[HIGH COURT OF AUSTRALIA.]

O'SULLIVAN . . . . . COMPLAINANT;

AND

NOARLUNGA MEAT LIMITED . . . DEFENDANT.

H. C. OF A. 1954.

ADELAIDE, *June* 16.

SYDNEY, *Aug.* 17-19; *Dec.* 17.

Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law—Commonwealth regulations—State statutes—Inconsistency—Validity—Meat—Export—Treatment—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (i.), 109—*Customs Act* 1901-1953, *ss.* 112, 270 (1) (*c*)—*Commerce* (*Trade Descriptions*) *Act* 1905-1950—*Meat Export Control Act* 1935-1953, *s.* 17 (1), (1A)—*Metropolitan and Export Abattoirs Act* 1936-1952 (*S.A.*), *ss.* 50*a*, 52*a*—*Commerce* (*Meat Export*) *Regulations*, *reg.* 4B.

Section 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.). so far as relevant is as follows :—" (1) No person shall in any part of the State outside the Metropolitan Abattoirs Area use any premises for the purpose of slaughtering stock for export as fresh meat in a chilled or frozen condition unless he is the holder of a licence from the Minister of Agriculture authorizing him to use those premises for that purpose . . . (2) The Minister of Agriculture shall have a discretion to grant or refuse any application for a licence under this section after due consideration of the following matters :—(*a*) whether the applicant is a fit and proper person to hold a licence under this section; and (*b*) whether the place where it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises; and (*c*) whether the premises are necessary to meet the requirements of the public . . . ".

Regulation 4B of the *Commerce* (*Meat Export*) *Regulations* so far as relevant is as follows :—" (1.). The exportation of all meat, meat products or edible offal is prohibited unless—(*a*) the treatment and storage of the meat, meat products or edible offal has been carried out in an establishment registered in accordance with these Regulations; (*b*) the provisions of these Regulations have been complied with; (*c*) the exporter has received an export permit in respect of the goods in accordance with these Regulations, and the export permit is in force at the time of exportation of the goods; . . . ".

The Regulations also provide (*inter alia*) that all premises used for the slaughter of meat for export shall be registered (reg. 5); that applications for registration shall be in accordance with a prescribed form, and that a

H. C. OF A. 1954. O'SULLIVAN v. NOARLUNGA MEAT LTD.

certificate issued to an "approved applicant" shall specify all operations which may be conducted on the premises (reg. 6); an application for registration must be accompanied by, *inter alia*, complete plans and specifications of the site (reg. 7); that where, after 30th March 1923, it is intended to erect premises to be registered, registration shall not be granted unless the secretary of the Department approves of the site prior to the erection of the premises (reg. 9). Other regulations contain detailed provisions with respect to specifications applicable to the construction of buildings and parts of buildings, drainage, distances of buildings, yards and pens from human habitation and noxious trade establishments and water supply.

Held (1) by *Dixon* C.J., *Fullagar* and *Kitto* JJ., *McTiernan*, *Webb* and *Taylor* JJ. *contra*, that s. 52*a* of the *Metropolitan and Export Abattoirs Act* is, within the meaning of s. 109 of the Constitution, inconsistent with the Regulations; (2) by *Dixon* C.J., *McTiernan*, *Fullagar* and *Kitto* JJ., (*Webb* and *Taylor* JJ. expressing no opinion) that the *Commerce* (*Meat Export*) *Regulations* are not beyond the legislative power conferred by s. 51 (i.) of the Constitution and are valid.

SPECIAL CASE removed into the High Court under s. 40A of the *Judiciary Act* 1903-1950.

Upon a complaint laid under the *Justices Act* 1921-1943 (S.A.) by Thomas O'Sullivan, Noarlunga Meat Ltd. was charged that on 27th November 1953, at Noarlunga, part of the State of South Australia outside the Metropolitan Abattoirs Area (as defined by the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.)), it used certain premises owned and occupied by it for the purpose of slaughtering lambs for export as fresh meat in a chilled or frozen condition contrary to the provisions of s. 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952.

At the hearing of the complaint on 29th March 1954 a statement of agreed facts was tendered by consent by counsel for the complainant and such facts were admitted in evidence. The facts and documents were agreed to and admitted subject to admissibility and to the rights of either party to adduce oral or documentary evidence adding to any of the facts or documents so admitted.

The facts and documents so tendered and admitted were stated substantially as follows: Noarlunga Meat Ltd. had for several years been the owner and occupier of a slaughter-house and abattoirs at Noarlunga where slaughtering of stock from time to time had been carried on by the company. The company's slaughter-house had at all relevant times been registered by the District Council of Noarlunga (in the area where the slaughter-house is situated) pursuant to Pt. XXVII of the *Local Government Act* 1934-1952 (S.A.). The company's premises are outside the Metropolitan

Abattoirs Area as defined in the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.). The Metropolitan Abattoirs, near Adelaide, is established for the purpose, *inter alia*, of slaughtering sheep and lambs for export and is duly registered under the *Commerce* (*Meat Export*) *Regulations* of the Commonwealth of Australia. The only other such premises in the State so established and so registered on 27th November 1953, were at Port Lincoln. At no time had the company been in possession of a licence from the Minister of Agriculture of South Australia under s. 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.) authorizing it to use its premises for the purpose of slaughtering stock for export as fresh meat in a chilled or frozen condition. On 31st January 1953, the company duly applied for such a licence but on 9th July 1953, the Minister of Agriculture by letter refused that application. The *Commerce* (*Meat Export*) *Regulations* had been made under and pursuant to the *Customs Act* 1901-1953 (Cth.). The Commonwealth *Meat Export Control* (*Licences*) *Regulations* had been made in due form under and pursuant to the *Meat Export Control Act* 1935-1953 (Cth.). The company had at all material times held a licence issued pursuant to the *Meat Export Control* (*Licences*) *Regulations*. (The licence, dated 29th June 1953, was issued to the company, and was a licence to export meat, meat products and edible offal from the Commonwealth during the period commencing on 1st July 1953 and ending on 30th June 1954 " upon the terms and conditions prescribed by the *Meat Export Control* (*Licences*) *Regulations* ".) The company's premises at Noarlunga had at all material times been registered under the *Commerce* (*Meat Export*) *Regulations* in the name of the company as proprietor as an establishment in which the operations of slaughtering and freezing mutton and/or lamb for export may be conducted.

The certificate of registration was subject to the following provisions :—" (a) The frozen carcases to be transferred to another approved registered establishment for storage. (b) Slaughterings to be limited to the freezing capacity of the chamber or chambers set aside exclusively for export operations. (c) The maintenance of satisfactory freezing temperatures in the chamber or chambers being used for the export operations ".

The certificate was granted subject to the conditions that operations would be conducted in accordance with the requirements prescribed under the *Customs Act* 1901-1953, and the *Commerce* (*Trade Descriptions*) *Act* 1905-1950, and that it would be liable to be withdrawn in the event of a contravention of the *Commerce* (*Meat Export*) *Regulations* or other applicable regulations in force

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

for the time being. The certificate was to remain in force until 31st December 1953.

At all material times there was in operation an agreement dated 11th October 1951, made between the Governments of the Commonwealth of Australia and the United Kingdom. (The intention of the two Governments was to develop further the production of meat in Australia, to increase the export of meat to the United Kingdom and to provide a satisfactory market in the United Kingdom for the whole of the exportable surplus of meat from Australia during the term of the agreement. The agreement related to beef and veal, mutton and lamb. It came into force on 1st July 1952 and was to terminate on 30th September 1967.) The Australian Meat Board at all relevant times had been duly constituted under the *Meat Export Control Act* 1935-1953 (Cth.), and, *inter alia*, had been the agent of the Commonwealth Government in implementing that agreement. In order to carry out the agreement the Australian Meat Board had been willing to accept lamb carcases which complied with the Commonwealth regulations, which fact was well known to the company. The Australian Meat Board did not do any slaughtering in South Australia but only bought for export. The process of freezing carcases differed from chilling in two essential respects, namely, in the final temperatures, and in the fact that frozen carcases might, when stowed in a ship for export, be packed while chilled carcases must be hung and not packed. At all relevant times only frozen carcases were being exported. On 27th November 1953, the company on the said premises slaughtered and froze 152 lambs for export as fresh meat in a frozen condition. The company purchased and slaughtered the lambs and froze the carcases for the purpose of selling them to the Australian Meat Board and of delivering them at an approved registered establishment for storage. On 27th November 1953, all the conditions and provisions contained in the certificate were duly complied with by the company. Of the 152 lambs then slaughtered none was rejected and all the carcases were certified by a duly authorized Commonwealth inspector as first-grade prime lamb carcases. The frozen carcases were transferred to another approved establishment registered under the *Commerce* (*Meat Export*) *Regulations* and, generally, the provisions of the registration of the premises and of the *Commerce* (*Meat Export*) *Regulations* were complied with and the carcases were duly sold and delivered to the Australian Meat Board and were on 13th December 1953, exported to the Government of the United

Kingdom by the Australian Meat Board on behalf of the Government of the Commonwealth of Australia pursuant to the said agreement.

The special magistrate found the facts contained in the statement to be proved.

On the part of the defendant it was contended that s. 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952, was inconsistent with a law or laws of the Commonwealth and, therefore, to the extent of the inconsistency, invalid.

On the part of the complainant it was contended that there was not any such inconsistency, and that the said section was valid.

These contentions were stated but not argued, and counsel for the complainant and for the defendant respectively, jointly requested the magistrate to state a case of the opinion of the Supreme Court.

The magistrate said that he did not form any opinion on the question of law involved except that it was a proper question to be reserved for the opinion of the Supreme Court.

The questions of law reserved for the opinion of that court were : (a) whether s. 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952, was a valid and operative enactment ; and (b) whether, on the above facts the defendant was guilty of the alleged offence ?

Upon the special case coming on for hearing *Hannan* A.J., purporting to act under s. 40A of the *Judiciary Act* 1903-1950, did not proceed further in the case and it was duly transmitted to the High Court and came on for hearing. Upon motion made on behalf of the Attorney-General for South Australia the High Court ordered that the special case be removed into the High Court under s. 40 of the *Judiciary Act* 1903-1950 and that it be transferred to the New South Wales Registry for hearing.

The relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

R. R. St. C. Chamberlain Q.C. (with him *W. A. N. Wells*), for the complainant. There is not any inconsistency between s. 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.) and the *Commerce (Meat Export) Regulations* made under the *Customs Act* 1901-1953. Section 52*a* is an important feature of the scheme of State legislation which deals with slaughter-houses, abattoirs, etc. and the proper, efficient, economic, clean and healthy working thereof, consisting of the *Abattoirs Act* 1911-1950 (S.A.), the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.), the *Port Lincoln Abattoirs Act* 1937 (S.A.), the *Health Act* 1935-1953 (S.A.), the *Local Government Act* 1934-1952 (S.A.), and the *Noxious Trades Act*

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

1943 (S.A.). The certificate given on form B permitting the use of the Noarlunga establishment for the " slaughtering and freezing of Mutton and/or Lamb for export " is nothing more than the following up of reg. 4B of the *Commerce* (*Meat Export*) *Regulations* which prohibits the operation of export unless the goods have been used in premises that have passed the inspection of the department. It is only a condition precedent to the right to export with which a person has to comply in order to export. It is not intended to confer a positive right to do anything. The Commonwealth law forbids export. It does not say what else one can do; it only says one cannot export and that is all it ever had any right to say under the *Customs Act* 1901-1953 or under s. 51 (i.) of the Constitution. This is a case where there are two sets of laws operating side by side (*Pirrie* v. *McFarlane* (1)). The Commonwealth law being limited to that very restricted area necessarily leaves everything else to the State. The regulations indicate that they do leave everything else except their own limited sphere of operations to the State. If the regulations do purport to enter into State activities, then, *ipso facto*, they go beyond the *Customs Act* 1901-1953 and the Constitution and become invalid. Those regulations and the *Meat Export Control Act* 1935-1953 and the regulations made under that Act, operate together. The essential feature of the last-mentioned regulations is that there is a prohibition of export except by licensed exporters. The agreement between the Commonwealth and the United Kingdom is not an agreement which if made between citizens would be enforceable. The leading Australian authority on this point is *R.* v. *Burgess*; *Ex parte Henry* (2). That case was not mentioned in *Attorney-General for Canada* v. *Attorney-General for Ontario* (3) which decision disposed, completely, of the theory that the Commonwealth Parliament by an arrangement with another country could acquire power which it otherwise did not have. The source of the regulation-making power is s. 112 of the *Customs Act* 1901-1953. The power to legislate with regard to trade and commerce with other countries contained in s. 51 (i.) of the Constitution does not extend to the making of laws with regard to matters preliminary to but not actually part of overseas trade.

[DIXON C.J. referred to *Crowe* v. *The Commonwealth* (4).]

Trade and commerce is something different from preparation for trade and commerce. The breadth of the expression is shown in *R.* v. *Gates*; *Ex parte Maling* (5). Trade and commerce was

(1) (1925) 36 C.L.R. 170.
(2) (1936) 55 C.L.R. 608.
(3) (1937) A.C. 326.
(4) (1935) 54 C.L.R. 69.
(5) (1928) 41 C.L.R. 519, at p. 530.

discussed in *Bank of New South Wales* v. *The Commonwealth* (1) and *Victoria* v. *The Commonwealth* (2). By the *Customs Act* 1901-1953 all that the regulation-making power permits is the prescription of conditions without which one cannot export. Some matters are left to the State, just as in many cases under s. 109 there is a background of State law : see *Stock Motor Ploughs Ltd.* v. *Forsyth* (3); *Tasmanian Steamers Pty. Ltd.* v. *Lang* (4) and *Ex parte McLean* (5). The existence of two parallel powers does not necessarily mean that there is any inconsistency. It may be that the Commonwealth power has been exercised so as to create an inconsistent situation and the State may have to wait until the Minister has done that which he had not done so far : see *Victoria* v. *The Commonwealth* (6). If the regulations do not cover the same field as the State legislation does and do not contain the effect of rendering the State regulations inoperative, then they are not inconsistent. Unlike *Colvin* v. *Bradley Bros. Pty. Ltd.* (7), the Commonwealth law in this case does not establish a positive right.

Dr. *F. Louat* Q.C. (with him *K. S. Jacobs*), intervening by leave for the State of New South Wales. There is not any inconsistency between the two enactments, but if there is an inconsistency then the *Commerce* (*Meat Export*) *Regulations* go beyond the power contained in s. 51 (i.). This legislation which is pointed at the moment of export is not the kind of legislative device by which a field of rights and obligations can be covered. There are two quite different fields covered by the regulations and s. 52*a* in its setting of the South Australian Act. If the regulations purport to be anything else then, quite apart from any question of s. 51 (i.), they would be outside the power derived from the *Customs Act* 1901-1953, because they are made as conditions annexed to a prohibition on export. The State must be able to make a monopoly of its slaughtering industry if it wishes to, and then it would be no longer open to the Commonwealth merely by registering someone's establishment to give such a person the right to slaughter for export if in fact a monopoly had been created under State law. The State Act does but the regulations do not concern itself or themselves respectively with the questions of (1) monopoly or private enterprise and who shall slaughter for export in that aspect ; (2) where slaughtering for export shall be done ; (3) State regional planning having regard to the proper areas in which slaughter-houses should

(1) (1948) 76 C.L.R. 1, at pp. 284-290, 305, 306, 380, 390.
(2) (1937) 58 C.L.R., at pp. 635, 636.
(3) (1932) 48 C.L.R. 128.
(4) (1938) 60 C.L.R. 111.
(5) (1930) 43 C.L.R. 472, at p. 483.
(6) (1937) 58 C.L.R. 618.
(7) (1943) 68 C.L.R. 151.

H. C. OF A. 1954. O'SULLIVAN v. NOARLUNGA MEAT LTD.

be established and whether there would be interference with residential amenities; (4) proximity to labour supply; (5) the availability of residential buildings for employees and their families; and (6) the availability of areas for stock yards: *Slaughterhouse & Butchers' Benevolent Association of New Orleans* v. *Crescent City Livestock Co.* (1). These matters have nothing whatever to do with the Commonwealth and are not to be brought within s. 51 (i.) of the Constitution. One of the purposes of s. 52a is the rationalizing of the slaughter-house industry. On any view of the scope of the trade and commerce power in s. 51 (i.), the matters dealt with by the *Meat Export Control Act* are matters in a narrower field and clearly within that power; their subject matter is export, which is itself a narrower term than "trade and commerce with other countries". If there is inconsistency here because the *Commerce (Meat Export) Regulations* amount to a complete statement of the conditions on which one may slaughter for export, and if that be so they are in excess of the power conferred by s. 51 (i.). The regulations would seem to be, apparently, within the statutory authority conferred by s. 270 (1) (*c*) of the *Customs Act* 1901-1953. The regulation of inter-State trade and commerce was referred to in *Federated Amalgamated Government Railway & Tramway Service Association* v. *New South Wales Railway Traffic Employes Association* (2). *W. & A. McArthur Ltd.* v. *State of Queensland* (3) is still authoritative on the meaning of "trade and commerce". The basis of the conception in the exposition of the meaning of trade and commerce is the idea of movement; that, when the movement of goods is in some way initiated then trade and commerce starts. "Trade and commerce" was also dealt with in *Huddart Parker Ltd.* v. *The Commonwealth* (4). It is the substance of the law that has to be looked at and not its form (*R.* v. *Barger* (5) and *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (6)). The substance of these regulations is that by means of the law which purports to deal with an act of export, they are establishing control over the whole process of the production and manufacture of articles to be exported: *Quick and Garran, The Annotated Constitution of the Australian Commonwealth* (1901), pp. 518, 519. These regulations were never designed to be the conditions attached to the export of goods: they were designed to take control of the slaughtering for export industry. So far as they depend on s. 112 of the *Customs Act* 1901,

(1) (1872) 16 Wall 36, at pp. 61-63 [21 Law. Ed. 395, at pp. 403, 404].
(2) (1906) 4 C.L.R. 488, at p. 545.
(3) (1920) 28 C.L.R. 530, at p. 549.
(4) (1931) 44 C.L.R. 492, at pp. 514, 515.
(5) (1908) 6 C.L.R. 41.
(6) (1939) 61 C.L.R. 735.

as amended, they are in excess of the power conferred by that section. The questions should be answered in favour of South Australia.

H. Zelling, intervening by leave on behalf of the State of Tasmania. Regulation 4B is not so much a grant as a restriction in that what is looked at is the fact that certain premises will be valid or useful only for certain purposes and can be registered only for certain purposes. It is a certificate of recognition restricted to certain premises and is not to be taken as a grant. If that be so then it does not confer either power or a licence. Where, as here, there is a regulation which applies simply to registration or approval of particular premises, it does not of itself say that those particular premises can be set down at a set place in defiance of State law. The cases referred to by Dr. *Louat* provide the limit to which the Court has gone in considering how far the trade and commerce power goes. The American cases only show a recession from the early cases of the New Deal: see *Empresa Siderurgica* v. *Merced & Co.* (1); *Parker* v. *Brown* (2) and *Currin* v. *Wallace* (3). The difference here is not the question of whether or not the premises are suitable or not, but whether or not they could be put down anywhere. It is not only a question of where they can be used. The real issue between the State and Federal power is not in relation to the licence of such premises *qua* their use but in relation to the licence of such premises *qua* their position, where they are geographically. If this licence goes as far as the defendant must contend it goes, then, providing it has premises which comply with the specifications for use, it can put them down wherever it likes. The State Act deals with two things, use and possession. The regulation ought to be read as a restriction and not a grant.

H. G. Alderman Q.C. (with him *E. W. Palmer*), for the defendant. The defendant company has a licence under ss. 552, 553 of the *Local Government Act* 1934-1952 (S.A.) to slaughter for many export purposes, all inter-State purposes and practically all human consumption purposes. It is a condition precedent of the granting of that licence that the premises are suitable for the purpose of a slaughter-house and one on a satisfactory site. Under that licence the defendant can slaughter for itself, for other people and for export provided the meat does not go away as chilled or frozen meat. That meat can go into the metropolitan area provided it is passed

(1) (1949) 337 U.S. 154 [93 Law. Ed. 1276].
(2) (1943) 317 U.S. 341 [87 Law. Ed. 315].
(3) (1939) 306 U.S. 1 [83 Law. Ed. 441].

H. C. OF A. 1954. O'SULLIVAN v. NOARLUNGA MEAT LTD.

by an inspector as being fit for consumption. Referring to s. 49 of the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.), if all export slaughtering had to be done at the abattoirs and those abattoirs happened to be running at a loss, or the debentures happened to grow, there is a statutory duty on the Abattoirs Board to insure that it paid profits and repaid the debentures, and the charges might very easily be so prohibitive as to materially interfere with the export of meat from Australia. That is a very good reason for supposing that the Commonwealth intended to say, as was said, that the Commonwealth may licence slaughter-houses to slaughter for export. Section 50*a* of the Act is relevant to show that s. 52*a* is designed as a monopoly section; to create a manufactured monopoly. Section 70 (*d*) shows that s. 52*a* is not aimed at health reasons. Section 52*a* is essentially in itself a law with respect to export; it is based on export. The defendant is being prosecuted for doing something for export which it could lawfully do for any other trade, inter-State, intra-State, or any other trade except export. The *Meat Export Control Act* 1935 with its amendments shows a scheme to control the export of meat from Australia. The legislature in the *Meat Export Control Act* 1935 and in the *Meat Export Control* (*Licence*) *Regulations* 1936 has deliberately formed one structure out of the *Customs Act* 1901-1953, the *Customs Regulations*, this Act and these regulations. The intention of regs. 5 and 7 is that anyone who holds an export licence will also be licensed to slaughter. All the Acts and regulations show that slaughtering for export is something essentially different from slaughtering merely with the intention of exporting. The offence charged is not "slaughtering" but of "slaughtering for export". In *Fergusson* v. *Stevenson* (1) and in *Wragg* v. *State of New South Wales* (2) the Court referred to the transactions in which the parties were engaged, and held that the possession was essentially the possession in inter-State trade because the transaction itself was a transaction in inter-State trade. This was one transaction and was essentially a transaction of trade and commerce overseas. All the Commonwealth's regulations are relevant to export. The *Meat Export Control Act* is valid and the regulations under it are valid. American decisions will not assist the Court.

Sir *Garfield Barwick* Q.C. (with him *R. Else-Mitchell*), for the Commonwealth, intervening by leave. The Commonwealth does not wish to participate in the argument as to whether there is or is not a conflict. Submissions will be made on the footing that

(1) (1951) 84 C.L.R. 421.

(2) (1953) 88 C.L.R., at p. 387.

there was a conflict. They are so made on the hypothesis that the Commonwealth has affected to do three things: (1) to prescribe exhaustive conditions as to the slaughter and treatment of meat for export; (2) it has prescribed, and exhaustively, the physical standards of the slaughter-house where meat for export is slaughtered and treated; and (3) it has affected to authorize the use of the registered premises for the slaughtering and treatment of meat for export. There is power in the Commonwealth to do all three things which it has been assumed the regulations affect to do. "Slaughtering for export" appears to be something more than mere slaughtering with the intention of putting the meat ultimately into the export trade. Both the Commonwealth and the State law regard a more or less continuous process as existing from the point of at least the slaughtering to the export. They regard the thing not merely as a matter of intention but as somehow inherent in the method. The expression "slaughter for export" refers to objective things rather than to some subjective intention of the owner or would-be exporter. The process of slaughtering for export is part of the external trade in meat and it is not at all comparable with the process of mere manufacture, which can be divided off from the trade itself. It must be conceded that the Commonwealth can specify and take steps to maintain standards of condition and quality at the point of export. The condition and quality at the point of export would include: (i) the condition of the stock immediately prior to the commencement of the slaughter; (ii) the manner of the slaughter itself; (iii) the nature and condition of the premises in which the slaughter takes place; and (iv) the conduct of those who handle the meat in course of treatment; the word "conduct" as so used including whether they themselves are diseased, or clean or follow cleanly habits and the like. The supervision of the slaughter and of the premises and those who handle the meat at that point of time are but appropriate means of securing standards of condition and quality at the point of export. The prescription of the premises—their layout and so on—equally is a not inappropriate method of maintaining those standards of condition and quality. Also, a registration or licensing scheme is an appropriate method of prescribing and maintaining the standards in the building and so on referred to above. This is all within the commerce power without any resort to any incidental power. The Commonwealth can authorize persons to slaughter for export although they had no other authority. *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (1) found no other connection with the trade and commerce power beyond the authority given

(1) (1945) 71 C.L.R. 29.

H. C. OF A. 1954. O'SULLIVAN v. NOARLUNGA MEAT LTD.

to trade. In *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 2] (1) it was said that the *inter se* question in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (2) was said to arise by the Court because, even if the Federal legislation reached no higher than to authorize the Federal corporation to engage in trade, yet no State could impair that authority or preclude the Federal corporation from exercising the authority. The journey to export of exported meat begins when it is sent to be slaughtered for export. A scheme of registration of slaughtering establishments is an appropriate means of securing standards of quality at the point of export and also of maintaining the trade itself abroad. Once carry the argument to the point that a scheme of registration and of prohibition of the use of other premises for slaughtering for export is reached, it necessarily follows that there must be power to authorize the use of those slaughter-houses. To determine standards of condition and quality, and to maintain those standards, is at the very heart of the commerce power in relation to foreign trade. Part and parcel of an ordinary licensing scheme is that the licence does two things, it authorizes as well as forbids.

R. R. St. C. Chamberlain Q.C., in reply.

Cur. adv. vult.

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

DIXON C.J. I have had the advantage of reading the judgment of *Fullagar* J. and agree in it.

McTIERNAN J. This is a case stated under the *Justices Act* 1921-1943 (S.A.) and removed into this Court pursuant to s. 40A of the Commonwealth *Judiciary Act* 1903-1950. The first question, as framed by the magistrate, is whether s. 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.) is a valid and operative enactment. The enactment of this section is within the constitutional power of South Australia. The question to be answered is really whether the section is inconsistent within the meaning of s. 109 of the Commonwealth Constitution with any law of the Commonwealth. The material laws of the Commonwealth are the *Commerce* (*Meat Export*) *Regulations*, Pt. II. This Part is headed " Registration of Premises and Standard Requirements Therefor ". Regulation 5 is in these terms : " All establishments used for the slaughter, treatment and storage of meat, meat products or edible offal for export shall be registered ". Regulation 6 prescribes the

(1) (1946) 71 C.L.R. 115. (2) (1945) 71 C.L.R. 29.

form of an application for registration. This regulation also directs the secretary of the Commonwealth Department of Commerce and Agriculture to issue to an approved applicant a certificate of registration specifying the operations which may be conducted in the establishment to which it refers and the conditions to be observed. The standard requirements for registered premises are dealt with by at least thirty-seven detailed regulations. These regulations refer to existing premises and premises to be erected. Comparatively few are prescribed for the former but there is also a general condition that such premises conform as far as practicable to the requirements prescribed for new premises seeking registration. The first relates to site. This regulation has in view facilities for drainage and distance from possible sources of infection and from public roads. The standards pertaining to the matter of site are not concerned with suitability having regard to the neighbourhood or the effect of starting a meat works on its amenities. The remainder of the standards apply to such matters as the planning and internal arrangements of the premises including the pens in which the beasts are to be kept ; chilling, freezing and cool storage ; employees' accommodation ; ventilation, wire fly-netting, lighting ; sanitation and hygiene. Regulation 49 authorizes the secretary of the Department to relax the prescribed standards in certain respects if " the sanitary objectives aimed at by this Part (of the regulations) will be attained ".

Part III deals with the supervision, inspection, preparation, transportation, marking and trade description of meat intended for exportation. Part IV deals with exportation. Regulation 91, which is in this Part, provides that the inspector appointed by the secretary of the Department to inspect and pass meat, meat products or edible offal intended for export, shall issue to the exporter an export permit in all cases in which the provisions of the *Commerce (Meat Export) Regulations* have been complied with. It is important to notice reg. 103 which provides as follows : " Where by the law of any State any goods are required to be inspected and approved by a State authority before export, and the Minister is satisfied that such inspection and approval are as efficient as inspection and markings under these regulations, the Minister may direct that such inspection and approval shall be accepted, wholly or partly, in lieu of examination and marking under these regulations ". The whole plan effectuated by the regulations depends substantially upon reg. 4B for its justification under the Commonwealth Constitution. The material parts of this regulation are : " (1) The exportation of all meat, meat products or edible offal

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

McTiernan J.

is prohibited unless—(a) the treatment and storage of the meat, meat products or edible offal has been carried out in an establishment registered in accordance with these regulations; (b) the provisions of these regulations have been complied with; (c) the exporter has received an export permit in respect of the goods in accordance with these regulations, and the export permit is in force at the time of exportation of the goods".

Section 52*a* of the *Metropolitan and Export Abattoirs Act* 1936-1952 (S.A.) makes it an offence, punishable by a fine, to use any premises in any part of the State outside the "Metropolitan Abattoirs Area" for the purpose of slaughtering stock for export as fresh meat in a chilled or frozen condition unless he is the holder of a licence from the State Minister of Agriculture authorizing him to use those premises for that purpose. The provisions of the section relating to the grant of licences are as follows: "(2) The Minister of Agriculture shall have a discretion to grant or refuse any application for a licence under this section after due consideration of the following matters:—(*a*) whether the applicant is a fit and proper person to hold a licence under this section; and (*b*) whether the place where it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises; and (*c*) whether the premises are necessary to meet the requirements of the public: Provided that the Minister shall not refuse an application for such a licence if the premises for which the licence is required are to be erected at least eighty miles from all premises, existing at the date of such application, and established within the State for the purpose of slaughtering stock for export as aforesaid. (3) Every licence shall be for such period and contain such restrictions, terms and conditions as the Minister thinks proper. (4) This section shall not apply to the Government Produce Department". Is this section in conflict with any provisions of the *Commerce* (*Meat Export*) *Regulations*? The material regulations are, I think, regs. 5 and 6.

Although the case is concerned with the question whether s. 52*a* is struck by s. 109 of the Constitution, I think that it is necessary to consider other sections of the Act. If s. 52*a* is considered in isolation an inadequate judgment may be formed of its operation. The Act grants to the Metropolitan and Export Abattoirs Board, a corporation existing under it, the power to erect and equip abattoirs and to construct railway sidings to serve them. The plant which the corporation may instal includes, of course, cool storage: s. 68. The Act fences off an area of the State which is described as the Metropolitan Abattoirs Area. This area may be added to

or reduced by proclamation: s. 7. There are different provisions applying to the area and the rest of the State. While abattoirs are available under the Act for slaughtering stock, no person shall within the Metropolitan Abattoirs Area elsewhere than at such abattoirs slaughter or allow to be slaughtered any stock for human consumption: s. 70. The Metropolitan Abattoirs Area consists of municipalities and districts which are enumerated in s. 7. One of these districts is called "the Garden Suburb". The councils exercising local governmental powers in these municipalities and districts are called for the purposes of the Act "constituent councils": s. 7. The Act closes all private abattoirs within the Metropolitan Abattoirs Area except slaughter-houses or abattoirs used or intended to be used "only for the purpose of slaughtering stock for meat to be tinned or canned for export, or for curing bacon and hams, or for the purpose of slaughtering stock for export otherwise than as fresh meat in a chilled or frozen condition or for the purpose of slaughtering swine for export as fresh meat in a chilled or frozen condition pursuant to a permit issued under section 50*a*": s. 79. This step is consequential upon the monopoly given by s. 70 to the Board's abattoirs. The manner in which the private abattoirs are closed is that s. 79 (1) forbids any constituent council or any board of health to issue any licence for slaughtering of stock. But in the case of the slaughtering houses or abattoirs used or intended to be used for the purpose of slaughtering stock for meat for export, as mentioned above, the power of the appropriate constituent council or board of health to issue a licence is retained. Section 109 of the Act is analogous to s. 79. The former section provides for the closing of private abattoirs in any area added to the Metropolitan Abattoirs Area as defined by s. 7. The section forbids the appropriate constituent council or board of health from issuing any licence for slaughtering stock except in the case of slaughtering houses or abattoirs used or intended to be used for the purpose of slaughtering stock for meat for export in forms similar to those specified in s. 79 (2). It will have been noticed that slaughtering of stock for meat for export in a chilled or frozen condition is excepted from the operation of either s. 79 (2) or s. 109 (2) of the Act. Section 50, to which s. 79 (2) and s. 109 (2) of the Act seem to be complementary, gives to the Board the sole right within the Metropolitan Abattoirs Area to slaughter stock for export as fresh meat in a chilled or frozen condition—and prohibits the slaughter of stock for this purpose in such area at any place other than the premises of the Board. Within the Metropolitan Abattoirs Area this monopoly is qualified

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

McTiernan J.

by s. 50*a*. This section says that notwithstanding the provisions of s. 50 the Minister of Agriculture may grant a permit to any person to slaughter swine for export as fresh meat in a chilled or frozen condition at a slaughter-house or abattoirs which is licensed by a council or board of health. The section gives to the Minister a discretion to grant or refuse any application for a permit under this section and provides that every permit shall be for such period and contain such restrictions, terms and conditions as the Minister thinks proper. Then comes s. 52*a* which applies to the part of the State outside the Metropolitan Abattoirs Area. This section relates to the same operations as s. 50, but in terms confers no monopoly upon the Board to conduct those operations. The provisions of the section have been already mentioned above.

The Commonwealth regulations depend for their constitutional validity upon s. 51 (i.) of the Constitution. In effect, the regulations prohibit the export of meat and the other commodities mentioned therein unless the premises in which the stock are slaughtered are registered in accordance with the regulations and the standard requirements for registered establishments are observed. It is a well-established proposition that the power granted by s. 51 (i.) to legislate with respect to trade and commerce with other countries includes the power to prohibit exportation either absolutely or unless a given condition is fulfilled. The question whether the condition is validly imposed depends upon whether the prohibition read with the conditions is a law with respect to the subject matter of trade and commerce with other countries. There may be a semblance of inconsistency between s. 52*a* and regs. 5 and 6. It is argued for the State of South Australia that really there is no conflict, but, if there be conflict, s. 52*a* does not fall because these regulations are in excess of the power vested in the Commonwealth Parliament by s. 51 (i.). I do not agree with the argument founded upon s. 51 (i.). In the first place I think that the standards required for registered establishments have a real causative relation to the fitness of the meat and other products to enter the stream of trade and commerce with other countries. That is, I think, a reasonable assumption and it leads, in my opinion, inevitably to the conclusion that regs. 5 and 6 are valid. I think that the scheme for registering the establishments described in reg. 5 can reasonably be regarded as an effective means for securing observance of the prescribed standards. Regulations 5 and 6 therefore are laws conducive to a legitimate end of the legislative power, namely, the securing of the quality and wholesomeness of goods entering the stream of trade and commerce with other countries. The question of the

validity of regs. 5 and 6 and the following regulations prescribing standards is not answered by pointing out that the Commonwealth Parliament has no power to make laws with respect to the industry of slaughtering stock. The regulations prescribing the standard requirements for registered establishments have a real and substantial connection with the subject of trade and commerce in meat with other countries and this is enough to support the validity of regs. 5 and 6 which, as I have said, are reasonable means for securing the adoption of the standards. It is, therefore, necessary for me to express my opinion on the question of inconsistency.

Section 52*a* applies only to slaughtering for export. If the section extended to all slaughtering for human consumption without distinguishing between home consumption and the export trade it would be open to an attack upon the ground of inconsistency with the regulations, essentially the same as that made in this case, but then the section could be attacked only to the extent of its application to slaughtering for export. Having regard to the scheme of the Act, the present attack is not really more forcible because the section relates only to slaughtering for export. Section 52*a* provides a means for modifying the Board's monopoly of slaughtering stock for human consumption. Section 50*a* does the same thing but to a lesser extent and in the same manner, that is the grant of a licence by the Minister. Sections 79 and 109 of the Act are in this respect comparable with ss. 50*a* and 52*a*. Indeed, the Commonwealth which was given leave to intervene did not claim that s. 52*a* is inconsistent with any Commonwealth law. Evidently s. 52*a* does not in practice interfere with or impair the operation of the regulations. The Commonwealth was only concerned to maintain that the regulations were valid. In the case of a Commonwealth law of the same type as these regulations inconvenience may result from declaring the State law to be inconsistent with the Commonwealth law if it deals with matters in respect of which the Commonwealth has less power to legislate than the States. However, this consideration would have no force if the State law were really inconsistent with the Commonwealth law.

Regulation 5 addresses itself to all establishments used at the time the regulations commenced or thereafter to be erected for the slaughter, treatment and storage of meat, meat products and edible offal for export. It directs that all such establishments shall be registered. This direction is not addressed to any person. The person bound by it is no doubt the person who uses or is about to use premises for the above-mentioned purposes. He is bound by the direction to the extent that if he does not comply with it he

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

McTiernan J.

may not obtain a permit to export the meat slaughtered, treated or stored in the establishment. There would be no prospect of obtaining a permit to export meat or any of the other products if the slaughtering, treatment or storage were done in an unregistered establishment except possibly in a case to which reg. 103, quoted above, applies. (This regulation relates to inspection under State Acts). Accordingly there is an effective practical sanction for the direction contained in reg. 5. Regulation 99 provides that any person committing a breach of the regulation for which no other penalty is provided shall be liable to a penalty not exceeding twenty pounds. Regulation 5 provides no penalty for a breach. There are provisions, for example sub-regs. 1 and 13 of reg. 43, which are addressed to individuals. They would clearly be liable to this penalty if guilty of a breach. Regulation 5 is not aptly expressed to create an offence. Many more of the regulations are in the same form. These constitute requirements to which it is necessary to conform to obtain registration. It is not necessary, I think, to decide whether reg. 5 merely creates a condition upon which export is permitted or a rule of conduct, the breach of which exposes some person to punishment. Even if reg. 5 creates the offence of failing to register establishments used for the slaughter of stock for export, s. 52*a* may nevertheless not be in conflict with it. I think that a distinction can be made. Regulation 5 applies to an establishment, in which slaughtering for export is conducted, as an instrument or agency of trade and commerce with other countries. Section 52*a* defines the premises to which it applies as premises used for slaughtering stock for export as fresh meat in a chilled or frozen condition. The section applies to such premises under the aspect of premises used as abattoirs or slaughter-houses, and forbids the use of any premises for particular slaughtering operations without a licence from the Minister. Regulation 5 operates within the field of trade and commerce with other countries. It could not validly operate beyond that field. The field marked out by s. 52*a* is indicated by the matters which the section says are to be taken into consideration by the Minister in exercising the discretion given to him by the section to grant or refuse a licence. The first matter is whether the applicant is a fit and proper person to hold a licence under this section. The Commonwealth regulations lay down no standards relevant to this matter. The matter which in my judgment the Minister has to consider is not whether the applicant is a fit and proper person to engage in trade and commerce with other countries. I think the matter for the Minister to consider is whether the applicant is a fit and proper person to conduct abattoirs in which

the particular class of operations to be carried on is slaughtering stock for export as fresh meat in a chilled or frozen condition. The second matter which the Minister has to consider is whether the place where it is proposed to establish the premises is a suitable place for the establishment of such premises. I have referred to the provisions of the regulations prescribing the requirements to which the site of an establishment to be erected must conform in order to qualify the establishment for registration. In my opinion the criteria of the suitability of a site laid down by the regulations are different from the criteria involved in the words " a suitable place for the establishment of such premises " which are to be found in s. 52*a*. The third matter which the Minister has to consider is whether the premises in respect of which a licence is sought are necessary to meet the requirements of the public. The Commonwealth regulations do not contain any express provisions as to this matter.

In my opinion the Commonwealth regulations leave it open to the States to determine who is a fit and proper person to conduct the class of slaughtering operations mentioned in s. 52*a*; what is a suitable place for an abattoirs in which such operations are conducted, and whether the establishment of any new abattoirs of that kind is necessary to meet the requirements of the public.

The acceptance of the argument that s. 52*a* is inconsistent with regs. 5 and 6 would involve the destruction of the monopoly granted by the Act to the Metropolitan and Abattoirs Board, and would lead to the conclusion that ss. 50*a*, 79 and 109 (of the State Act) are also inconsistent and invalid to the extent of the inconsistency. It does not seem to me that the Commonwealth regulations manifest an intention to operate so widely that these results would flow from them. I think that the language of reg. 5 is compatible with accepting for the purposes of the regulations determinations made by a State or a local governing body under State law, pursuant to which premises may be used for slaughtering stock and treating and storing the products thereby obtained, whether for home consumption or export. The continued acceptance or recognition of those determinations is implicit in the description which reg. 5 contains of the establishments which are directed to be registered. The description is " all premises used for the slaughter, treatment or storage of meat, meat products or edible offal for export ". The registration does not bring premises within that description: the premises are not directed to be registered unless they are within the description. The regulations intend that the status of a registered establishment should be acquired by premises

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

McTiernan J.

which may be lawfully used for those purposes. It is not an intended result of the regulations that registration should give a right to use premises without the licence of a municipal council or a board of health or of a State itself if that is necessary under State law. Registration, as I have said, does not bring an establishment within the description of an establishment used for the purposes mentioned in reg. 5. Upon the very terms of reg. 5, an establishment is not made subject to the direction given by the regulation unless it is an establishment used for those purposes. Whether it is lawfully used may depend upon State law. A comparable situation would arise if a Commonwealth law directed that all hotels used for the accommodation of migrants were to be registered and that no hotel-keeper would be permitted to provide accommodation for migrants unless the hotel were registered and conformed to certain standards. It would, I think, be difficult to hold that the laws of the State under which the hotels were licensed fell because of inconsistency with the Commonwealth law. In enacting s. 52*a* the subjects upon which the State Parliament legislated are the personal qualifications of persons to conduct abattoirs, the localities in which they may be conducted and the number there should be. The Parliament confined this section to abattoirs in which a particular class of slaughtering is conducted, namely, the slaughtering of stock for export in a chilled or frozen condition. There are other classes of slaughtering for the export trade dealt with by the Act. Section 52*a* is essentially not a law with respect to trade and commerce with other countries. Regulation 5 is not a law on the same subjects as s. 52*a*.

The sanction for this section is punishment by a fine. It is not clear that the regulations intended that failure to register an establishment under reg. 5 is to be punishable by a fine. If the regulations do so, it would be hard to resist the conclusion that numerous other regulations described as standard requirements also have penal sanctions and thus the export trade in meat has become controlled by the criminal law.

Difference between the legislative categories to which s. 52*a* and the regulations may be assigned, and diversity between the sanctions for the section and reg. 5 are important considerations in determining the question of inconsistency. I think that in the present case the decisive consideration is the intention of the regulations. In my opinion they do not disclose the intention that the direction to register under reg. 5 is the only law to be obeyed by any person who conducts an establishment for the slaughter, treatment and storage of meat, meat products and edible

offal for export to qualify him to carry on the establishment lawfully. In my opinion s. 52*a* is not inconsistent with any of the Commonwealth regulations. However, I think a reservation ought to be made about sub-s. (3) of this section. If upon its true construction that provision authorizes the Minister of Agriculture to prescribe a restriction, term or condition dealing with a matter covered by any of the "standard requirements" prescribed by Pt. II of the regulations, a question similar to that considered in *State of Victoria* v. *The Commonwealth* (1) would arise.

The second question asked by the magistrate should, upon the facts stated by him, also be answered against the defendant company.

WEBB J. For the reasons given by *Taylor* J., whose judgment I have had the advantage of reading, I think the question in the special case should be answered as his Honour proposes. But, in addition to the matters relied upon by his Honour as indicating that the *Commerce* (*Meat Export*) *Regulations* are not intended to occupy the field to the exclusion of State law, I rely on reg. 103 which, in authorizing the adoption of State inspection and approval of meat for export and consequential markings of such meat, also indicates I think that those regulations are not intended to be exhaustive and exclusive of State law. As stated by *Dixon* J. (as he then was) in *Ex parte McLean* (2): "The inconsistency" (that is, within the meaning of s. 109 of the Commonwealth Constitution) "does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed" (3).

I think that reg. 103 contemplates that the State's inspection, approval and markings, which require an extensive and costly set up, but in any event are essential features of control, shall continue to be made and given from time to time, as there is not sufficient indication anywhere in the regulations that the State operations referred to are only those which are completed when the regulations come into force, and therefore that the purpose of reg. 103 is simply to enable the change from State to Commonwealth control to be brought about without a duplication of effort.

If I am right as to the intention of reg. 103, it is an important provision for the co-operation of Commonwealth and State in

(1) (1937) 58 C.L.R. 618.
(2) (1930) 43 C.L.R. 472.
(3) (1930) 43 C.L.R., at p. 483.

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Webb J.

securing and maintaining the standard of meat for export. After all, the States are at least as much concerned as is the Commonwealth in securing and maintaining those standards. The Commonwealth has no greater interest than the States in that matter. Indeed, where a State is very largely dependent upon its export trade in a certain commodity, as South Australia is in the lamb export trade and Tasmania in the fruit export trade, the State may have the greater interest. However, there seems to be no doubt that the Commonwealth has the power in all cases to exclude the State law. But I think the correct view of these regulations is that the State is permitted to remain in the field so that advantage of its services may be taken from time to time if that appears desirable to the authorities administering the regulations, who, of course, have no power to bind their successors as regards future exports. I can see no regulation, not even regs. 5 and 10, that points as clearly to the exclusion of the State law as reg. 103 points to its continuance.

FULLAGAR J. This case comes before the Court on a special case stated for the Supreme Court of South Australia by a special magistrate. It was removed into this Court by order under s. 40 of the *Judiciary Act* 1903-1950.

The case arises under the *Metropolitan and Export Abattoirs Act* 1936-1952 of the State of South Australia. This Act provides for the establishment of a board to be called the Metropolitan and Export Abattoirs Board, which is made a body corporate. It is necessary to refer only to two sections of the Act. Section 50 relates to the slaughter of stock for export *within* the Metropolitan Abattoirs Area, which is defined by s. 3. It provides: "(1) Except as provided by section 50*a* the board shall have the sole right within the Metropolitan Abattoirs Area to slaughter stock for export as fresh meat in a chilled or frozen condition. (2) Nothing in this Act shall operate so as to allow any person other than the board to slaughter stock within the metropolitan abattoirs area for export as fresh meat in a chilled or frozen condition, or any place within the said area other than premises of the board to be used for that purpose. (3) The board shall not slaughter any stock for export except for and on account of and in the manner directed by the manager of the Government Produce Department. (4) The manager of the Government Produce Department shall not procure the slaughter of any stock for export except upon condition that he is appointed by the owner of the stock as agent to arrange for the slaughter, freezing, and shipment thereof, and, where required, to

market the meat and by-products, and, that he is to be paid an inclusive fee for all these services". The exception provided by s. 50a is immaterial for the purposes of the present case. The other relevant section is s. 52*a*, which relates to the slaughter of stock for export *outside* the Metropolitan Abattoirs Area. It provides: "(1) No person shall in any part of the State outside the Metropolitan Abattoirs Area use any premises for the purpose of slaughtering stock for export as fresh meat in a chilled or frozen condition unless he is the holder of a licence from the Minister of Agriculture authorising him to use those premises for that purpose . . . (2) The Minister of Agriculture shall have a discretion to grant or refuse any application for a licence under this section after due consideration of the following matters:—(*a*) whether the applicant is a fit and proper person to hold a licence under this section; and (*b*) whether the place where it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises; and (*c*) whether the premises are necessary to meet the requirements of the public: . . ."

The defendant company was charged with a breach of s. 52*a* (1) in that it did on 27th November 1953 in a part of the State outside the Metropolitan Abattoirs Area use certain premises owned and occupied by it for the purpose of slaughtering certain stock, viz. lambs, for export as fresh meat in a chilled or frozen condition. Such a breach is made an offence against the Act by s. 115. The case states that the allegations of fact contained in the charge are true. The company's premises, however, are registered under the *Commerce* (*Meat Export*) *Regulations* of the Commonwealth, and the defence raised by the company is that s. 52*a* of the South Australian Act is inconsistent with those Commonwealth regulations and is therefore invalid by virtue of s. 109 of the Constitution of the Commonwealth. The prosecution denies that any such inconsistency exists, and says, further, that, if the inconsistency does exist, the Commonwealth regulations are not authorized by the statutes under which they purport to be made and could not lawfully be so authorized, because the making of them involves an excess of the constitutional powers of the Commonwealth. Two questions are thus raised. The first is whether there is an inconsistency within the meaning of s. 109. The second (which need not be considered unless the first question is answered in the affirmative) is whether the Commonwealth regulations are valid. The latter question is, on the view which I take, a question of "limits *inter se*". The former is not such a question.

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Fullagar J.

The regulations, so far as they refer to registration of premises for the slaughter of stock for export, are badly drawn and are not co-ordinated into a consistent whole. Some are expressed as conditions of registration; some are not so expressed but must probably be taken to be so intended; some are neither so expressed nor so intended but prescribe conditions which are to be observed in and about the actual slaughter of stock and subsequent operations.

It is not necessary to set out the material regulations in full, but it is necessary to examine closely their nature and content. By reg. 4B, which was introduced into Pt. I of the regulations on 7th May 1953, it is provided that the exportation of all meat, meat products or edible offal, is prohibited unless (a) the treatment and storage of the meat etc. has been carried out in an establishment registered in accordance with the regulations; (b) the provisions of the regulations have been complied with; and (c) the exporter has received an export permit in respect of the goods in accordance with the regulations. Regulation 5 provides that all establishments used for the slaughter, treatment and storage of meat, meat products or edible offal, for export shall be registered. This regulation is cast in a form which is generally considered objectionable, since it is impersonal and does not in terms cast any direct duty on any person. Such cases, however, are familiar enough, and I would think it clear that reg. 5 must be construed as forbidding any person to use any establishment for any of the purposes mentioned unless the establishment is registered. The use of premises for that purpose without registration will therefore be a breach of the regulations, for which s. 99 provides a penalty not exceeding twenty pounds.

Regulation 6 provides that applications for registration shall be in accordance with Form A. The form requires the nature of the proposed operations to be stated, and it is to be accompanied by plans and specifications of the premises. Regulation 6 also provides that there shall be issued to an "approved applicant" a certificate of registration in accordance with Form B, which shall specify, *inter alia*, all operations which may be conducted in the establishment to which it refers. In the present case the certificate of registration issued to the defendant company states that its premises are registered as "an establishment in which the following operations may be conducted:—slaughtering and freezing of mutton and/or lamb for export". Certain conditions are stated which are not material for present purposes. By reg. 7 an application for registration must be accompanied by, *inter alia*, complete plans and specifications of the establishment and a clear photograph of

the site, showing its relation to the land or other property adjoining the establishment. Regulation 9 provides that, where after the commencement of the regulations (they commenced on 30th March 1923) it is intended to erect premises to be registered, registration shall not be granted unless the secretary approves of the site prior to the erection of the premises.

Regulation 12 provides that no premises or buildings shall be registered unless they conform to such prescribed requirements as are applicable. Regulation 13 prescribes requirements with respect to places appointed by the secretary for the inspection of meat for export. Regulation 14 provides that no establishment shall be registered unless the site is such as to admit of ready and efficient drainage. It also prescribes distances which must separate buildings, yards and pens from any human habitation or any noxious trade establishment, and that the site is to be such as to allow an interval of at least twenty yards between the main building and the nearest public road. Regulation 15 deals with the floor area of killing, dressing and hanging rooms. It prescribes certain areas for floors and heights for walls, and it provides that the hanging room shall have not less than nine square feet for each carcase hung. The hanging rails are to be not less than three feet apart. Regulation 16 provides that, if meat is slaughtered for export, the establishment shall contain chilling, freezing or cold storage accommodation commensurate with its killing capacity. Regulations 17 to 21 inclusive contain other provisions which must be complied with if the operations to be carried on include chilling or freezing. Regulation 23 provides that the height of killing and dressing rooms shall be sixteen feet in the case of cattle, and ten feet in the case of sheep. The walls are to be of a height of not less than four feet, and solidly constructed of brick, masonry or concrete. Other matters of detail are provided for. Regulation 24 provides that the height of hanging rooms for cattle shall be not less than sixteen feet and for sheep not less than ten feet. Regulation 25 provides that chilling, freezing and cold storage rooms shall be constructed of concrete, brick or wood, and that the hanging rails in chilling rooms for cattle shall be not less than three feet apart and in the case of sheep not less than fourteen inches apart. By reg. 26 the rooms in which edible offal and edible fats are prepared are to be constructed of material similar to that prescribed for killing and dressing rooms. Regulation 27 requires ramps over which offal is conveyed to be constructed with a hard impervious surface of concrete or other suitable material. Regulation 28 contains detailed provisions with regard to sorting houses

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Fullagar J.

for offal and reg. 29 with regard to casing houses. Regulation 30 contains provisions with relation to the accommodation of employees engaged at the establishment. Regulation 31 provides that plant for the treatment of inedible offal shall be at least ninety feet distant from any building in which edible offal is prepared or stored for export. The buildings are to be constructed of materials similar to those prescribed for killing and dressing rooms. By reg. 32 the wall and floors of the killing and dressing rooms are to be rendered impervious and washable by means of cement rendering. Regulation 33 contains detailed requirements with regard to ventilation. Regulation 34 provides that wire fly-netting shall, if the secretary so directs, be provided over all openings and walls. By reg. 35 benches, tables and similar articles are to be so constructed as to be easily drained, removed and cleansed. Regulation 36 contains detailed provisions with regard to lighting. Regulation 37 provides that there must be to the satisfaction of the secretary air disconnection between compartments used for slaughter and preparation and storage of meat and those used for purposes of dressing rooms etc. Regulation 38 provides certain special sanitary and other requirements relating to premises where meat is preserved for export. These requirements are set out in great detail. Regulations 40 and 41 contain detailed provisions with regard to drainage and the handling and disposal of blood etc. Regulation 42 contains certain requirements with regard to water supply and fittings. Regulation 44 provides that yards, lairs and pens shall be provided, and the manner and materials of their construction are prescribed. Regulation 45 provides that ramps shall be constructed with a hard impervious surface of concrete or other suitable material and provided with raised kerbing. Regulation 46 provides that a suitable race or yard shall be provided for the inspection of stock before killing. Regulation 47 provides that the area of yards and holding pens shall be such as to allow of at least twenty square feet of floor space per head for cattle and six square feet per head for sheep. The floor area of pens is to be constructed of materials similar to those prescribed for the floors of killing and dressing rooms. There are also certain requirements with regard to drainage. Regulation 48 contains certain requirements with regard to the construction of partitions separating pens and ramps and the gates or doors leading from pens.

Part III of the regulations deals with " Supervision, Inspection, Preparation, Transportation, Marketing and Trade Description of Meat intended for Export ", and contains reg. 91, which provides that an export permit in accordance with form E shall be issued

by the inspector to the exporter in all cases in which the provisions of the regulations have been complied with and a note to that effect signed by an inspector has been made upon the face of the notice of intention to export which is required to be given.

The above summary, which gives only in bare outline the effect of a large number of regulations, is sufficient to show that they constitute an extremely elaborate and detailed set of requirements which must be complied with before registration can be obtained of premises to be used for the slaughter of stock for export. They relate to site, materials of construction, arrangement, dimensions and many other matters. It is an offence to use premises for the slaughter of meat for export unless the premises are registered. Registration cannot be obtained except upon compliance with all these detailed provisions, and in addition the applicant must be "approved". But, if all those provisions are complied with, an approved applicant is entitled to a certificate specifying the operations which may be conducted on the premises. In my opinion a State statute which has the effect of prohibiting the use of premises registered under the Commonwealth regulations for the very purpose for which they have been registered under those regulations is plainly inconsistent with those regulations.

It is, of course, possible to obey both laws. It is possible to refrain altogether from using premises outside the Metropolitan Abattoirs Area in South Australia for slaughtering stock for export as chilled or frozen meat. It is equally possible to comply with all the detailed requirements of the regulations and obtain registration thereunder, and then, after failing to obtain a licence under s. 52*a* of the South Australian Act, to use the premises for storing apples or not to use the premises at all. But it is now well settled that there may be inconsistency within the meaning of s. 109 between two laws, although it is quite possible to obey both. The test of inconsistency which is now generally applied was laid down in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1). It has been applied in a number of later cases: see especially *H. V. McKay Pty. Ltd.* v. *Hunt* (2); *Hume* v. *Palmer* (3); *Ex parte McLean* (4); *Colvin* v. *Bradley Bros. Pty. Ltd.* (5) and *Wenn* v. *Attorney-General (Vict.)* (6). In *Clyde Engineering Co. Ltd.* v. *Cowburn* (1), *Isaacs* J. said: "If . . . a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent

(1) (1926) 37 C.L.R. 466.
(2) (1926) 38 C.L.R. 308.
(3) (1926) 38 C.L.R. 441.
(4) (1930) 43 C.L.R. 472.
(5) (1943) 68 C.L.R. 151.
(6) (1948) 77 C.L.R. 84.

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Fullagar J.

upon the same field " (1). The test was analyzed and fully stated by *Dixon* J. in *Ex parte McLean* (2), in a passage which is often cited. His Honour said: " When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and s. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume* v. *Palmer* (3)). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter " (4).

Applying this test, it appears to me impossible to deny that the regulations evince an intention to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export. The extremely elaborate and detailed character of the regulations seems to me to be itself sufficient to compel this conclusion. Almost every requirement which occurs to one as a relevant requirement is prescribed. But this is not the only feature of the regulations which appears to me to compel the conclusion that there is inconsistency in s. 52*a* of the South Australian Act. It is true that the regulations do not in express terms provide that it shall be lawful for any person who has obtained the registration of premises to slaughter stock for export on those premises. But reg. 6 (2) requires the secretary to issue to an approved applicant a certificate of registration, and that certificate must specify the operations which may be conducted in the establishment to which it refers. According to the certificate held by the defendant company the operations which it may conduct on the premises are, as has been said, the slaughtering and freezing of mutton and/or lamb for export. It

(1) (1926) 37 C.L.R., at p. 489.
(2) (1930) 43 C.L.R. 472.
(3) (1926) 38 C.L.R. 441.
(4) (1930) 43 C.L.R., at p. 483.

is clearly contemplated that, when registration has been obtained, the operations referred to in the certificate may be lawfully conducted on the registered premises. Section 52*a* of the South Australian Act is a clear denial of any such permission. The case, indeed, is seen, I think, closely to resemble the case of *Colvin* v. *Bradley Bros. Pty. Ltd.* (1). In that case an order which had been made under s. 41 of the *Factories and Shops Act* 1912-1936 (N.S.W.) prohibited the employment of females on a milling machine. By an award of the Commonwealth Court of Conciliation and Arbitration the employment of females on certain classes of work, which included work on a milling machine, was permitted unless such work had been declared by a Board of Reference to be unsuitable. There had been no such declaration by any Board of Reference. It was held by this Court that the order in its application to persons covered by the award was inconsistent with that award and therefore, by virtue of s. 109, invalid.

It was said that the purpose and object of s. 52*a* was different from the purpose and object of the Commonwealth regulations. It was said that s. 52*a* was not concerned with the purity and quality of meat intended for export but was concerned with such matters as the suitability of the proprietor of the premises, the suitability of the site and similar matters of local concern. As to this there are two things to be said. In the first place the suitability of the applicant and the suitability of the site are plainly matters with which the regulations are concerned. In the second place, the discretion given to the Minister by s. 52*a* is absolute. It is true that he is required to consider the matters specified in sub-s. (2) of s. 52*a*, but subject to the proviso to sub-s. (2)—and, of course, to the requirement of good faith—the Minister of Agriculture may refuse a licence for any reason whatever which seems good to him. In particular, he could refuse a licence because he thought that a Commonwealth requirement, which had been complied with, was not sufficiently drastic. It should perhaps be added that the subject matter of the Act here is the same as the subject matter of the regulations—the use of premises for slaughtering stock for export. It is therefore unnecessary to consider whether the statement of *Latham* C.J. in *Colvin* v. *Bradley Bros. Pty. Ltd.* (2), that the " classification of statutes according to their true nature is . . . a matter that is irrelevant to any application of s. 109 " is not expressed somewhat too widely.

It was argued that reg. 103 indicated an intention on the part of the Commonwealth that State legislation on the subject matter

(1) (1943) 68 C.L.R. 151.

(2) (1943) 68 C.L.R., at p. 159.

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Fullagar J.

of the regulations could exist alongside the Commonwealth law. Regulation 103 provides that " where by the law of any State any goods are required to be inspected and approved by a State authority before export, and the Minister is satisfied that such inspection and approval are as efficient as inspection and marking under these regulations, the Minister may direct that such inspection and approval shall be accepted, wholly or partly, in lieu of examination and marking under these regulations ". No such conclusion as is suggested can, in my opinion, be drawn from reg. 103. In the first place, it is very limited in its scope and relates only to inspection and marking. In the second place, it is incapable to my mind of carrying the implication suggested. Indeed, I am not at all sure that it does not indicate a contrary intention, because it applies only where the Minister is satisfied with regard to State inspection and approval, and the intention seems to be that, in the absence of satisfaction and direction on the part of the Minister, the Commonwealth system is to supersede any State system. But all that reg. 103 really means is that, if satisfactory machinery happens to exist at any port, the Minister, in the interests of economy, may use it. It is impossible to imply an intention that the export of goods which have received a Commonwealth export permit may be prohibited by a State.

The conclusion that there is inconsistency, within the meaning of s. 109, between s. 52*a* of the South Australian Act and the Commonwealth regulations makes it necessary to consider the second question, which relates to the validity of the regulations. The regulations purport to be made under the *Customs Act* 1901-1953 and the *Commerce* (*Trade Descriptions*) *Act* 1905-1950. Only Pt. II of the regulations is directly relevant in the present case, and Pt. II is, in my opinion, within the power conferred in terms by s. 270 (1) (*c*) of the *Customs Act*. That provision, so far as material, authorizes the Governor-General to make regulations not inconsistent with the Act for prescribing " the conditions of preparation or manufacture for export of any articles used for food or drink by man ". The power given by s. 270, however, must be regarded as limited by the Constitution. The question therefore resolves itself into whether the regulations are within the constitutional power of the Commonwealth. If Parliament had enacted them directly, would they be valid ? The only power invoked, and, so far as I can see, the only relevant power, is that given by s. 51 (i.) of the Constitution to make laws with respect to trade and commerce with other countries.

Before considering the constitutional question it will be well to look again for a moment at the regulations and to see what is their general scheme and what they really do. In this connection it becomes necessary to look also at certain other regulations, viz. the *Meat Export Control* (*Licences*) *Regulations* made under s. 28 of the *Meat Export Control Act* 1935-1953.

What may be called the keystone of the *Commerce* (*Meat Export*) *Regulations* seems to be found in reg. 4B, which prohibits the export of meat, etc. unless (*a*) treatment and storage has been carried out in a registered establishment; (*b*) the provisions of those regulations have been complied with; and (*c*) the exporter has received an export permit. "Treatment and storage" do not include slaughter, but, since reg. 5 in effect prohibits slaughter for export in an unregistered establishment, the regulations will not have been complied with if slaughter has taken place in an unregistered establishment. It is to be noted, in addition, that reg. 4 of the *Meat Export Control* (*Licences*) *Regulations* prohibits the export of meat except by persons who hold licences, and reg. 7 of those regulations requires a licensee to comply with the *Commerce* (*Meat Export*) *Regulations*. The licence under the *Meat Export Control* (*Licences*) *Regulations* is in general terms, but an "export permit" is also required before any particular consignment may be lawfully exported. The issue of an export permit is provided for by reg. 91 of the *Commerce* (*Meat Export*) *Regulations* which, as has been noted, says that a permit shall issue if the regulations have been complied with.

So far the general structure, though somewhat complex and very elaborate in detail, seems clear enough. The export of meat is prohibited unless it was slaughtered in a registered establishment, and an establishment cannot be registered unless it complies with the prescribed conditions. The export of meat is also prohibited unless certain other prescribed conditions as to treatment, storage and so on, are complied with. And so far no ground for attack on the validity of the *Commerce* (*Meat Export*) *Regulations* appears. There is no suggestion of any ulterior objective behind the regulations: no such question as that which arose in *R.* v. *Barger* (1), or that which arose in *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (2), arises here. The Commonwealth is legislating to ensure that only meat of a certain grade and quality shall be exported, and the law is clearly a law with respect to trade and commerce with other countries. The power given by s. 51 (i.) extends to authorizing the total prohibition of the

(1) (1908) 6 C.L.R. 41. (2) (1939) 61 C.L.R. 735.

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Fullagar J.

export of any commodity, and *a fortiori* it includes a power to prohibit the export of any commodity except upon compliance with prescribed conditions.

But the regulations go further than this, and, indeed, if they did not go further, it might be less clear that they were inconsistent with s. 52*a* of the South Australian Act. Regulation 5 prohibits the use of any premises for the slaughter of meat for export unless those premises are registered, and a penalty is imposed by reg. 99 on any use of premises which is in breach of reg. 5. In fact, although the regulations were originally enacted in 1923, it was not until 1953 that reg. 4B was introduced, which expressly prohibits the export of meat etc. unless, *inter alia*, it was slaughtered in a registered establishment. It is true that reg. 91 (which provides for export permits) has been in force from the beginning, and reg. 4 of the *Meat Export Control (Licences) Regulations* has been in force since 1936. But the position originally was, and still is, that reg. 5 prohibits the use of premises for slaughter for export unless the premises are registered, and they cannot be registered unless they comply with a large number of prescribed conditions which descend to meticulous detail. The question which emerges is whether the Commonwealth power with respect to trade and commerce with other countries extends to authorizing legislation regulating and controlling the slaughter of meat for export. In my opinion it does so extend.

The question obviously tends to open up a wide field of speculation as to the extent of the power in question. But it will be wise, I think, to avoid that field, and to concentrate attention on the particular case before us and the particular commodity with which that case is concerned. It will be wise also, I think, to begin by obtaining as clear a conception as possible of what is meant by the expression "slaughter for export". It would perhaps have been better if we had had some evidence before us as to Australia's export trade in meat, and as to the processes involved in the killing and preparation of meat for export and for home consumption respectively. But it seems to me safe to say that Sir *Garfield Barwick* was entirely right when he said that the expression "slaughter for export" is used in the relevant legislation as a composite expression which would be understood objectively in the trade. Whether "slaughter for export" is taking place is not, from the point of view of the legislator, a question which depends entirely on some intention in the mind of the owner or slaughterer of a beast—an intention which may change from time to time as operations proceed. The whole process from killing to packing

will be conditioned in certain respects by the predetermined destination of the meat, and " slaughter for export " is, in the mind of the legislator, a definite objective conception distinct from slaughter for home consumption. It does not, of course, follow that any corresponding position exists with regard to any commodity other than meat. It may very well be, for example, that such an expression as " mining metals for export " or " sowing wheat for export " is meaningless except by reference to some subjective element.

Probably fifty years ago in the United States such legislation as that contained in the *Commerce* (*Meat Export*) *Regulations* would have been held to lie outside the federal commerce power. A sharp distinction seems to have been drawn between manufacture or production on the one hand and commerce, conceived essentially as the movement of goods, on the other hand : see, e.g. *Kidd* v. *Pearson* (1). Today, however, it seems most probable that such legislation would be held within the power to regulate commerce with foreign nations. It is possible indeed that the killing and treatment of stock for export might be regarded as themselves part of the course of commerce with foreign nations, but in any case I think they would be held to be matters within the commerce power : see, e.g., *Stafford* v. *Wallace* (2) ; *National Labor Relations Board* v. *Laughlin Steel Corporation* (3) and *United States* v. *Darby* (4). It was argued that the regulations in question here are a direct regulation of the very subject matter of the power, that they control steps taken in the actual course of trade and commerce with other countries. But, even if counsel for the State of South Australia be right in saying that the course of commerce with other countries does not begin until a later stage, I am of opinion that the regulations must be held valid on the broad general principle of constitutional interpretation adopted in the earliest days of this Court. In *D'Emden* v. *Pedder* (5), the Court accepted the famous enunciation of the principle by *Marshall* C.J. in *M'Culloch* v. *Maryland* (6), as " a most welcome aid and assistance " and said : " Where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every

(1) (1888) 128 U.S. 1, at pp. 20, 21 [32 Law. Ed. 346].
(2) (1922) 258 U.S. 495 [66 Law. Ed. 735].
(3) (1936) 301 U.S. 1 [81 Law. Ed. 893].
(4) (1941) 312 U.S. 100 [85 Law. Ed. 609].
(5) (1904) 1 C.L.R. 91.
(6) (1819) 4 Wheat. 316, at pp. 321-323 [4 Law. Ed. 579, at pp. 580, 581].

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Fullagar J.

control the denial of which would render the grant itself ineffective " (1).

It is true that the Commonwealth possesses no specific power with respect to slaughter-houses. But it is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported. Nor can the power, in my opinion, be held to stop there. By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. Such matters include not only grade and quality of goods but packing, get-up, description, labelling, handling, and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it. It seems clear enough that the objectives for which the power is conferred may be impossible of achievement by means of a mere prescription of standards for export and the institution of a system of inspection at the point of export. It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine. How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export. The " slaughter for export " of stock is such an act or process, and, in my opinion, the *Commerce (Meat Export) Regulations* are within the legislative power conferred upon the Commonwealth by s. 51 (i.).

The questions submitted to this Court should, in my opinion, be answered—

1. No.
2. No.

KITTO J. I entirely agree in the judgment of my brother *Fullagar* and have nothing to add.

TAYLOR J. The questions for decision in this case are whether s. 52a of the *Metropolitan and Export Abattoirs Act* 1936-1952 of the State of South Australia is inconsistent with any of the provisions of the *Commerce (Meat Export) Regulations* made pursuant to the

(1) (1904) 1 C.L.R., at p. 110.

Customs Act 1901-1952 and the *Commerce* (*Trade Descriptions*) *Act* 1905-1950 and, if so, whether the conflicting Commonwealth provisions are within statutory and constitutional power.

The defendant company, which owns and operates an abattoirs in South Australia outside the Metropolitan Abattoirs Area as defined by the first-mentioned Act, is the holder of a licence issued by a local governing authority pursuant to Pt. XXVII of the *Local Government Act* 1934-1952. This is the general condition upon which it is lawful to slaughter cattle, sheep, or swine within the local government area in which the defendant company's establishment is situated. Such licences may be issued in respect of premises which the authority is of the opinion " are suitable for the purpose, are situated in a convenient situation and conform to any by-laws in force in the area and to the provisions of the Health Act 1935 ". Licences so issued remain in force until 30th June next after the grant thereof. There is nothing in the *Local Government Act* to restrict the purposes for which slaughtering operations may be carried on pursuant to such a licence and if it were not for the provisions of s. 52*a* of the *Metropolitan and Export Abattoirs Act* the defendant company at its establishment might, apart from the effect of the relevant Commonwealth legislation, have lawfully slaughtered and prepared meat for export. It was, however, the holder also of a certificate issued pursuant to the *Commerce* (*Meat Export*) *Regulations* which certified that the company's premises " have been registered in the name of Noarlunga Meat Limited of Noarlunga as an establishment in which the following operations may be conducted : 'Slaughtering and freezing of Mutton and/or Lamb for export' ". It is unnecessary to specify the several conditions subject to which the certificate was granted.

Before considering the operation and effect of the last-mentioned regulations and the certificate issued thereunder it is necessary to make reference to some of the provisions of the *Metropolitan and Export Abattoirs Act*. By Pt. IV of the Act the Metropolitan and Export Abattoirs Board is empowered to erect and establish abattoirs and to execute certain incidental works and there is conferred upon the Board the exclusive right of conducting slaughtering operations in the metropolitan area (ss. 82 and 70). But in spite of the provisions of s. 6, which stipulate that the provisions of the Act shall apply within the Metropolitan Abattoirs Area, the Act makes express provision for the control of some slaughtering activities outside that area. Section 50 provides that " except as provided by s. 50*a* " the Board shall have the sole right within the Metropolitan Abattoirs Area to slaughter stock for export as fresh

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Taylor J.

meat in a chilled or frozen condition, whilst s. 52*a* provides that no person shall in any part of the State outside that area use any premises for the purposes of slaughtering stock for export as fresh meat in a chilled or frozen condition unless he is the holder of a licence from the Minister of Agriculture authorizing him to use those premises for that purpose. The Minister is given a discretion to grant or refuse any application for a licence under this section after due consideration of a number of matters which are specified in sub-s. (2). It is the prohibition in the latter section which, it is said, the company failed to observe and which is said to be in conflict with the relevant Commonwealth legislation.

From the brief references to the State legislation which I have made it is apparent that, with some immaterial exceptions, slaughtering operations in South Australia may not be carried on within the Metropolitan Abattoirs Area by any person other than the Board and that, outside that area, they may not be carried on by any person unless he is the holder of a licence under the *Local Government Act* (or certain other legislation to which it is unnecessary to refer) or, in the case of slaughtering for export, he is the holder of a licence under s. 52*a* of the *Metropolitan and Export Abattoirs Act*. Since the defendant company's operations were carried on outside the last-mentioned area and it was the holder of an appropriate licence under the *Local Government Act*, it was entitled lawfully to engage in slaughtering operations but, as it did not hold a licence under s. 52*a* of the *Metropolitan and Export Abattoirs Act*, it was subject to the prohibition erected by that section. This at least was the submission of the complainant. But the defendant contended that being the holder of a certificate issued under the Commonwealth regulations it needed no further lawful authority to engage in the operation of slaughtering and treating meat for export. The effect of the issue of that certificate was, it was contended, to confer upon the defendant company lawful authority to conduct the operations therein specified one of which is, of course, the operation the subject of the present charge. If this contention is sound and the relevant regulations are within power then the charge against the defendant company is not well founded and must be dismissed.

It may be contended that, in terms at least, the certificate purports to confer a licence to conduct the operation of slaughtering and freezing mutton and lamb for export. This, however, by no means disposes of the difficulty in the case, for the extent to which the certificate can operate as a licence to perform this operation can be ascertained only by a consideration of the provisions upon which

its efficacy as a licence depends. Regulation 5 provides that all establishments used for the slaughter, treatment and storage of meat, meat products or edible offal for export shall be registered. Provision is made by reg. 6 for the making of applications for registration and for the issue of certificates of registration. The form in which such certificates should issue is prescribed and the certificate issued to the defendant company is in that form. Divisions 2, 3 and 4 of Pt. II prescribe in considerable detail standard specifications with respect to the construction, ventilation, sanitation and methods of operation of registered establishments, whilst Pt. III contains extensive provision with respect to supervision, inspection, preparation, transportation and the marking of meat intended for export. It is unnecessary to refer to these provisions in detail and it is sufficient to say that the conditions prescribed and the provision made for supervision and inspection are of a most comprehensive and exhaustive character. Regulation 91 makes provision for the issue of export permits to exporters in all cases "in which the provision of these regulations have been complied with", though until May 1953 the regulations themselves do not appear expressly to have placed any direct embargo or prohibition on the export of meat. In that month, however, reg. 4B (1) was promulgated. That regulation is in the following terms:—"The exportation of all meat, meat products or edible offal is prohibited unless—(a) the treatment and storage of the meat, meat products or edible offal has been carried out in an establishment registered in accordance with these regulations; (b) the provisions of these regulations have been complied with; (c) the exporter has received an export permit in respect of the goods in accordance with these regulations, and the export permit is in force at the time of exportation of the goods."

But prior to the promulgation of this regulation the *Meat Export Control (Licences) Regulations* were in operation and reg. 4 of those regulations prohibited the export of meat except by persons who held licences. These regulations came into force in June 1936 and, apparently, are still in force. We have not been told, nor have I been able to discover, whether prior to that date the exportation of meat without a licence was forbidden by proclamation pursuant to s. 112 of the *Customs Act* before its amendment in 1934, but upon the view which I have formed of the operation and effect of the *Commerce (Meat Export) Regulations* this is of little consequence.

The contention that the issue of a certificate of registration issued pursuant to the regulations operated to confer upon the defendant

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Taylor J.

company lawful authority to conduct the operations therein specified asserts, in effect, that the regulations evidence an intention on the part of the Commonwealth to assume the supervision and control of all establishments for the slaughtering of stock and the preparation of meat for export. To this end, it is said, the regulations exhaustively define the standard requirements for such establishments and have provided for the issue of licences to approved applicants. In one sense much of this may be conceded without damage to the complainant's case, for a great deal depends upon what is meant by the assumption of " supervision and control " of such establishments. If this means that the Commonwealth intended to constitute itself the sole licensing authority for such establishments, and if the effect of the regulations is to carry this intention into operation, then it may be assumed that the issue of a licence would have the effect contended for on behalf of the defendant. In those circumstances there would be a clear conflict between the relevant regulations and s. 52*a* of the *Metropolitan and Export Abattoirs Act*. But it does not necessarily follow that if this view be rejected there is no such conflict. It is sufficient for the defendant to establish either that the issue of a certificate has such an effect or, alternatively, that the effect of the regulations is to prohibit the use of establishments which are not registered thereunder for the purpose of slaughtering stock and the preparation of meat for export. In the latter case they would also clearly conflict with the provisions of s. 52*a* which purport to empower the Minister to issue licences authorizing the use of premises for that purpose.

In considering the problem it is not without significance to observe that the regulations do not contain any provision which purports expressly either to confer upon the holder of a certificate authority to slaughter or treat meat for export or to prohibit the use of establishments for those activities. Regulation 5 merely provides that all establishments used for the slaughtering, treatment and storage of meat, meat products or edible offal for export shall be registered, whilst reg. 6 provides machinery for the issue of certificates of registration. A perusal of the regulations discloses that almost invariably they are not couched in the language of command but rather in the form of specifications, some of which appear to be designed as conditions precedent to the registration of an establishment and others as conditions precedent to the right to obtain an export permit under reg. 91 in respect of meat processed in a registered establishment. In other words, the regulations, in the main, present themselves not as rules of conduct with which

the regulations imperatively require compliance, but as the antecedent specification of conditions the fulfilment of which will entitle an applicant to the issue of an export permit at the appropriate time. A few individual regulations, and notably reg. 10, are not couched in language which is appropriate to such an understanding of them, but they are not in question in this case and they are insufficient, I think, to require modification of the general view which I have expressed. The object which the regulations appear to be designed to achieve might have been achieved in other ways. It might have been brought about by a simple prohibition of export except in cases where the commodity had been processed under specified conditions designed to ensure appropriate export standards and this, of course, might have been done without any provision for the registration of slaughtering establishments. But I see very little, if any, difference between such a plan and that which is carried into effect by the regulations. In the main the regulations merely prescribe conditions designed to secure standards of purity, quality and condition at the point of export and these are the conditions which, if observed, will entitle an applicant to an export permit. Again, in the main, the only sanction for the observance of these conditions, including that of registration, is that failure to observe them will or may result in the refusal of such a permit. If this be the correct view of the effect of the regulations then it is quite clear that their provisions were not intended to supersede, *pro tanto*, all other existing requirements for the establishment of slaughter-houses. Indeed, it clearly appears that when the regulations came into operation there was in existence in South Australia, and no doubt in the other States, legislation providing for the licensing and supervision of abattoirs generally and it should not, in the absence of a clear indication, be inferred that it was the intention of the Commonwealth to over-ride this legislation so far as the slaughtering of stock for export was concerned. If such a result was intended I should have expected the regulations expressly to provide that the holder of a certificate of registration might lawfully engage in that operation. The meaning of reg. 5 is, of course, a critical matter in the case and I am unwilling to recognize it as the cornerstone of a licensing scheme intended to supersede the legislation of the State.

In these circumstances the form of the certificate of registration adds nothing to the defendant's arguments. It is merely a certificate which evidences the fact that for the purposes of the regulations the defendant company's establishment is a registered establishment.

H. C. OF A. 1954.

O'SULLIVAN v. NOARLUNGA MEAT LTD.

Taylor J.

On the view which I have formed it is, I think, quite immaterial that s. 52*a* deals exclusively with the slaughtering of meat for export or that the grant of a licence thereunder is in the discretion of the Minister.

For the reasons which I have given I am of opinion that there is no conflict between the relevant State and Commonwealth legislation and it becomes unnecessary to consider whether the provisions of the *Commerce (Meat Export) Regulations* or any of them are invalid. Accordingly I am of opinion that the first question raised by the special case should be answered in the affirmative, and, since there is no dispute on the facts of the case, the second question should also be answered in the affirmative.

The questions in the special case dated 29th March 1954 *which special case stood removed into this Court under s.* 40A *of the Judiciary Act* 1903-1950 *are answered as follows:—*

Question 1—*No.*

Question 2—*No.*

With these answers the cause is remitted to the special magistrate of the Court of Summary Jurisdiction at Adelaide.

The complainant to pay the costs of the special case.

Solicitor for the complainant, *R. R. St. C. Chamberlain*, Crown Solicitor for South Australia.

Solicitors for the defendant, *Wallman & Palmer*, Adelaide.

Solicitor for the State of New South Wales, intervening, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitor for the State of Tasmania, *H. Zelling*, intervening.

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

J. B.