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# [HIGH COURT OF AUSTRALIA.]

SHANAHAN . . . . . APPELLANT ;  
DEFENDANT,  
AND  
SCOTT . . . . . RESPONDENT.  
INFORMANT,

## ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

*Marketing of Primary Products—Egg and Egg Pulp Marketing Board—Regulation—Validity—Prohibition against any person placing eggs in cold storage without consent of board—Not restricted to eggs vested in the board—Statutory power to make regulations—For purposes necessary or expedient for the administration of the Act or for carrying out the objects of the Act—Regulating the storage of the commodity—Marketing of Primary Products Acts 1935-1953 (No. 4337—No. 5710) (Vict.), ss. 18 (1) (c), 43 (1) (b) (iv)—Egg and Egg Pulp Marketing Board Regulations 1953, reg. 44.*

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The defendant was charged by information with breach of reg. 44 of the *Egg and Egg Pulp Marketing Board Regulations 1953* which provides that no person shall without the consent of the Egg Board place or cause to be placed any eggs in cold storage premises. Regulation 44 was made in purported pursuance of the power conferred upon the Governor in Council by s. 43 (1) of the *Marketing of Primary Products Acts 1935-1953* (Vict.) to make regulations, *inter alia*, “providing for all or any purposes (whether general or to meet particular cases) necessary or expedient for the administration of this Act or for carrying out the objects of this Act, and in particular, without affecting the generality of the foregoing— . . . (b) in relation to any board for or with respect to— . . . (iv) . . . regulating the transport treatment manufacture grading processing branding labelling packing storage marketing selling export and delivery of the commodity (whether the same is produced within or outside Victoria) or the packages containing such commodity.” The defendant appealed against an order by the Supreme Court to review the decision of the court of petty sessions dismissing the information.

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Williams,  
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Fullagar and  
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*Held* : by Dixon C.J., Williams, Webb and Fullagar JJ., Kitto J. dissenting,

- (1) that the discretionary power which the regulation purported to give of prohibiting the cold storage of eggs went beyond the power to regulate the particular operations enumerated in s. 43 (1) (b) (iv), and
- (2) that the regulation was not within the scope and general operation of the legislation which was to give the board control of eggs with a view to marketing them.

Hence reg. 44 fell neither within the particular nor within the general regulation-making power conferred by s. 43 (1), and it was *ultra vires*.

The functions of marketing boards under the *Marketing of Primary Products Acts* 1935-1953 (Vict.), considered.

Decision of the Supreme Court of Victoria (*Lowe J.*), *Scott v. Shanahan* (1956) V.L.R. 469, reversed.

APPEAL from the Supreme Court of Victoria.

By information dated 9th February 1956 George Scott as informant charged Henry Shanahan of Moama, New South Wales with that he on 3rd October 1955 at Tongala, Victoria, did without the consent of the Egg and Egg Pulp Marketing Board cause eggs to be placed in cold storage premises in contravention of the provisions of reg. 44 of the *Egg and Egg Pulp Marketing Board Regulations* 1953.

The information was heard by the Court of Petty Sessions at Echuca constituted by *J. W. Marwick*, Esq., Stipendiary Magistrate, who on 27th March 1956 dismissed the information.

The informant obtained from the Supreme Court of Victoria an order nisi to review the decision of the court of petty sessions. On 8th June 1956 *Lowe J.* ordered that the order nisi be made absolute.

From this decision, pursuant to special leave granted by the High Court on 14th June 1956 the defendant appealed to the High Court.

*Gregory Gowans* Q.C. (with him *W. H. Tredinnick*), for the appellant. The only issue on this appeal is whether reg. 44 is *ultra vires* the *Marketing of Primary Products Acts* and therefore invalid. The regulation is universal in its scope, and is directed to any person, whether or not a producer of eggs. Section 43 (1) of the Acts provides that regulations may provide for purposes necessary or expedient for the administration of the Act or for carrying out the objects of the Act. The objects of the Act are to be ascertained from the Act itself. [He referred to the *Marketing of Primary Products Acts* 1935-1953, ss. 3, 4, 6, 7, 9, 12, 15, 16, 19, 23.] The effect of the provisions is that there may be found in Victoria

at any point of time a quantity of the commodity falling into any one of a number of classes. Firstly, a quantity which is not produced by Victorian producers at all and therefore never vested in the board. Secondly, a quantity produced by Victorian producers but the subject of inter-State trade or required for the purposes of inter-State trade or intended to be used for inter-State trade and therefore not vested. Thirdly, a quantity which is in fact vested in the board but not required to be delivered up pursuant to s. 19 (a) and (g). Fourthly, a quantity which is vested in the board but rejected on tender and thereupon divested. Fifthly, there may be a quantity of the commodity in the disposition of persons other than producers and therefore free to be sold because s. 19 (c) places no embargo upon them, or in the hands of producers who are excepted or exempted from the prohibition against sale. Some of these classes overlap. In addition there may be present in Victoria a quantity of the commodity which, having passed through the board, has been re-sold by it. That could consist of such of the commodity as had been produced in Victoria, vested in the board and delivered to it, or on the other hand produced outside Victoria and not vested in the board but purchased by the board and delivered up to it voluntarily. The words in s. 18 (1) "after ensuring the supply and distribution of any commodity at reasonable prices to consumers thereof in Victoria" were not intended to confer an independent power on the board but set out a limitation on the exercise of the powers to market conferred on the board with respect to amounts of the commodity vested in it, or otherwise under its control. In s. 43 (1) (b) (iv) the references to delivery indicate that the subject matter of regulation is a commodity delivered or to be delivered to the board. The paragraph does not extend the power to make regulations to a commodity which is not delivered or to be delivered to the board. The words "necessary or expedient for the administration of the Act or for carrying out the objects of the Act" have been examined in *Carbines v. Powell* (1) and in *Morton v. Union Steamship Co. of New Zealand Ltd.* (2). [He referred also to *McMahon v. Carter* (3); *McNee v. Barrow Bros. Commission Agency Pty. Ltd.* (4); *Ex parte Provera*; *Re Wilkinson* (5).]

Dr. E. G. Coppel Q.C. (with him H. G. Ogden), for the respondent. The *Marketing of Primary Products Acts* are not self-executing. They are machinery Acts which may have to be applied to a wide variety

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(1) (1925) 36 C.L.R. 88, at pp. 91,  
92, 95, 96, 97.

(2) (1951) 83 C.L.R. 402, at pp. 409,  
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(3) (1954) V.L.R. 315.

(4) (1954) V.L.R. 1.

(5) (1952) 69 W.N. (N.S.W.) 242.

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of produce. Eggs may be divided into fresh, chilled and pulped eggs. The portion of the total supply to be chilled will diminish that to be put to other uses. There is a vital distinction between the Act considered in *Ex parte Provera*; *Re Wilkinson* (1) and the Acts in question here. While the setting up of a board under the *Marketing of Primary Products Acts* depends on the action of a majority of producers under s. 6, the board, when set up, is to consider the interests of all consumers and not only producers: see ss. 15, 18, 43 (4) (5). The powers in s. 18 are not merely in aid of a general power to sell eggs vested in or delivered to the board but in aid also of the duty to supply eggs to consumers at reasonable prices. The words "after ensuring the supply and distribution" are not linked with the words "which is vested in or delivered or to be delivered to". The supply and distribution of eggs to consumers in Victoria must involve ensuring a sufficient supply of eggs in good condition at all times of the year to all parts of Victoria and also to ensure that there is no surplus in any particular place at any particular time. The board can only regulate the supply of eggs as between fresh and chilled eggs if it has power to permit or forbid chilling from day to day in the various districts of Victoria. The regulation in question here is directed to this end and is valid. [He referred to *Crowe v. The Commonwealth* (2).]

*Cur. adv. vult*

1957, Feb. 15.

The following written judgments were delivered:—

DIXON C.J., WILLIAMS, WEBB AND FULLAGAR JJ. The purpose of this appeal by special leave is to obtain from this Court a decision upon the validity of a specific provision of the *Egg and Egg Pulp Marketing Board Regulations* 1953 of the State of Victoria. The question depends entirely upon the extent of the power of subordinate legislation conferred upon the Governor in Council of that State by the *Marketing of Primary Products Acts* 1935-1953. The provision the validity of which is attacked is No. 44 of those regulations. It purports to make it an offence for any person, without the consent of the Egg and Egg Pulp Marketing Board, to place or cause to be placed any eggs in any cold storage premises or to subject any eggs to any preservative treatment. The expression "cold storage premises" is defined by the regulations to mean any premises at or in any part of which eggs are received or stored for the purpose of being chilled. There is a proviso saying that nothing in the regulations shall prevent "a person or

(1) (1952) 69 W.N. (N.S.W.) 242.

(2) (1935) 54 C.L.R. 69, at p. 89.

owner of any eggs " (*sic*) preserving a quantity of eggs not exceeding thirty dozen for his own domestic requirements.

An information was laid against the present appellant by the respondent, who is an officer of the board, for that on 3rd October 1955 at Tongala he did without the consent of the board cause eggs to be placed in cold storage premises in contravention of the provisions of the regulation. It appeared on the hearing of the information before the court of petty sessions at Echuca that the appellant was manager of a firm carrying on business in New South Wales and in that capacity he had caused eggs which may be supposed to have been produced in New South Wales to be placed in cold storage in Tocumwal in Victoria. Although the point taken against the validity of reg. 44 was that it was not authorised by the terms of the Victorian legislation the magistrate decided in favour of the defendant on the ground that the regulation invaded s. 92 of the Constitution of the Commonwealth and dismissed the information. An order nisi to review this determination was obtained and on the return before *Lowe J.* it was made absolute. There was no attempt to support the decision of the magistrate under s. 92 and upon the question whether under State law reg. 44 was *ultra vires* *Lowe J.* took the view that the provision was a valid exercise of the power conferred upon the Governor in Council by s. 43 (1) of the *Marketing of Primary Products Acts* 1935-1953. His Honour accordingly made the order nisi to review absolute, set aside the dismissal of the information and remitted it to the Magistrate for further hearing.

Section 43 (1) begins by conferring on the Governor in Council a power in very general terms to make regulations. It then proceeds to give particular powers the grant of which is not to affect the generality of what has preceded. The particular powers are divided into two lists, the first of which relates to matters under the Act generally and the second is expressed to be "in relation to any board". In this second list of the subjects or purposes of the power to make regulations there occurs one the material part of which is expressed as follows: "(b) . . . in relation to any board, for or with respect to . . . (iv) . . . regulating the transport treatment manufacture grading processing branding labelling packing storage marketing selling exporting and delivery of the commodity (whether the same is produced within or outside Victoria) or the packages containing such commodity". *Lowe J.* placed his decision, at all events to some extent, upon the reference in this clause to "storage". But his Honour also relied upon the general power with which s. 43 (1) begins. That general power authorises the Governor in

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Council to make regulations providing for all or any purposes (whether general or to meet particular cases) necessary or expedient for the administration of the Act or for carrying out the objects of the Act. Powers of this kind have been discussed in more than one case in this Court: see *Carbines v. Powell* (1); *Gibson v. Mitchell* (2); *Broadcasting Co. of Australia Pty. Ltd. v. The Commonwealth* (3); *Grech v. Bird* (4); *Morton v. Union Steamship Co. of New Zealand Ltd.* (5).

The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

The *Marketing of Primary Products Acts* provide machinery for what is commonly called collective marketing. The products to which the process may be applied are those of agriculture, grazing, farming or kindred rural pursuits and if they are not all primary products the preparation they have undergone for consumption falls short of manufacture. Fishing is added but that is not presently material. Poultry farming is mentioned specifically. The plan of the Acts is to enable producers of any such product to cause the establishment of a marketing board by which the collective marketing of the product is to be conducted and the proceeds distributed among them. If a specified percentage of the producers of any such product desire that a board should be set up to market it they may petition the Governor in Council praying that by proclamation he should declare the product to be a commodity under and for the purposes of the Acts. The petition must name the product, state the number, being not less than three nor more than five, of members of the proposed board, and give enough information as to the board's powers to acquaint producers with their nature. These particulars must be published both in the *Government Gazette* and elsewhere. If the petition is granted a poll must then be taken of the producers, the question submitted being whether a marketing board should be constituted in relation to the commodity. If this question is decided affirmatively in the prescribed way a

(1) (1925) 36 C.L.R. 88.  
(2) (1928) 41 C.L.R. 275.  
(3) (1935) 52 C.L.R. 52.

(4) (1936) 56 C.L.R. 228.  
(5) (1951) 83 C.L.R. 402, at pp. 409,  
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proclamation may then declare that a board shall be constituted in relation to the "commodity", the description which the "product" must now assume (see s. 6). A marketing board is then appointed in relation to the commodity composed of members one of whom is appointed by the Governor in Council and the others of whom are elected by the producers: ss. 7, 9 and 10. It may be dissolved as it was established, namely by petition followed by a poll and a proclamation: s. 12. When a product has been declared a commodity and a board has been appointed in relation thereto the Governor in Council may provide by proclamation that the commodity shall be divested from the producers and be vested in the board and that upon any of the commodity coming into existence it shall become vested in and be the absolute property of the board: s. 16. Although the Acts contain no territorial restriction it is evident that this provision must be confined to things coming into existence in Victoria and it is equally evident that the producers who vote and share in the proceeds of distribution are producers in Victoria.

Among the marketing powers of a board, however, is a power to arrange with any person (whether in or outside Victoria) for the sale and delivery of any of the commodity (whether produced in Victoria or elsewhere) to the board on such terms and conditions as are agreed on: s. 18 (1) (e). The provision for the distribution of the proceeds is expressed somewhat indefinitely, a not uncommon feature of clauses dealing with the division of proceeds found in statutory instruments for collective marketing and pooling. Out of the proceeds of any commodity disposed of by a board and other moneys received, the board is to make payments to each producer in respect of the commodity delivered to the board by him on the basis of (1) the net proceeds of the sale of all the commodity of the same quality or standard delivered to the board during or covering such periods of time as are prescribed, and (2) the proportion of the commodity delivered by the producer during such respective periods, regard being had to the circumstances (if any) that affect the amount of the payments: s. 23 (1). There are provisions excluding or exempting, or giving a board power to exempt, parcels of a commodity in particular cases. The vesting section, for example, is not to affect such portion of a commodity as is the subject of trade commerce or intercourse among the States or as is required by the producers thereof for, or is intended then to be used for, trade commerce or intercourse among the States: s. 16 (3). If a board refuses to accept a tender of part of the commodity vested in it that works a re-vesting in the producer: s. 19 (g).

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A board may exempt sales of the commodity direct to local consumers or retail vendors: it may exempt "small producers" and other sales and purchasers in its discretion. It will be seen, therefore, that in addition to parcels of a commodity entering Victoria from other States there may be quantities, no doubt relatively small, which have never formed the property of the board. A board is given a long list of powers covering all the operations, commercial, financial or otherwise, upon which it might find reason to engage in marketing its commodity. This list is preceded by general words as follows:—"Subject to this Act and for the purposes thereof, a board, after ensuring the supply and distribution of any commodity at reasonable prices to consumers thereof in Victoria, may sell or arrange for the sale of any commodity in relation to which it is constituted which is vested in or delivered or to be delivered to it and do all acts matters and things necessary or expedient in that behalf accordingly." No doubt it was thought that a board substantially elected by producers and charged with the duty of the collective marketing of their product should be placed under the check expressed by the words "after ensuring the supply and distribution of any commodity at reasonable prices to consumers thereof in Victoria". One of the specific powers conferred by the section says that a board may, so far as practicable, provide the commodity for consumption in Victoria and for its supply during any period of shortage to those places within Victoria wherein a shortage is experienced: s. 18 (1) (c).

The first of the foregoing provisions can hardly be regarded as an independent power. It is rather an injunction to safeguard the interests of the local consumer in spite of the necessity of marketing the commodity for the collective benefit of the producers. The second is an authority to supply the commodity for the relief of shortage and doubtless such an authority is expressly given lest it be said that a marketing board should do the best for its collective constituents without regard to such matters. For the same reason, one may suppose, authority is given for the appointment from time to time of a consumers' committee to represent the interests of consumers of all the commodities, that is collectively, in respect of which there are marketing boards and to report on supply distribution and prices: s. 15.

It is under the machinery provided by the foregoing legislation that the Egg and Egg Pulp Marketing Board was established and it is under those provisions that it has worked. Doubts whether the inclusion of egg pulp was consistent with the legislation were removed by an Act of 1939 (No. 4658). Power to make progress

payments and to make certain deductions therefrom was conferred upon the Egg and Egg Pulp Marketing Board by Act No. 4750. Acts Nos. 5612 and 5710 made some further special provisions but they do not seem material.

The question whether reg. 44 is valid depends on its relation to the provisions which have been discussed above. The effect of the regulation is to forbid the use of "cold storage premises" for the chilling of eggs except with the consent of the board and to forbid the preserving of eggs except with that consent and except for a limited number of eggs preserved by a person for his domestic requirements. The prohibition extends to all eggs—eggs that have been vested in the board and already "marketed", eggs that have never vested in the board and with which the board has had nothing to do and eggs that have been brought from another State.

Can this be supported as a regulation for or with respect to regulating storage within the meaning of s. 43 (1) (b) (iv)? One short answer is that a prohibition of cold storage and preservation subject to a power of consent is not "regulating" storage. It is a form of prohibition which operates as a complete prohibition unless consent happens to be obtained. But in any case the context of s. 43 (1) (b) (iv) suggests that it relates to the conditions, manner and occasion in which the various things the provision mentions are done rather than to the possibility of doing them at all. The question of the validity of reg. 44 therefore must, it seems, depend upon the opening words of s. 43 (1). Can reg. 44 be upheld as a regulation necessary or expedient for the administration of the Acts or for carrying out the objects of the Acts within s. 43 (1)? An attempt has been made in this judgment to state what appears to be the scope and purpose of the Acts. It is impossible to reduce the indefinite test supplied by the words quoted from s. 43 (1) to precision but they are not unlimited in their operation and in their actual application the decisions of this Court that have already been mentioned and the considerations they supply afford some guidance. If the regulation were concerned only with eggs vested in the board and with them while they were so vested, there could be no objection to it. For the purpose of the legislation is to give the board control of such eggs in all respects so that they can be marketed when, how and where the board decides conformably with the provisions of the Acts. To provide by regulation against chilling or preserving the board's eggs would be nothing but filling in a detail of the plan which the Acts describe. But the regulation extends to eggs with which the board has and can have nothing to do and it extends to those which the board has sold unconditionally. The complaint against this

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provision is that it means much more than an elaboration, a filling in or a fulfilment of the plan or purpose which the main provisions of the Act have laid down or, if the expressions be preferred, have "outlined" or "sketched". It means that an attempt has been made to add to the general plan or conception of the legislation and to extend it into a further field of regulation, namely that of the use, handling or disposition of eggs independently of the board's marketing of the eggs vested in or otherwise acquired by the board. Expressed in the phrase of *Isaacs J.* repeated by him in *Carbines v. Powell* (1), the objection is that the regulation is an attempt not to complement but to supplement the plan of the legislation or, in another phrase used by that learned judge in the same case, that it is not confined to the same field of operation as the provisions of the Acts.

In support of the validity of the legislation the answer made to the objection is in substance that for the effective marketing of the eggs vested in the board it is necessary or expedient to forbid the cold storage or preserving of eggs generally without the consent of the board. To chill or preserve eggs means, it is said, that they will be withheld from consumption when fresh. They may be released for distribution when it is least desirable from the point of view of the board's administration. The board moreover, so it is urged, should be able to ensure that consumers know whether eggs are fresh or have been chilled or preserved. It should be able to control what may be called the rate or volume of supply from time to time. A proper marketing scheme may not be worked out or maintained, if chilled or preserved eggs uncontrolled by the board may exist in quantities in the State.

The argument in support of reg. 44 seems to treat the legislation as having a purpose beyond, and indeed different from, the collective marketing of an agricultural pastoral or like rural product of Victoria. A foundation might possibly be found for it in legislation the purpose of which was the control or regulation of the use, distribution and consumption of given descriptions of food or consumable things. Even then it might be said with some reason that reg. 44 contained the kind of restriction which, if it did not form part of the plan formulated by the legislature itself, could not be added under a general power of the kind in question here to make regulations. But in essence the legislation is for the collective marketing of agricultural pastoral and rural products of the State of Victoria. Its provisions have been described and discussed and no doubt its essential purpose does bring into its scope many things which are

incidental consequential or ancillary. But to impose such a restriction as that contained in reg. 44 with respect to part of the commodity falling outside the board's marketing powers is to extend the legislative plan not to carry it into effect. The regulation cannot, therefore, be justified as necessary or expedient for the administration of the Act or for carrying out its objects. Accordingly it is *ultra vires*.

The appeal should be allowed with costs and the order nisi discharged with costs.

KIRTO J. The question to be decided on this appeal is whether the making of reg. 44 of the *Egg and Egg Pulp Marketing Board Regulations* 1953 was within the power conferred upon the Governor in Council by s. 43 of the *Marketing of Primary Products Acts* 1935-1953 (Vict.). The regulation is in these terms: "No person shall without the consent of the Board place or cause to be placed any eggs in any cold storage premises nor subject any eggs to any preservative treatment. Provided that nothing in these Regulations shall prevent a person or owner of any eggs preserving a quantity of eggs not exceeding 30 dozen for his own domestic requirements."

The power of the Governor in Council is "to make regulations providing for all or any purposes (whether general or to meet particular cases) necessary or expedient for the administration of the Act, or for carrying out the objects of the Act", and it extends to certain particular matters to which I find no need to refer. The language is unusual, but the intention seems clearly to be that any regulation is authorised which may fairly be considered necessary or expedient either for the administration of the Act or for carrying out the objects of the Act.

The Act is described in its long title as an Act to provide for boards for the marketing of certain classes of products; and this general object it pursues by enabling marketing boards to be established in respect of individual products comprised within certain extensive classes. A product becomes a product for the purposes of the Act when declared to be such by proclamation; and a proclamation may be made with respect to any product (with a few exceptions) of agriculture, horticulture, viticulture, grazing, poultry-farming, bee-keeping or fishing operations, any dairy produce, and any other article of commerce prepared (otherwise than by a process of manufacture) from the produce of any of the foregoing activities. It is evident from the diversity which exists within these categories as regards their inherent characteristics and other circumstances which affect their marketing, that what is necessary or expedient

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for the administration of the Act and the carrying out of its objects is a question requiring a separate answer in respect of each product for which a board is established.

The scheme of the Act is, broadly, to set up for each declared product a board specially qualified to cope with the peculiar marketing problems of that product, and to confide to it, as far as practicable, the responsibility of regulating the marketing thereof. This is only to be done when the product has been declared by proclamation to be a commodity under and for the purposes of the Act, in response to a petition by a specified proportion of the producers, and when a poll of the producers has favoured, by a specified majority, the constituting of a board in relation to the commodity. After a similar process of petition and pool a board may be wound up and dissolved. A board is a body corporate, having the corporate name of "The (name of commodity) Marketing Board", and of its members one is appointed by the Governor in Council and the others are elected by the producers. The Minister is empowered by s. 15 from time to time to appoint a "Consumers' Committee" to represent the interests of the consumers of all the commodities "the marketing of which is for the time being regulated by marketing boards under this Act", with the duty of considering and reporting upon "(a) the effect of the operations of any marketing board upon the supply and distribution of any commodity; (b) the price or prices at which any commodity is sold to consumers; and (c) any *bona fide* complaints . . . as to the effect of the operations of any marketing board on consumers of any commodity the marketing of which is for the time being regulated by such board." Such a board is referred to in s. 15 (3) as "the board regulating the marketing of the commodity". Section 18 (1), which will be mentioned again in a moment, prefaces a provision that a board may exercise a variety of powers by the phrase "after ensuring the supply and distribution of any commodity at reasonable prices to consumers thereof in Victoria"—thus creating a curious problem of construction which need not be investigated here, but underlining what the foregoing references show to be clear on the face of the Act, namely that its scheme is for the regulation by each board of the marketing generally in Victoria of the commodity in relation to which the board has been set up.

Beginning with s. 16, the Act goes on to provide means to this end. By proclamation, "the commodity" (*scil.* so far as then in existence in Victoria) may be divested from the producers and vested in the board, and any of the commodity coming into existence

(*scil.* in Victoria) within a specified time may be made to vest in the board. The board becomes the absolute owner of all that is vested in it. By s. 19 (a) all the commodity so vested is required to be delivered by the producers thereof to the board or its authorised agent, and by s. 19 (c) the sale or delivery of it to any other person is made an offence. The board is given by ss. 14 and 18 (1) a wide variety of powers. Those conferred by s. 18 (1) include a power to sell or arrange for the sale of any commodity, in relation to which it is constituted, which is vested in or delivered or to be delivered to it. More particular powers are also given. They include a power to provide the commodity so far as practicable for consumption in Victoria, and for its supply during any period of shortage to those places within Victoria wherein a shortage is experienced; a power to make arrangements with regard to sales of the commodity for export; a power to arrange with any person in or outside Victoria for the sale and delivery of any of the commodity, whether produced in Victoria or elsewhere, to the board; a power to enter into arrangements with respect to marketing with any marketing body in another State; and a power to take steps for the encouragement of the consumption of the commodity in Victoria or elsewhere. Section 23 provides for proportionate payments to the producers out of the proceeds of the commodity disposed of by the board and any other moneys received by the board under the Act.

The provisions above mentioned as to the vesting of the commodity in the board and its compulsory delivery to the board are, however, subject to qualifications. Certain portions of the commodity are excluded from the vesting by an exception contained in par. (a) of s. 19, and by par. (g) of that section. The prohibition in par. (c) of s. 19 upon sale or delivery to persons other than the board contains an exception of sales and deliveries in the course of trade commerce or intercourse among the States. Such of the commodity as is refused by the board as being below the prescribed quality, or as falls within certain other special classes, is placed outside the application of par. (c) by provisos thereto. Paragraph (d) of s. 19 enables the board to exempt from the operation of the section small producers, sales direct to local consumers or retail vendors, and such other sales and purchases or receipts of the commodity as are prescribed.

From this brief review of the more material provisions of the Act it will be seen that at any particular time there may be in Victoria portions of the commodity in relation to which a board is established which are not vested in the board and may lawfully be disposed of

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by the owners of them otherwise than by delivery to the board. They may be covered by the exemption in s. 19 (*a*) or s. 19 (*g*) or by an exemption granted by the board under s. 19 (*d*); they may be outside the application of the Act because of a relation which they possess to inter-State trade; or, if they have been acquired by the board, whether by the operation of the vesting provisions of the Act or otherwise, they may have been disposed of by it so as to be found in the disposition of wholesalers, retailers, manufacturers or consumers.

The board has not the disposition of any portion of the commodity which is for any of these or other reasons in hands other than its own. Yet, as I have endeavoured to show, the Act intends the board to regulate the marketing generally in Victoria of the commodity in relation to which it has been set up. The provisions for compulsory acquisition and purchase go far to enable this to be done, but whether they go far enough is a question which does not admit of a general answer. It must be answered in relation to each commodity, after considering what is the significance, in relation to the marketing of the whole of the commodity, of the existence of portions of it in the disposition of persons outside the board's organisation. And if such provisions do not go far enough in the case of a particular commodity, it must be, I think, within the regulation-making power to adopt in relation to that commodity ancillary provisions to the same end.

The commodity concerned in this case is one the marketing of which is notoriously affected by special considerations. Its principal commercial value is as an article of food or as an ingredient in the manufacture of articles of food. Eggs, because of their proneness to fairly rapid deterioration, must be consumed within a short period after production, unless in the meantime they are chilled, subjected to preservative treatment or pulped. If chilled or preserved, they are not as much in demand for many culinary purposes as if fresh, but are suitable for other such purposes as well as for some purposes of manufacture. (Egg pulp, of course, serves its own separate purposes.) Possibly the greatest single complicating factor in the task of regulating the marketing of eggs is that the volume of production fluctuates considerably. Times of glut occur, and fresh eggs (as I shall call eggs not chilled or preserved) which are in excess of the demand may then be stored by chilling or preserving. Times of scarcity are also recurrent, and then the unsatisfied demand for fresh eggs may be met, to some extent at least, by chilled or preserved eggs. It must be a constant problem in the marketing of eggs to decide how much of the supply of fresh

eggs which is available for the time being it is expedient to put on the market for immediate consumption, and how much ought to be chilled or preserved to meet future demand. The Act provides (in ss. 33 and 34) for the collection and dissemination of information, much of which is relevant to this problem. When there is a glut in the State generally or in particular parts of it, the Board, if its regulation of the marketing of the commodity is to be efficient, will have to decide from time to time what portion of the fresh eggs vested in it should be withheld from the market, and in doing so it must be able to make reasonably reliable forecasts, in the light of statistics and experience in the trade, of the extent to which fresh eggs outside its control will continue to supply the market or will be put into cold storage or preserved. What is perhaps more important, the board in making its decisions must be able to depend upon the fresh eggs which it releases to the market being applied in meeting the demand for fresh eggs ; for its efforts will be stultified if eggs which it elects not to chill or preserve are going to be chilled or preserved by other persons, and so diverted from satisfying the demand for fresh eggs. Likewise when there is a scarcity, the board must decide how far to supplement the available supply of fresh eggs by releasing chilled or preserved eggs from its stores ; and here again it must be able to depend upon its expectations being fulfilled as to the extent to which fresh eggs which it either has never acquired or has released for consumption will satisfy the demand. At all times the purpose of efficiently regulating the marketing of eggs, fresh, chilled or preserved, in varying conditions of supply and demand, requires that the board shall be in a position to prevent or allow, in the exercise of a discretionary judgment, the diversion of fresh eggs away from immediate consumption.

The regulation here challenged gives the board the discretionary power which it thus needs. Domestic requirements, fixed by the proviso at thirty dozen, are left untouched ; but, subject to that, the regulation closes the door upon the only practical courses, other than sale for consumption or consumption itself, which are open to a person having fresh eggs to dispose of. In so far as it would interfere with inter-State trade, its application is precluded by s. 92 of the Constitution ; but, with that inescapable qualification, it invests the board with the power to relax or maintain, as it may judge expedient according to circumstances, a general prohibition against postponing the availability of privately-owned eggs for consumption.

The argument against the validity of the regulation appeared to assume that a provision against chilling or preserving eggs must

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be justified, if at all, as complementary to the provisions of the Act for the vesting of eggs in the board and their delivery by producers to the board. Accordingly the generality of the prohibition which the regulation contains was relied upon as fatal to its validity. The very fact, however, that it applies to eggs not vested in the board seems to me to provide a conclusive reason for holding it valid. Having regard to the special characteristics of eggs and egg-marketing, I find it difficult to see how the objects of the Act could be effectively carried out in relation to eggs without some such provision being made by regulation. I am accordingly of opinion that the regulation is authorised by s. 44, and that this appeal should be dismissed.

*Appeal allowed with costs. Order of Supreme Court discharged; in lieu thereof order that the order nisi to review be discharged with costs.*

Solicitors for the appellant, *Moule, Hamilton & Derham*.  
Solicitors for the respondent, *Henderson & Ball*.

R. D. B.

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| Cons<br><i>R v Roberts;</i><br><i>Ex p Jacob</i><br>[2002] 2 QdR<br>655   | Foll<br><i>Question of</i><br><i>Law Reserved</i><br><i>(No1 of 2000)</i><br>(2000) 77<br>SASR 344         | Appl<br><i>Win-TV</i><br><i>Mildura TV Pty</i><br><i>Ltd v Aust</i><br><i>Broadcasting</i><br><i>Auth (1996)</i><br>11 ALD 419 | Appl<br><i>Dickins v</i><br><i>Herald &amp;</i><br><i>Weekly Times</i><br><i>Ltd (1994)</i> 1<br>IRCR 135                                   | Foll<br><i>Koutsoukas v</i><br><i>Loader (1991)</i><br>109 FLR 114   |
| Foll<br><i>Trall v</i><br><i>McRae (2002)</i><br>122 FCR 349  | Appl<br><i>Kempark Pty</i><br><i>Ltd v New</i><br><i>South Wales</i><br>(1998) 108<br>LGERA 22             | Appl<br><i>Public</i><br><i>Prosecutions</i><br><i>(Cth), Director</i><br><i>of v Pirone</i><br>(1997) 143<br>ALR 369          | Foll<br><i>Victrawl Pty</i><br><i>Ltd v Telstra</i><br><i>Corporation</i><br><i>Ltd (1995)</i><br>131 ALR 465                               | Foll<br><i>Traythurn &amp;</i><br><i>Australian</i><br><i>Securities</i><br><i>Commission</i><br><i>Re (1994)</i> 13<br>ACSR 471         |
| Cons Hewitt v<br><i>Property</i><br><i>Agents &amp;</i><br><i>Motor Dealers</i><br><i>Tribunal</i><br>[2003] 2 QdR<br>649 | Appl<br><i>MacCarron v</i><br><i>Coles</i><br><i>Supermarkets</i><br><i>Aust (2001)</i> 23<br>WAR 355      | Cons <i>Immigra-</i><br><i>tion &amp; Ethnic</i><br><i>Affairs, Min for</i><br><i>v Petrovski</i><br>(1997) 45 ALD<br>16       | Refd to <i>Resort</i><br><i>Management</i><br><i>Services Ltd v</i><br><i>Council of the</i><br><i>Shire of Noosa</i><br>[1995] QPLR<br>213 | Foll<br><i>APESMA,</i><br><i>Assoc of v</i><br><i>Skilled</i><br><i>Engineering</i><br><i>Pty Ltd (1994)</i><br>122 ALR 471              |
| Foll<br><i>Reynolds &amp;</i><br><i>Co v ASX Ltd</i><br>(2003) 174<br>FLR 311   | Foll<br><i>Glenmont</i><br><i>Investments v</i><br><i>O'Loughlin</i><br><i>(No2) (2000)</i><br>79 SASR 185 | Appl<br><i>Jones v Jones</i><br>(1996) 6 TasR<br>273   | Cons<br><i>Law v Rebel</i><br><i>Liquor Shop</i><br><i>Ltd [1995] 2</i><br>QdR 604  | Foll<br><i>Dickins v</i><br><i>Herald &amp;</i><br><i>Weekly Times</i><br><i>Ltd (1994)</i><br>124 ALR 308                               |
| Cons<br><i>Dosselt v TKJ</i><br><i>Nominees</i><br>(2003) 78<br>ALJR 161  | Dist<br><i>Handa v</i><br><i>MIMA (2000)</i><br>106 FCR 95   | Appl<br><i>New South</i><br><i>Wales, State of</i><br><i>v McMullin</i><br>(1997) 153<br>ALR 473                               | Dist<br><i>White v</i><br><i>Eurocycle Pty</i><br><i>Ltd (1995)</i> 64<br>SASR 461  | Cons<br><i>Social</i><br><i>Security,</i><br><i>Department of</i><br><i>v Kratochvil</i><br>(1994) 35<br>ALD 78                          |
| Foll<br><i>Tai Shing</i><br><i>Wong &amp;</i><br><i>MIMA, Re</i><br>(2006) 90 ALD<br>154                                  | Foll<br><i>Hollingsworth</i><br><i>v Comr of</i><br><i>Police (1998)</i><br>47 NSWLR<br>104                | Appl<br><i>Siganto v R</i><br>(1997) 141<br>FLR 73   | Refd to<br><i>Baulderstone</i><br><i>v Workcover &amp;</i><br><i>Male (1995)</i><br>64 SASR 519   | Appl<br><i>Professional</i><br><i>Engineers etc</i><br><i>Australia v</i><br><i>Skilled Engi-</i><br><i>neering (1994)</i><br>1 IRCR 106 |
|   | Dist<br><i>Tourism</i><br><i>Holdings v</i><br><i>Comr of Taxes</i><br>(2002) 166<br>FLR 368               | Appl<br><i>Law v Austin</i><br>(1999) 105<br>ACrimR 407  | Appl<br><i>Victrawl Pty</i><br><i>Ltd v Telstra</i><br><i>Corporation</i><br><i>Ltd (1994)</i><br>183 CLR 595                               | Appl<br><i>O'Brien v</i><br><i>State of South</i><br><i>Australia</i><br>(1994) 63<br>SASR 175   |
|   | Appl<br><i>Tourism</i><br><i>Holdings v</i><br><i>Comr of Taxes</i><br>(2002) 48<br>ATR 530                | Appl<br><i>Question of</i><br><i>Law Reserved</i><br><i>(No1 of 2000)</i><br>(2000) 113<br>ACrimR 272                          | Refd to <i>Khan</i><br><i>&amp; Australian</i><br><i>Community</i><br><i>Pharmacy</i><br><i>Authority, Re</i><br>(1996) 41<br>ALD 435       | Foll<br><i>Reparation</i><br><i>Commission v</i><br><i>Keeley (2000)</i><br>60 ALD 401   |
|   | Appl<br><i>Hawkesbury</i><br><i>CC v Sammut</i><br>(2002) 119<br>LGERA 171                                 |  |   |  |