

[HIGH COURT OF AUSTRALIA.]

FISH BOARD COMPLAINANT ;

AND

PARADISO DEFENDANT.

ON REMOVAL FROM A COURT OF PETTY SESSIONS OF
QUEENSLAND.

Constitutional Law (Cth.)—Freedom of trade, commerce and intercourse among the States—State Act—Control of fish—Prohibition on sale unless sold under direction of Fish Board—Fish brought from one State into another—Delivery pursuant to contract of sale—Whether required to be sold under direction of board—Complaint—Removal into High Court—Dismissal—The Constitution (63 & 64 Vict. c. 12), s. 92—Judiciary Act 1903-1955 (No. 6 of 1903—No. 35 of 1955), s. 40—The Fish Supply Management Acts 1935 to 1951 (Q.), ss. 27 (1), 27B.

Section 27 (1) of *The Fish Supply Management Acts 1935 to 1951 (Q.)* provides : “ No person shall in any district sell or purchase any fish unless such fish have first been brought to a market in that district and there sold at a sale conducted by the board . . . ”.

Held, by Dixon C.J., Williams, Webb, Fullagar, Kitto and Taylor JJ., McTiernan J. expressing no opinion, that the sub-section, in so far as it purports to prevent a purchaser of fish in the course of inter-State trade from dealing with it upon its delivery to him in Queensland otherwise than by placing it at the disposal of the board, has an immediate and direct impact upon inter-State trade and constitutes an infringement of s. 92 of the Constitution ; by McTiernan J. that the sub-section is not intended to apply to fish other than fish from local sources.

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Aug. 14-16 ;
MELBOURNE,
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REMOVAL under s. 40 of the *Judiciary Act 1903-1955*:

Upon a complaint made under s. 27 (1) of *The Fish Supply Management Acts 1935 to 1951 (Q.)* by the Fish Board by David Herbert Pluckrose, its secretary, Sam Paradiso was charged before the Court of Petty Sessions, Brisbane, that on 29th February 1956, at Kedron, Brisbane, he did in the Metropolitan Fish Supply District

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sell fish, such fish not having first been brought to a market in that district and there sold at a sale conducted by the board, contrary to the said Acts. The defendant pleaded not guilty.

At the close of the defendant's case the further hearing of the charge was adjourned to a date to be fixed, whereupon the defendant applied on motion to the High Court for and obtained an order pursuant to s. 40 of the *Judiciary Act* 1903-1955 removing the cause into the High Court, upon the ground that such cause involved the interpretation of the Constitution of the Commonwealth and in particular s. 92 thereof.

The relevant facts and statutory provisions are sufficiently set forth in the judgments of the Court hereunder.

C. G. Wanstall Q.C. (with him *M. B. Hoare*), for the defendant. The statutory scheme disclosed by ss. 27, 27A and 27B of *The Fish Supply Management Acts* 1935 to 1951 infringes s. 92 of the Constitution by imposing a burden which, although *prima facie* imposed in relation to an act of intra-State trade, has the necessary effect *qua* the importer of rendering his freedom completely illusory. Section 27 takes as the criterion of imposition of the burden the circumstance of the prior acquisition of the fish by the importer, and he is required to part with the possession of his property as a first condition of complying with the law. The obligation of s. 27 first applies to the importer ; it cannot by virtue of s. 2A of the Acts and s. 92 apply to his supplier. The word " sold " in s. 27 (1) has its ordinary meaning (*Cam & Sons Pty. Ltd. v. The Chief Secretary of New South Wales* (1)), so that there must occur at the board's market a real sale according to law, but because the defendant already has property in the fish there cannot ever be a sale in law to him and consequently he cannot bring about the only condition which will enable him to retain the fish as trading stock in his retail business. Being thus forbidden to retain this fish for sale in the course of his retail trade, s. 92 has been infringed or else the Acts must be read down to exempt him from compliance. Upon the assumption that a notional sale to the defendant can be made to free the fish for subsequent re-sale, the defendant cannot buy the fish unless he holds a distributor's licence, the grant of which is in the unfettered discretion of the board which may impose such conditions on any licence granted as it pleases. The method of sale of fish and the quota to be sold are both matters resting with the board, so that the defendant could thereby be prevented from buying his own fish and releasing it for re-sale in his retail trade. Thus the legal effect,

as distinct from any economic consequence, of ss. 27 and 27A is to prohibit absolutely the retail selling of this fish by the defendant, who has imported it for that purpose only. Further, the sections require compliance with conditions which are not merely regulatory but which offend s. 92. The sections are no less offensive to s. 92 in that they produce the results outlined above by a circuitous rather than direct means. [He referred to *Grannall v. Marrickville Margarine Pty. Ltd.* (1); *Hughes & Vale Pty. Ltd. v. State of New South Wales* [No. 2] (2).] The activity of the defendant is wholly related to the conduct of his business and the necessity for obtaining continuous supplies of fish. [He referred to *Reg. v. Wilkinson*; *Ex parte Brazell, Garlick and Coy* (3).] If the right to resell fish is absolutely prohibited because of the impossibility of making a sale at market, the position is no different from what it would be if s. 27 simply prohibited any sale of fish at all in Queensland, in which case s. 92 would be infringed although s. 27 had a general application both to domestic and imported fish. The obligation sought to be enforced by this prosecution is a real deterrent to an inter-State trader in fish. [He referred to *Hughes & Vale Pty. Ltd. v. State of New South Wales* (4).] Section 27 puts a higher burden on the importer as an importer, because he is the first person on whom the section can operate, there being no obligation on the person outside the State from whom the fish was brought to comply. The higher burden is imposed upon the importer because he can never avail himself of the release from the offence in that he has a reasonable belief that some other person had brought the fish to market. The section is not regulatory, for it does not permit his trade to continue as trade but brings it to an end. The kind of control here imposed is in no way like a price-fixing control. [He referred to *Wragg v. State of New South Wales* (5); *McNee v. Barrow Bros. Commission Agency Pty. Ltd.* (6).] The principle of *Vacuum Oil Co. Pty. Ltd. v. State of Queensland* (7) applies to this case. [He referred to the *Vacuum Oil Co. Case* (8).] The effect of this case is shown by *Williams v. Metropolitan and Export Abattoirs Board* (9). [He referred to *Fergusson v. Stevenson* (10); *Grannall v. Marrickville Margarine Pty. Ltd.* (11).] The former case shows that something which is admittedly not an act of inter-State trade itself but an inseparable consequence of the inter-

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(1) (1955) 93 C.L.R. 55, at p. 78.

(2) (1955) 93 C.L.R. 127, at pp. 205, 206.

(3) (1952) 85 C.L.R. 467, at pp. 483, 484.

(4) (1954) 93 C.L.R. 1, at p. 24.

(5) (1953) 88 C.L.R. 353, at pp. 397-399.

(6) (1954) V.L.R. 1, at pp. 13, 14.

(7) (1934) 51 C.L.R. 108.

(8) (1934) 51 C.L.R., at pp. 126-128.

(9) (1953) 89 C.L.R. 66, at pp. 75, 76.

(10) (1951) 84 C.L.R. 421, at p. 435.

(11) (1955) 93 C.L.R., at p. 81.

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State transaction is brought within the immunity of s. 92. The defendant's business is the importation and sale of fish and that business is brought to an end by prohibiting the sale. [He referred to *Hospital Provident Fund Pty. Ltd. v. State of Victoria* (1); *Wilcox Mofflin Ltd. v. State of New South Wales* (2).] Section 2A must be applied at the very beginning of the defendant's dealing with the fish in Queensland and as from that moment the Act has no application to anything which he does with it. The transaction by which the defendant got the property in the fish and took it into his possession is excluded by s. 2A from the operation of s. 27. Once it has been shown that the defendant is exempt from the operation of the section, the Acts cease to apply in any relevant particular. The proper construction of s. 27 (1) and the word "first" in it shows that it is intended to operate in conjunction with s. 27B and that "first" means in effect on landing or at all events as a first step before anything is done commercially to dispose of the fish. So construed, fish, the subject of inter-State trade, could not first have been brought to a market because they were first dealt with commercially in Queensland under the protection of s. 92 when they were delivered to the defendant on sale. Section 2A would take them out of the operation of s. 27 (1) and that section should be read down so that there would be no offence here. No obligation here attaches to the defendant in relation to the fish so that the defendant is free to sell.

T. D. McCawley Q.C. (with him *B. M. McLoughlin*), for the complainant. The word "first" in s. 27 (1) has the meaning which it bears in s. 26, namely previously. If there has been a previous sale the fish may be freely dealt with. The first sale of the fish which occurred here took place on the floor of the market in Queensland when the agent sold to the defendant. That sale is not caught by the legislation, but the second sale by the defendant to the inspector is. It is sought to give this sale an inter-State character, but it has none. What is here sought to be done is to extend the doctrine of *W. & A. McArthur Ltd. v. State of Queensland* (3) further than it goes at the present time. Nothing in that case suggests that this second sale cannot be caught by State legislation. The State legislation does not have regard to any inter-State element in the transaction; it affects all sales whether intra-State or inter-State. In *James v. The Commonwealth* (4) the Privy Council treats the *Vacuum Oil Co. Case* (5) as a case of a special burden on goods

(1) (1953) 87 C.L.R. 1, at pp. 36, 37.

(2) (1952) 85 C.L.R. 488, at pp. 512, 520, 521, 523, 533, 534, 537, 542.

(3) (1920) 28 C.L.R. 530.

(4) (1936) 55 C.L.R. 1, at pp. 52, 59.

(5) (1934) 51 C.L.R. 108.

simply because they came from another State. No such burden is here placed on this fish because it comes from New South Wales. Once the fish comes out of inter-State trade and enters the domestic market it must be treated in the same manner as Queensland fish. It is not a burden on the sale of the fish to Paradiso to attach to it the consequence that it cannot be sold in Queensland otherwise than through the marketing system. The legislation is not aimed at inter-State fish, though it may have an indirect effect upon it. The severability clause operates to leave unimpaired the inter-State sale and the section then attaches to the first non-inter-State sale. The defendant was at liberty to consume these fish or to re-consign them to the inter-State market, but if he retains them for sale in Queensland he is obliged to obey the statute. This view is justified by the attitude which this Court has previously taken to first sales. The re-sale of this fish in Queensland is purely an intra-State transaction. [He referred to *Williams v. Metropolitan and Export Abattoirs Board* (1).] The distinction between sales where goods are ordered upon condition that they come from another State and sales where the goods are to the knowledge of all concerned coming from another State is a very fine one. In previous cases on any interpretation of s. 92 no legislation has been held invalid unless the fact of importation is in some way or other made to condition the imposition of the burden. The legislation does not operate on the importation of New South Wales fish, and if it does it is regulatory and not burdensome. The defendant is perfectly free to get fish from outside Queensland and his personal right under s. 92 to do so is unimpaired. It may be that his right is less valuable than it would otherwise have been, but it still exists. The fact that the legislation deals without discrimination with both Queensland and non-Queensland fish is a factor for consideration. [He referred to *Wragg v. State of New South Wales* (2).] Section 2A eliminates inter-State sales, and when the operation of that section is spent the Act takes full effect and all its incidents attach to subsequent sales. If there was a discriminatory scheme regard would be had to the circuitry and deviousness of the means adapted, but if it is a non-discriminatory scheme the Court would not regard as devious or circuitous a route which incidentally reached the same result. The complainant relies upon *Williams v. Metropolitan and Export Board* (3).

C. G. Wanstall Q.C., in reply.

Cur. adv. vult.

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(1) (1953) 89 C.L.R. 66, at pp. 70, 71, 72, 73.

(2) (1953) 88 C.L.R. 353, at p. 398.

(3) (1953) 89 C.L.R. 66.

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The following written judgments were delivered :—

DIXON C.J., WILLIAMS, WEBB, FULLAGAR, KITTO AND TAYLOR JJ.

The defendant in these proceedings is the proprietor of a retail fish shop near Brisbane and he was, at all material times, the holder of a retail distributor's (shop) licence issued pursuant to *The Fish Supply Management Acts 1935 to 1951 (Q.)*. In the course of his business, on 29th February 1956, he sold a fish to an inspector appointed under and for the purposes of the Acts referred to. The sale took place at the defendant's shop, the fish, the subject of the sale, being one of several purchased by the defendant from Clarence River Co-operative Limited, a co-operative society which, apparently, had established and was operating, in New South Wales, a market for the sale of fish pursuant to approval under s. 2 of the *Co-operation (Amendment) Act 1949 (N.S.W.)*. Substantially the business of the company was that of selling fish taken by its members and other licensed fishermen. It was in the course of this business that the company sold to the defendant the fish in question which, together with the total consignment purchased by him, was transported from New South Wales by the company's agents into Queensland, where, after being subjected to an examination, at the fish market in South Brisbane, to ascertain its suitability for human consumption, it was delivered by the company to the defendant.

Subsequently to the sale by the defendant a complaint was laid on behalf of the Fish Board, a corporation constituted by the Acts first above referred to, charging that the defendant, in the Metropolitan Fish Supply District, sold fish "such fish not having first been brought to a market in that district and there sold at a sale conducted by the Board". After evidence had been given the complaint was removed into this Court under s. 40 of the *Judiciary Act*.

The charge was laid under s. 27 (1) of *The Fish Supply Management Acts* which reads as follows :—" 27. (1) No person shall in any district sell or purchase any fish unless such fish have first been brought to a market in that district and there sold at a sale conducted by the board." This provision is one of several in the Acts which are designed to control the distribution of fish throughout the various fish supply districts established under the Act. That this is the substantial object of the Act is not in dispute and it is unnecessary to refer to the provisions of the Acts in any great detail. Sections 27 and 27B, however, should be set out in full before entering upon a discussion of the questions involved. Those sections are in the following terms :—

“ 27. (1) No person shall in any district sell or purchase any fish unless such fish have first been brought to a market in that district and there sold at a sale conducted by the board :

Provided that the board, with the approval of the Minister, may from time to time exempt from the provisions of this sub-section, for such period, in such form, and subject to such terms and conditions as the Minister approves, any district or any part or parts of any district comprising all or any seaside areas or any local authority areas or parts of local authority areas in that district.

Notice of each and every such exemption shall be published in the *Gazette* and thereupon shall be judicially noticed.

(2) As far as possible any species of fish for sale brought to a market and certified as fit for human consumption shall be sold in the order of priority in which it has been brought to that market.

At each and every market the board shall have power to conduct all sales of fish therein by public auction or otherwise than by public auction and subject to such terms and conditions as it may, in its absolute discretion, deem fit to impose, and may in its absolute discretion determine the manner of such sales and the order of priority in which fish has been brought to that market.

(3) Any approval by the Minister under the proviso to sub-section one of this section may be based upon—(i) The average consumption of fish during such period as the board shall fix in the seaside area or local authority area or part of a local authority area concerned ; or (ii) The average catch of fish during such period as the board shall fix by fishermen operating from the seaside area or local authority area or part of a local authority area concerned ; or (iii) Such other basis as the board shall think fit in relation to the seaside area or local authority area or part of a local authority area concerned.

(4) A person shall not be convicted of the offence that in any district he did purchase fish contrary to the provisions of sub-section one of this section if he proves that he did not know and could not with reasonable care have ascertained that the fish the subject of the proceeding had not first been brought to a market in that district and there sold at a sale conducted by the board.”

“ 27B. Where a depot has been established in a district all fish intended for sale in any district (whether in that district or in any other district) landed in the seaside areas, local authority areas, or parts of local authority areas in the district adjacent to such depot shall be brought to the depot.

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Any person refusing or failing to observe the provisions of this section shall be guilty of an offence, and shall be liable to a penalty not exceeding twenty pounds.

Any person who purchases any fish required by this section to be brought to a depot which were not brought to that depot shall be guilty of an offence, and shall be liable to a penalty not exceeding twenty pounds :

Provided that a person shall not be convicted of purchasing any such fish if he proves that he did not know and could not with reasonable care have ascertained that the fish had not been brought to such depot."

Provision is made by s. 27A for the issue of what are called wholesale distributors' licences, retail distributors' (shop) licences and retail distributors' (hawkers') licences and, by sub-s. (3) of that section, it is provided that a retail distributor's (shop) licence shall authorise the holder of that licence to purchase, for the purpose of sale directly to consumers, fish at any market in the district or in the part of a district specified therein, in accordance with the terms and conditions, if any, set out in that licence, and to sell that fish by retail from a shop at the address specified in the licence.

The evidence in the case shows the course of business between the defendant and the company to have been as follows. It was the practice of the Brisbane representative of the company, one Kingston, to call upon various retailers of fish in Brisbane each Monday morning for the purpose of ascertaining their requirements for the following week. At the same time he would present accounts for supplies delivered during the previous week and collect the amounts outstanding. Having ascertained the retailers' respective requirements he would telephone the company's office at Maclean (in New South Wales) and communicate to an official of the company the details of each customer's order. Thereupon the orders would be made up and despatched by road transport to Brisbane together with an aggregate manifest for the carrier and individual invoices for each customer. The consignment would first of all be taken to the South Brisbane fish market for inspection pursuant to s. 26 of the Acts and, thereafter, Kingston would make deliveries to each retailer pursuant to each individual order. The fish the subject of the present charge was purchased from the company in accordance with this practice and it seems clear enough that it was brought into Queensland and there delivered to the defendant pursuant to a contract of sale made between him and the company.

That, until the delivery of the fish to the defendant, the fish was in the course of inter-State trade was not contested by counsel for the board. It was also conceded that s. 27 (1) of the Acts and other associated provisions could not apply to the incidents of the sale and delivery to the defendant. These concessions were made, no doubt, in view of the decision of this Court in *Cam & Sons Pty. Ltd. v. The Chief Secretary of New South Wales* (1). But it is contended that s. 27 (1) and other relevant provisions of the Act apply to every sale made subsequently to the point of time at which fish, the subject of an agreement such as that proved in the present case, cease to be in the course of inter-State trade. The sale by the defendant is, of course, said to have been made subsequently to such a point of time. To support this contention the provisions of s. 2A of the Acts are relied upon but there are, at the very least, grave difficulties in the way of producing this result by any application of that section, particularly if it should be thought that the agreement between the defendant and the company resulted in an actual first sale in Queensland. It is, however, unnecessary to pursue this point for the case is capable of being decided upon, and should be decided upon, a much broader basis.

The prohibition contained in s. 27 (1) is a conditional prohibition against the sale or purchase of fish in any fish supply district and unless the specified condition has been observed any such sale or purchase is unlawful. No difficulty arises in applying the section to cases where no element of inter-State trade is present but difficulties resulting from the nature of the condition immediately obtrude themselves in cases such as the present. It may be conceded that the sale the subject of the charge against the defendant was an intra-State transaction and, as such, that it was, in general, subject to control by the State legislature. But when the sub-section as a whole is considered it appears quite clearly not as a provision the object of which is to make it unlawful for retailers to sell fish in Queensland, but rather as a provision designed to ensure that all fish in Queensland shall be initially distributed in each particular district by means of sales conducted by the board. This view, which is apparent from the terms of the sub-section itself, is confirmed by the marketing provisions of the Acts as a whole. In its application to the circumstances of the present case the effect of s. 27 (1)—if indeed, it can be read down pursuant to s. 2A in the manner suggested—was to render the sale by the defendant unlawful simply because he had not caused it to be brought, first, to

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the market in the district and there sold at a sale conducted by the board. This, of course, means that the defendant never was at liberty to sell the fish in question except in this manner. Yet it is contended on behalf of the board that such a provision left the defendant's inter-State trade untouched. He was, it is said, perfectly free to buy fish from the company and to have it delivered to him in Brisbane; only after delivery did the provisions of s. 27 (1) commence to have an impact on his trade. This may be literally true but, as we understand the argument, the provision can say no less to persons in the position of the defendant than "Although you may purchase fish for delivery from New South Wales and although you may have it delivered to you in Queensland you must immediately allow the board to sell it in the market on your behalf." In terms s. 27 (1) operated to prohibit the sale by the defendant of the fish ordered by him as from the moment of its entry into Queensland and the event which attracted the prohibition was its entry into that State. Such an operation is, however, denied to the sub-section by s. 1 (see *Cam & Sons Pty. Ltd. v. The Chief Secretary of New South Wales* (1)). Nevertheless, it is said, from the moment the fish ceased to be in the course of inter-State trade the defendant was subject to the impact of the prohibition erected by the sub-section. Of course, if the sub-section had provided that all fish in or coming into Queensland, whether in the course of inter-State trade or not, should be delivered to the board for sale there could be no doubt that it would collide with s. 92. Indeed we do not understand that proposition to be in dispute. But what difference is there between such a provision and that now under consideration? In each case the plain object is to compel the purchaser to place his property in the disposition of the board; the only difference is in the sanction provided. In the one case a failure to deliver to the board goods in the course of inter-State trade would be punishable by such penalty as might be provided whilst, in the circumstances of the present case, the prohibition against re-selling goods purchased for re-sale serves precisely the same purpose. In the former case, of course, no option is given to the trader; he must, under penalty, comply with the statutory requirement. In the latter case, however, the Acts do not directly and imperatively require fish to be delivered to the board; the trader is free so to deliver it or not as he pleases. But he is told that unless he does he shall not be at liberty to deal with it. The distinction is, however, but a matter of words and, in truth, s. 27 (1), as the respondent

seeks to construe it, does not give any practical option to the trader. In each case the impact on inter-State trade is, in our opinion, immediate and direct and constitutes an infringement of s. 92. Accordingly the complaint should be dismissed.

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McTIERNAN J. In this case I would first construe sub-s. (1) of s. 27 of *The Fish Supply Management Acts* without reference to s. 92 of the Constitution. It is an obscure sub-section and it must be borne in mind that it is penal. Does it apply to a sale of fish caught outside Queensland? Doubtless, such fish may be brought to a "market" of the Fish Board, and there released by it for wholesale or retail distribution in Queensland, according to the marketing procedure established by the Act. But is it compulsory first to bring such fish there and have them sold by the board?

Sub-section (1) of s. 27 applies only to sales or purchases in a fish supply district. There is no provision in the Act stating to what market conducted by the board in a fish supply district, fish caught outside Queensland are to be brought. How, in the case of such fish, is the condition that fish are to be brought to a market, if applicable, to be applied? If it is applicable to such fish, it would seem that the Act leaves open the question as to what market they are to be brought. But arguing from s. 27B, it is apparent that the Act contemplates a more orderly scheme of marketing in the case of local fish than leaving the fishermen or the supplier free to choose the market from which any fish in his hands is to be distributed for wholesale or retail sale. Section 27B applies to "all fish intended for sale . . . landed in the seaside areas, local authority areas etc." These areas are clearly within the territorial limits of Queensland. Section 27B says that where a "depot" (another name for "market" according to s. 2) has been established by the Fish Board in a fish supply district, all such fish shall be brought to a depot described as "adjacent". Section 27B determines the market to which they are to be brought for the purposes of sub-s. (1) of s. 27.

It has been stated that sub-s. (1) of s. 27 is a penal provision. I think it is not clear that the intention of the Act is to force fish from external sources, as well as locally caught fish, through the markets of the board. If sub-s. (1) of s. 27 does intend that consequence, the provision makes it a matter merely of practical necessity rather than of legal obligation. In the case, however, of locally caught fish, steps necessary to channel it through the markets of the board are, by s. 27B, made a matter of legal obligation. Why should there be this difference if the intention of sub-s. (1) of s. 27 is to penalise the sale of either category of fish if the conditions

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stated in the sub-section have not been observed? I think that it is necessary to proceed upon the view that the intention of the Act is not to subject fish from external sources to compulsory marketing control. This view raises no doubt of the application for example of s. 26 to such fish.

Counsel for the Fish Board stated in the course of argument that the circumstances in reference to which the Act was passed, were that the supply of fish from Queensland fisheries is inadequate to meet the demand of consumers, and that unfair competitive buying of the local supply had to be suppressed. It is reasonable to say, I think, that while these circumstances might call for compulsory marketing provisions dealing with fish from local sources, they do not so cogently suggest that similar provisions should apply to fish from external sources coming into Queensland to supplement the internal food supply. Indeed they may suggest the contrary. The express provisions of the Act in my opinion evince no intention to apply sub-s. (1) of s. 27 to fish other than fish from local sources.

That result is, I think, entirely consistent with the circumstances, as stated by counsel, in view of which the Act was passed. For these reasons I think that this is not a case in which it is necessary to decide any question under s. 92. I think the prosecution should fail.

Complaint dismissed. Costs of the defendant in the court of petty sessions and in this Court to be taxed and paid by the complainant board.

Solicitor for the complainant, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland.

Solicitors for the defendant, *Thynne & Macartney*.

R. A. H.