather industries, the payment to be made by the board in respect of hides acquired by the board in pursuance of the State Act is to be fixed in accordance with the provisions of this Act, the board shall pay for those hides the appropriate price specified in the table of limits or such amount in excess of that price as the board, subject to any direction by the Minister, determines from time to time.

The *Hide and Leather Industries Act* 1948-1949 (N.S.W.) contains definitions of home consumption sale and export sale similar to those in the regulations and the Commonwealth Act. It defines the board to mean the Australian Hide and Leather Industries Board constituted under the Commonwealth Act. It sets up an appraisement committee and an allocation committee and provides by s. 3 (9) that the appraisement committee shall have such powers and functions as this Act confers or are assigned to it by the board, but shall exercise all its powers and functions subject to any direction of the board. Section 5 provides (8) that the allocation committee shall distribute on an equitable basis the hides which may be sold to tanners at auctions and for that purpose, it may assess a quota of hides which may be bought at each sale by tanners. (9) The allocation committee shall exercise its powers and functions subject to any direction of the board. Sections 6 and 7 correspond

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to regs. 14 and 15 and to ss. 12 and 13 of the Commonwealth Act. They are in the following terms. "6 (1) Subject to subsection two of this section, a person shall not sell or offer for sale any hides which have not been appraised in accordance with section seven of this Act. (2) The prohibition contained in subsection one of this section shall not apply to any sale of hides by a person other than a licensed dealer to a licensed dealer. 7. All hides, other than hides salted and treated in a meatworks, shall be submitted to a person or place appointed or approved by the Board or by the Committee for appraisement—(a) in the case of hides which do not come into the possession of a licensed dealer within twenty-eight days after being salted and treated—within twenty-eight days after being so salted and treated; and (b) in the case of hides in the possession of a licensed dealer—within twenty-eight days after coming into the possession of that licensed dealer." Section 9 (1) corresponds with reg. 18 and with s. 16 of the Commonwealth Act. It provides that all hides which are salted and treated in a meat works or are submitted for appraisement in accordance with s. 7 of this Act shall thereupon, by force of this section, be acquired by and become the absolute property of the board freed from all mortgages &c., and payment in respect of those hides shall be made in accordance with s. 11 of this Act. Section 9 (2) provides that "Nothing in subsection one of this section shall apply to any hides the subject of trade commerce or intercourse between States or required or intended by the owners of the hides for the purpose of trade commerce or intercourse between States." Section 11 (1) provides that the person who would have been entitled to receive the price of the hides if the hides had been lawfully sold to the board at the time of their acquisition by the board shall be entitled to be paid in respect thereof such amount as is fixed in accordance with the provisions of the Commonwealth Act. Section 16 provides that a member of the police force &c. may upon production of a warrant issued by a justice of the peace (a) at all reasonable times enter upon any premises and inspect any stocks of hides &c. and (b) take possession of and remove any hides which are the property of the board or which, in contravention of s. 7 of this Act, have not been submitted for appraisement.

This analysis of the material provisions of the regulations and of the Commonwealth and New South Wales Acts is sufficient to indicate that the purpose of the Commonwealth Act and the complementary State Acts is to continue in peace-time, so far as the Constitution will permit, the scheme of control instituted during hostilities over the marketing of all hides produced in

Australia, to apportion those hides upon some basis determined by the board between home consumption and the export trade, and to allocate those hides reserved for home consumption between Australian users. The attack upon the New South Wales Act in these proceedings is solely that the Act or alternatively certain sections of the Act, particularly ss. 6, 7, 9 and 16, contravene s. 92 of the Constitution. The evidence in the actions establishes that prior to the institution of these controls there was an active inter-State trade in hides due mainly to the fact that in some States hides were produced in excess of local requirements whereas in other States there was a deficiency and that, after satisfying Australian requirements, there was an overall surplus of hides for export. There can be no doubt that the Commonwealth can acquire all hides that are produced in the Territories because there s. 92 does not run. There can also be no doubt that a State can acquire all property in the State save such property as is immunized by s. 92. Section 92 provides, so far as material, that trade, commerce and intercourse among the States shall be absolutely free. Section 9 (2) was no doubt introduced into the New South Wales Act so that s. 92 would not be infringed. It was submitted that, despite that sub-section, the New South Wales Act nevertheless infringes s. 92 and, as I understood Mr. *Barwick's* argument, on three grounds, (1) that the acquisition is part of a scheme to force tanners both in New South Wales and in the other States to accept the quotas out of the hides reserved for home consumption that are allocated to them by allocation committees and that such a scheme combines all the vices of ss. 20 and 28 of the South Australian *Dried Fruits Acts* brought to the surface in *James* v. *South Australia* (1) (in this Court) and *James* v. *Cowan* (2) (in the Privy Council) where *James* v. *South Australia* (1) was approved. It was pointed out that s. 9 (2) only applies to owners of hides but that they are not the only persons in the community who are engaged or may be desirous of engaging in inter-State trade in hides. For instance there are residents of other States who may desire to buy New South Wales hides, and persons in New South Wales who may desire to buy hides for resale in other States, and it was submitted that these purchasers also have an immunity under s. 92, but their immunity is not protected by s. 9 (2); (2) that s. 6 (1) of the Act which requires that hides, before they can be sold or offered for sale inter-State, shall be submitted for appraisement, operates directly and not merely incidentally to burden and hinder owners of hides engaging in trade and commerce among the States; and

(1) (1927) 40 C.L.R. 1. (2) (1932) A.C. 542; 47 C.L.R. 386.

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that this sub-section must therefore infringe s. 92 unless it is essentially regulatory in character which it is not; (3) that under s. 9 (1) all hides submitted for appraisement other than hides protected by s. 9 (2), are acquired at the moment of appraisement so that the acquisition operates directly to burden and hinder inter-State trade because it interferes with the liberty of owners of hides to dispose of them as and when they choose either by an intra-State or inter-State transaction. As Mr. *Barwick* said, the first and third grounds overlap to a considerable extent. They appear to me to mean in effect that a State, in order to impose a quota system, can only acquire the residue of goods that remain after all the possibilities of these goods being required for inter-State trade have been exhausted, or, in other words, that a State can only acquire such goods as have been irrevocably dedicated to intra-State trade.

I am unable to find in *James* v. *South Australia* (1) or *James* v. *Cowan* (2) any support for the first or third grounds. Section 20 of the *Dried Fruits Act* 1924-1925 (S.A.) was the section impeached in *James* v. *South Australia* (1). That section authorized the Dried Fruits Board to determine where and in what respective quantities the output of dried fruits produced and dried in South Australia in any particular year should be marketed. It therefore authorized the board to order the owners of such fruit to sell a certain proportion intra-State, a certain proportion inter-State, and a certain proportion for export. It was held that the board could not direct owners to market only a certain proportion of their fruit inter-State. Such a direction would be an obvious infringement of s. 92 and the section would be equally infringed if owners were ordered to market their fruit in certain proportions intra-State and for export so that they would only be free to market the residue inter-State. Section 28 of the *Dried Fruits Act* was expressly made subject to s. 92 so that it could not be unconstitutional. But it authorized the Minister for purposes of the Act to acquire compulsorily any dried fruit in South Australia not held for export and it was held in *James* v. *Cowan* (2) that acquisitions made for the purpose of forcing surplus dried fruit off the Australian market contravened s. 92 of the Constitution and s. 28 of the *Dried Fruits Act* to which the powers given to the Minister were made subject under s. 92. Lord *Atkin*, delivering the judgment of the Privy Council, said "the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-State trade . . .

(1) (1927) 40 C.L.R. 1.

(2) (1932) A.C. 542; 47 C.L.R. 386.

'To force the surplus fruit off the Australian market' appears necessarily to involve two decisions: first, the fixing of a limited amount for Australian consumption (a necessary element in the conception of a 'surplus'); secondly, the prevention of the sale of the balance of the output in Australia. In the result, therefore, one returns to the precise situation created by sec. 20 with its determination of where and in what quantities the fruit is to be marketed." (1). In *The Commonwealth* v. *Bank of New South Wales* (2) Lord *Porter*, delivering the judgment of the Privy Council, said "Section 20 of the South Australian Act was invalid. It was general in its terms: it did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorized a determination at the will of the Board the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid". These decisions do not appear to me to throw any light upon the question whether sub-s. (2) of s. 9 of the New South Wales Act confers a sufficient immunity to satisfy s. 92. They are simply decisions that the Commonwealth and States cannot by legislation or by executive act limit the quantities of goods which a trader may sell in inter-State trade. Mr. *Barwick* relied upon a later passage in the judgment of Lord *Porter* in the *Banks' Case* (3) "it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against the prohibition would invoke s. 92 in vain." The unqualified power in question was the power of the Dried Fruits Board under s. 20 of the *Dried Fruits Act* to interfere with James' liberty to dispose of his produce at his will by an inter-State or intra-State transaction. Mr. *Barwick* contended that this passage could only mean that s. 92 gave a trader a right, until he actually made a disposition of his goods, to decide whether to sell them intra-State or inter-State. The passage does not appear to me to have this meaning. A Court is not fettered by the form of words in a judgment as if it were a phrase in an Act of Parliament which must be accepted and construed as it stands, *Mills* v. *Mills* (4), and I venture to think that all the passage intends is that James could not be ordered to dispose of any produce by an intra-State

(1) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.
(2) (1950) A.C., at p. 305; (1949) 79 C.L.R., at pp. 634, 635.
(3) (1950) A.C. 235, at p. 306; (1949) 79 C.L.R., at pp. 635, 636.
(4) (1938) 60 C.L.R. 150, at p. 169.

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transaction which he wished to dispose of by an inter-State transaction.

The whole question is whether s. 9 (2) of the New South Wales Act provides a sufficient immunity to comply with s. 92. In my opinion it does. It is in the same words as the immunity which was held to be sufficient for the same purpose in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1). The freedom protected by s. 92 is the freedom of the individual to dispose of his goods in inter-State trade and commerce. Section 9 (2) protects the hides of an owner which are the subject of trade or commerce between the States at the time the hides are submitted for appraisement. It also protects all hides which are required or intended by their owners for the purpose of trade or commerce between the States. It appears to me that the trader who invokes the protection of s. 92 must establish that the legislation or executive act impeached is interfering with his inter-State trade. He must prove the necessary inter-State element at the date of the alleged interference. To do this he must prove that some particular inter-State transaction which he is then engaged in or possibly then desires to engage in is being hindered, burdened or prevented. It is not sufficient to prove that he has not then made up his mind whether to engage his goods in intra-State trade or inter-State trade. Complete indecision is not sufficient to arouse s. 92. It is unnecessary to decide whether mere intention is sufficient. Section 9 (2) plays safe. It includes mere intention in the exemption. There is nothing that I can discover in any of the judgments of the Privy Council to suggest that *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1) was wrongly decided.

The true gravamen of the attack upon the constitutional validity of the New South Wales Act seems to me to lie in the second ground. The first question that arises on this ground is the true construction of s. 6 (1). It was contended that this sub-section does not prohibit an owner of hides from making an inter-State sale or offering them for sale inter-State before they are appraised and that he can sell hides or offer them for sale inter-State subject to appraisement. I cannot place this construction on the sub-section. It appears to me plainly to provide that an owner cannot sell or offer his hides for sale until after they have been appraised. The sub-section contains one prohibition and one prohibition only. It cannot be given a different operation in relation to hides which fall within the exception in s. 9 (2) and hides which do not fall within that exception. It states in plain terms that no hides are

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

to be sold or offered for sale which have not been appraised and this must mean that no hides can be sold or offered for sale until they have been appraised. It is evident that that was its meaning in the regulations and is still its meaning in the Commonwealth Act. The only hides that could lawfully be sold or offered for sale under the regulations or the Commonwealth Act would be hides which had been appraised and had been acquired by the Commonwealth or the board and subsequently sold by the Commonwealth or the board. This construction of s. 6 (1) does not appear to me, however, to be crucial to the second ground. The interference with inter-State trade is greater if the owner cannot sell or offer his hides for sale prior to appraisement than it is if he can sell them subject to appraisement. But assume that s. 6 (1) means that hides can be sold or offered for sale inter-State subject to appraisement. What then ? Surely the fact that the hides excepted from acquisition by s. 9 (2) must, nevertheless, be submitted for appraisement to a person or place appointed or approved by the board burdens the inter-State trade. Evidence was given that since the imposition of controls the trade has functioned much in the same way as it did before they were imposed. There are many types of hides which require to be sorted, graded, and catalogued to prepare them for sale. Hides submitted for appraisement under the regulations and subsequent legislation have been consigned by the owners to a convenient broker and sorted, graded, and catalogued in the same way as before controls. It was contended that in these circumstances it could not be said that the necessity of submitting hides for appraisement placed any real burden on inter-State trade. But it is not the way in which an Act is in fact administered that matters. In the *Banks' Case* (1) Lord *Porter* cited a passage from the speech of Lord *Watson* in *Salomon* v. *A. Salomon & Co. Ltd.* (2), " In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." Section 7 states that the board or committee can direct the owner of hides to send them to a person or place approved or appointed by the board and this confers on the board or committee a complete discretion to appoint or approve of a person or place anywhere in New South Wales. No limitation is placed upon the locality of the person or place. No period of time is fixed within which the appraisement must be made. An owner of hides could be subjected

(1) (1950) A.C. 235, at p. 307 ; (1949) 79 C.L.R., at p. 636.

(2) (1897) A.C. 22, at p. 38.

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to expense and delay before, on one construction of s. 6 (1), he could sell them or offer them for sale or, on the alternative construction, before he could deliver them under the contract. An owner of hides can sell them or offer them for sale to a dealer before appraisement. Accordingly the section is not a total prohibition upon the sale or offering for sale of hides but it is a partial prohibition and it operates directly and immediately to restrict such sale or offering for sale. It is a prohibition which must infringe s. 92 unless it is essentially regulatory in character. In the *Banks Case* (1) Lord *Porter* said, " But it seems that two general propositions may be accepted : (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote ". Lord *Porter* meant, I think, regulatory of the particular inter-State trade, commerce or intercourse. I can find nothing in the New South Wales Act to link the prohibition in s. 6 (1) with any regulation of the inter-State trade in hides.

It was contended that it was necessary for the board to know the number and types of hides that were being sold in inter-State as well as in intra-State trade in order to estimate the overall surplus of hides available for export. There is nothing in the Commonwealth or State Acts to indicate that it is only the overall surplus after the needs of all Australian users have been satisfied that is to be exported. The board has a complete discretion under the Acts to make as many hides available for home consumption and as many available for export as it thinks fit. A purchaser of hides sold for export is under no obligation to export them. In practice hides sold for export are sold at higher prices than hides sold for home consumption. Apparently the former hides are sold at world parity. But again the Acts do not provide for this. The provision that an allocation committee shall distribute on an equitable basis the hides that may be sold to tanners at auctions, and for that purpose may assess a quota of hides that may be bought at each sale by tanners, does not appear very apt to meet a situation where the only hides sold for export are those remaining after local needs have been supplied in full. The evidence is that local tanners cannot purchase a full supply and that the tanneries are partly idle. If information of the number of hides sold in inter-State trade is really necessary for such a purpose, returns of such sales could

(1) (1950) A.C., at p. 310; (1949) 79 C.L.R., at p. 639.

be required and s. 14 of the New South Wales Act does in fact require certain returns. There is no evidence whatever of any circumstances peculiar to the inter-State trade in hides that makes it necessary or reasonable that the right to carry on such a trade should be made subject to the appraisement of such hides under the direction of the board or a committee. The board and the appraisement committees have nothing to do with this trade. They are properly concerned only with hides that can lawfully be acquired under the various Acts. The ordinary natural meaning of the word "appraisement" and of a statutory requirement that hides should be submitted for appraisement is that they should be submitted to a competent valuer so that their value may be estimated. There is nothing in the New South Wales Act to indicate that this is not the true meaning of the word. No other purpose for requiring hides to be submitted for appraisement appears on the face of the Act except the purpose of acquisition.

The defendants relied upon the decision of this Court in *Hartley* v. *Walsh* (1). In that case it was held that a regulation made under the *Dried Fruits Act* 1928 (Vict.) that no person should sell or buy any dried fruits unless they had been packed in a packing shed registered under the Act was valid. The Chief Justice said (2) that the regulation in question was a regulation of trade which was directed towards the promotion of all trade in dried fruits by insisting that they should be properly treated before they were sold. The facts of that case were altogether different from the present case. The present legislation does not aim at promoting trade in hides, certainly not the inter-State trade in hides. It aims at the compulsory acquisition of as many hides as possible and their disposition under Commonwealth and State control. Sections 6 and 7 have nothing to do with the regulation of inter-State trade in hides. They infringe the immunity guaranteed by s. 92. They are quite inseverable. They apply to all hides indiscriminately but they cannot lawfully apply to inter-State hides. Section 9 is part of the same integrated scheme. It operates to vest two classes of hides in the board (1) hides salted and treated in a meatworks and (2) hides submitted for appraisement in accordance with s. 7 of the Act other than hides excepted by s. 9 (2). But the Act as a whole cannot be given a partial operation so as to be effective with respect to hides salted and treated in a meatworks. The vesting of both classes of hides in the board is necessary to the effective operation of the Act. The acquisition of all hides

(1) (1937) 57 C.L.R. 372.

(2) (1937) 57 C.L.R., at p. 382.

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other than those excepted by s. 9 (2) is the basis of the whole Act. The fall of ss. 6 and 7 must cause s. 9 (1) to fall with them, and these falls must bring the whole Act down. Section 16 is one of the casualties. Its main purpose, to be gathered from its terms, is to authorize members of the police force &c. to take possession of and remove any hides which are the property of the board or which, in contravention of s. 7 of the Act, have not been submitted for appraisement. The first limb of this section falls with s. 9 (1) and the second limb with s. 7. The rest of the section is ancillary to its main purpose.

I would answer the question asked by saying that the whole of the *Hide and Leather Industries Act* 1948-1949 (N.S.W.) is invalid.

WEBB J. In my opinion the validity of this statute is to be determined not by the way it is administered, but by the power which it gives. If it gives a power to interfere with the freedom protected by s. 92 it is invalid. Any trader can successfully challenge a power to interfere with his liberty to dispose of his goods at his will by an inter-State or an intra-State transaction: *The Commonwealth* v. *Bank of New South Wales* (1). It is true that their Lordships in that case speak of " an unqualified power ". They were referring to s. 20 of the *Dried Fruits Act* 1924-1925 (S.A.), which was not made subject to s. 92 and contained no exceptions. But a qualified power is also invalid where the qualification is not sufficient to enable a conflict with s. 92 to be avoided. However, it is claimed that this statute gives no such power as brings about a conflict with s. 92. For this claim the exceptions appearing in the acquisition provision s. 9 are relied upon. The exceptions are in sub-s. (2), and are in the same terms as those which *Starke* J., in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (2) held to be co-extensive with the requirements of s. 92. Whether that view is consistent with that taken by *Dixon* J. and *Williams* J. in *Field Peas Marketing Board* (*Tas.*) v. *Clements and Marshall Pty. Ltd.* (3) is not clear to me. In the latter case their Honours held that peas grown in Tasmania were in the course of inter-State trade, although the growers sold them without any intention that they should be in that trade, but sold them to buyers who intended to resell them in another State. Still I do not venture to say that their Honours' view was inconsistent with that of *Starke* J.

(1) (1950) A.C., at pp. 305, 306; (1949) 79 C.L.R., at pp. 635, 636.

(2) (1938) 60 C.L.R., at p. 283.

(3) (1948) 76 C.L.R. 414.

However, it is conceded by counsel for the defendant board, rightly so I think, that to be adequate in the face of s. 92, the exceptions in s. 9 (2) must extend to commodities held in bulk, such as petrol in tanks but not in drums, or potatoes in stacks but not in bags, when the trader has both intra-State and inter-State trade. The concession is made because the trader cannot know in those circumstances what part of his commodity will be required for inter-State trade; so that his intention to use it in such trade must be taken to extend to the whole of it. But it appears to me that the same position arises where the commodity is not held in bulk: the trader cannot know until he receives offers and accepts them just how much, or what particular part, of his commodity will be required for his inter-State trade; and I hesitate to hold that an intention to sell inter-State within the meaning of the exceptions cannot also be imputed to such a trader as regards all his commodity. I hold then, but with no great certainty, that the exceptions are sufficient to avoid a conflict with s. 92.

But I take a different view of ss. 6 and 7. They extend to the whole of the commodity, as they are not expressed to be subject to any exceptions, and I think it would be contrary to the intention of the legislature to imply any exceptions. So they give power to require the commodity, including any part of it in the course of or required or intended for inter-State trade, to be sent to any place named by the board, and prevent the owner from selling it or offering it for sale in the meantime. This could result in ruinous expense and delay. Sections 6 and 7 cannot in my opinion be regarded as mere regulation: they can only be a burden and an interference of the kind prohibited by s. 92. The purpose is not, say, the inspection of hides and skins to detect and eradicate disease, but to enable the number and class of hides and skins to be ascertained with a view to fixing a quota for tanners to secure what is considered equitable to them. That is not mere regulation of the kind to which the Privy Council adverted in the *Banks' Case* (1).

Sections 6 and 7 are in my opinion invalid, and as I think they are of the essence of the scheme of this legislation there cannot be a severance to save the other provisions. The provisions of the Act are, I think, interdependent: each appears to me to be a link in a chain ending with the tanners' quota. See *Fraser Henleins Pty. Ltd.* v. *Cody* (2), per *Dixon* J.

I hold then that the Act is invalid, and that the question referred by *Williams* J. should be answered accordingly.

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

(2) (1945) 70 C.L.R. 100, at p. 127.

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KITTO J. The plaintiffs in these cases seek a decision that some of the provisions of the *Hide and Leather Industries Act*, 1948-1949 (N.S.W.) are inconsistent with s. 92 of the Constitution, and that the whole Act, or alternatively those provisions, must be held void for that reason. First, it is said that the Act establishes a quota system, resembling that which was held void in *James* v. *South Australia* (1), and *James* v. *Cowan* (2), because, by means of prohibitions upon sale and provisions for compulsory acquisition of hides, it enables a board to determine where and in what quantities hides may be sold. Secondly, it is said that the provisions of the Act for the compulsory acquisition of hides are enacted as a means of effectuating a marketing scheme, and are indistinguishable in any relevant respect from the provisions held to infringe s. 92 in the *Peanut Board* v. *Rockhampton Harbour Board* (3). Thirdly, it is said that the Act imposes an obligation to submit hides for appraisement within a specified time, and this is in itself a burden upon inter-State trade, and obnoxious to s. 92.

The scheme of the Act, the inter-relation between it and the Acts which the Commonwealth and the other States have passed upon the same subject, and the circumstances of the industries to which all these Acts relate, have been so fully explained by my brothers, *Dixon*, *McTiernan* and *Fullagar*, that I can go at once to a consideration of the plaintiffs' submissions in the light of these matters but without attempting to re-state them.

It will be convenient to deal first with the provisions for compulsory acquisition, for they form the keystone of the Act. The chief of these provisions is s. 9 (1). It applies to the two classes into which hides are divided by the Act; that is to say hides salted and treated in a meatworks, and other hides. Hides of the former class s. 9 (1) operates to vest absolutely in the board upon their being salted and treated. Hides of the latter class the sub-section operates to vest absolutely in the board upon their being submitted for appraisement in accordance with s. 7. Section 7 provides that all hides of the latter class shall be submitted within certain specified times to a person or place appointed or approved by the board or the appraisement committee for appraisement. The section does not specify who must submit the hides for appraisement, but s. 9 obviously contemplates as the normal case that in which the submission for appraisement is made in accordance with s. 7. If, in a particular case, s. 7 is not complied with, the hides remain unaffected by s. 9; but then a warrant may be issued under s. 16,

(1) (1927) 40 C.L.R. 1.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1933) 48 C.L.R. 266.

authorizing the taking possession and removal of the hides, and, upon possession being taken of them they are, for the purposes of the Act, deemed to be acquired by the board under the Act: (s. 16 (3)). This is not an acquisition for all purposes, but under s. 18 the board may sell or otherwise dispose of the hides, and thus may divest the property in them from the owner.

If the Act did not contain any such provision as is found in s. 9 (2), I should be prepared to agree with the plaintiffs that the divesting provisions I have mentioned would be in collision with s. 92 of the Constitution, for reasons similar to those which must now be taken to have justified the decision in *Peanut Board* v. *Rockhampton Harbour Board* (1). I say the reasons which must now be taken to have justified it, having in mind particularly that *Dixon* J. took several tests which earlier decisions had suggested and showed that the Queensland provisions in question infringed s. 92 whichever of those tests should be applied. Amongst them was the test of directness of operation. It is established now that that is the test, the Privy Council having decided in the *Banks' Case* (2) that a legislative provision which is not in its true character regulatory infringes s. 92 if, and only if, it operates, not remotely or incidentally, but directly, to interfere with the passage of the border between States in trade commerce or intercourse. This test, of course, does not diminish in any degree the force of the word " absolutely " in s. 92 ; its purpose is simply to answer the question which has been the riddle of s. 92, namely, absolutely free from what ? The application of the test to acquisition provisions was not discussed in the judgment in the *Banks' Case* (2), but *James* v. *The Commonwealth* (3) approved the *Peanut Board* v. *Rockhampton Harbour Board* (4) as an application of the principle laid down in *James* v. *Cowan* (5) on the basis of the view that the Act in question embodied a marketing scheme entirely restrictive of any freedom of action on the part of the producers and involving a compulsory regulation and control of all trade, domestic, inter-State and foreign. The proposition which I think is warranted by the authorities as they now stand is this, that a provision for the compulsory acquisition of goods does not infringe s. 92, unless a scrutiny of its legislative setting reveals that it is enacted as a means of precluding or hindering individuals from engaging in or carrying out operations of trade, commerce or intercourse across State lines. The fact, if it is a fact, that the provision is also a

(1) (1933) 48 C.L.R. 266.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1933) 48 C.L.R. 266.
(5) (1932) A.C. 542; 47 C.L.R. 386.

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means of preventing or hindering operations not across State lines is, of course, irrelevant. The justification for the proposition I have stated is that an acquisition for a purpose which neither consists of nor includes interference with inter-State trade commerce or intercourse cannot be described as operating directly to produce such an interference; any interference which may ensue from the acquisition is consequential and remote. But if the provision for acquisition is enacted as a means of interfering with inter-State trade, commerce or intercourse, either alone or together with other trade, commerce or intercourse, it would be idle to deny that that interference is within the direct and immediate operation of the provision.

As I have said, if the Act now in question did not contain any provision such as s. 9 (2), I should not be able to see any ground for distinguishing the *Peanut Case* (1). The divesting provisions are obviously machinery for transferring some of the marketing of hides from the producers to the board; and if the marketing which they operate to transfer included inter-State marketing, as it plainly would if there were no s. 9 (2), the provisions would be entirely restrictive of that freedom of action on the part of the producers which is guaranteed by s. 92 (*Field Peas Marketing Board (Tas.)* v. *Clements and Marshall Pty. Ltd.* (2)). But s. 9 (2) completely removes from the application of s. 9 (1) any hides which are the subject of trade, commerce or intercourse between States or are required or intended by the owners of the hides for the purpose of trade, commerce or intercourse between States. It is true, as the plaintiffs pointed out, that this leaves within the operation of s. 9 (1) hides which are not brought within the three stated descriptions before being salted and treated (in the case of hides salted and treated in a meatworks) or before the expiration of the relevant period prescribed by s. 7 (in the case of other hides). The relevant period in the latter case is twenty-eight days after being salted and treated, unless within that time they come into the possession of a licensed dealer, in which event it is twenty-eight days after their coming into the possession of that dealer. The time is in any case not long; but what has to occur in that time in order to prevent a divesting of the hides under s. 9 (1)? The hides have to become, if not actually the subject of inter-State trade, commerce or intercourse, required by their owners for the purpose of inter-State trade commerce or intercourse or intended by their owners for that purpose. The plaintiffs point out, as the evidence shows,

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

(2) (1948) 76 C.L.R. 414, at pp. 421-425.

that the nature of the trade in hides is such that the efficient conduct of their businesses necessitates their having on hand at some periods large stocks of hides, while being unable to say with respect to any specific hides in stock that they will turn out to be needed for sale in inter-State trade or have become the subject of a decision, intended to be final, that they shall be sold in inter-State trade and not otherwise. But the plaintiffs, in my opinion, place too narrow a construction on s. 9 (2). It is not a necessary condition of the application of that sub-section to particular skins that a positive necessity to sell those skins in inter-State trade, commerce, or intercourse, or a definite and unconditional intention to sell them therein shall be provable at the relevant time. All that is necessary is that they shall then be required or intended by the owners *for the purpose* of inter-State trade, commerce, or intercourse. If, for example, the owners have an inter-State trade in hides, and for the purpose of that trade they require to keep particular skins in stock, s. 9 (1) seems to me to have no application to that stock; and the same is true if the owners intend skins which they have in stock for the purpose of their inter-State trade, even though it is possible that events may so turn out that the intention has to be abandoned. Of course the width of the terms in which s. 9 (2) is couched gives much scope for uncertainty in practice as to whether or not particular skins are thereby saved from s. 9 (1); but that is not a consideration which goes to validity. It is evident that s. 9 (2) covers a very wide field indeed, and, evincing as clearly as it does a legislative intention so to restrict the application of s. 9 (1) as to avoid conflict with s. 92, it should be given a construction as favourable to the effectuation of that intention as its terms will allow. It is not possible to say categorically that there can never be a case in which, despite s. 9 (2), an acquisition may take place under s. 9 (1) with the result that a desired transaction of inter-State trade may be made impossible; but the evidence given in the present cases does not appear to me to establish affirmatively that the draftsman has failed to exclude all acquisitions which would in practice diminish inter-State trade.

The importance of this is twofold. In the first place, if it is the fact that s. 9 (2), properly construed, suffices to save the inter-State trade in hides from interference by the application of s. 9 (1), the attack on the latter sub-section of course fails. But of much greater consequence is this, that even if s. 9 (2), notwithstanding the straining it exhibits for words sufficient for its purpose, leaves uncovered some residual cases in which acquisition under s. 9 (1)

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will have the effect of preventing an owner of hides from trading with them across State lines, the question whether that effect is within the direct operation of s. 9 (1) or is merely consequential upon its operation cannot receive in the presence of s. 9 (2) the same answer as would have to be given to it in the absence of that provision. For the enactment of so wide a provision as s. 9 (2), in relation to an industry such as the hides industry is shown to be, makes it impossible, as I think, to concede to s. 9 (1), or to any other provision to be found in the Act which works a divesting of hides from the owners in favour of the board, the character of a means of transferring inter-State marketing in the commodity it affects from the owners to the board. In other words, even if s. 9 (2) does not succeed in completely achieving its apparent object of preventing all interference by s. 9 (1) with inter-State trade, yet it does succeed in demonstrating that the scheme of the Act is to exclude private owners, not from all trade in hides, but from all non-inter-State trade in hides. I say advisedly the scheme of the Act, because s. 9 (1) is central to the Act; remove it and the Act would collapse; qualify it in terms which make strenuous efforts, by no means certainly unsuccessful, to exclude inter-State trade from the effects of its operation, and the principle upon which the *Peanut Case* (1) depends becomes, as I think, at once inapplicable.

For this reason, I find myself unable, in the face of s. 9 (2), to discover any conflict with s. 92 in any divesting of the property in hides for which the Act makes provision. It remains to consider the prohibitions upon sale and purchase which it contains, particularly in ss. 6, 12 and 13. It will be sufficient to speak of s. 6 for similar considerations applying to all these provisions. The section is not qualified by any provision corresponding with s. 9 (2), and there can be no doubt about the directness of the operation it purports to have to prevent inter-State as well as other sales. It therefore conflicts with s. 92; and there is not in the Act, or in any Act of general application, a provision requiring effect to be given to the section so far as it is not inconsistent with s. 92. But it does not follow necessarily that the section is wholly void. Section 92 never affects legislation in any other way then to deny it a certain operation. The nature of the legislation may be such that to deny it that operation is to deny it any operation at all, either because it does not purport to have any further operation, or because any further operation that is within its contemplation cannot be had by itself consistently with the manifest intention

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

of the legislature, or cannot be had by itself in the very nature of things. A prohibition upon the sale of any hides which have not been appraised is contradicted by s. 92 so far as, but only so far as, it would if effectual detract from that freedom of the border which s. 92 guarantees. So far as it is capable of an application consistent with that freedom, s. 92 has nothing to say to it, and there is nothing in the nature of things which prevents it from taking effect. The only question is whether so partial an operation of the prohibition is consistent with the disclosed intention of the legislature. At this point, s. 9 (2) again assumes a significance which seems to me to be decisive, for it reveals the scheme, to which the prohibition provisions are plainly ancillary, as a scheme so confined in intended operation as to involve no conflict with s. 92. To allow to s. 6 a residual operation consistent with s. 92 is to allow it all the operation which its ancillary character requires. It is essentially a provision of distributive application; s. 92 precludes its application in some cases only; and in order to be justified in denying it an application in the residue of cases, I think one would need to find a warrant in a consideration of the Act, or the nature of the matters to which it relates.

The remaining matter to be mentioned is the plaintiff's contention that s. 7, by requiring that all hides shall be submitted for appraisement within specified times to a person or a place appointed or approved by the board or the committee, so burdens inter-State trade as to constitute by itself an infringement of s. 92. I have mentioned that s. 7 does not say who is to submit the hides for appraisement, but let it be assumed that an owner of hides desiring to sell them across the border is confronted with the necessity of first obeying the requirement of s. 7. It is impossible to say from a mere perusal of the Act that any real burden upon inter-State trade will be involved, for it may be that no substantial interference with or departure from the normal course of trade in hides will result. I refer to what is said on this point by my brothers *Dixon*, *McTiernan* and *Fullagar*, in their discussion of the working of the industry and of the Act. The plaintiffs' main ground of attack in relation to s. 7 is that it purports to give to the board or the appraisement committee so unlimited a power of appointing or approving a person to whom or a place to which the submission for appraisement is to be made, or of refraining from so doing, that a substantial interference with inter-State trade could be produced either unintentionally or of set purpose. It is clear that if a statute on its true construction purports to authorize an executive act conflicting with s. 92, the authorization

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is void as well as any act done under it (*James* v. *South Australia* (1); *James* v. *Cowan* (2)). But that principle cannot, I think, be applied here, for the view I have expressed to the effect that the Act discloses a purpose so limited as to leave inter-State trade in hides untouched supplies an ample ground for construing s. 7 as intended to operate to the extent only to which it does not authorize acts infringing s. 92. It may be accepted that if, by reason of the non-exercise, or the manner of exercise of the power of appointment or approval which the section confers, compliance with the section were found by an owner of hides to be incompatible with enjoyment of the freedom which s. 92 guarantees, the owner would be entitled by s. 92 to disregard s. 7; but it does not follow that s. 7 is void.

For these reasons, I would answer the question reserved by declaring that no provision of the Act is invalid because it contravenes s. 92.

Order in each suit:—

Question reserved answered that s. 6 of the Hide and Leather Industries Act 1948-1949 *(N.S.W.) is invalid but that the other provisions of the said Act are not invalid because they contravene s. 92 of the Constitution.*

Costs of the reservation to abide the order of the judge on the further hearing of the suit.

Solicitors for the plaintiffs Wilcox Mofflin Ltd., *Bartier, Perry & Purcell.*

Solicitors for the plaintiffs Birdsall Bros. Pty. Ltd., *W. P. McElhone & Co.*

Solicitor for the defendants the State of New South Wales and the Attorney-General for the State of New South Wales, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

Solicitor for the defendant the Australian Hide and Leather Industries Board, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitor for the State of Victoria, intervenant, *F. G. Menzies*, Crown Solicitor for Victoria, by *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitor for the State of Queensland, intervenant, *H. T. O'Driscoll*, Crown Solicitor for Queensland, by *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.

(1) (1927) 40 C.L.R. 1.

(2) (1932) A.C. 542; (1930) 43 C.L.R. 386.