

[HIGH COURT OF AUSTRALIA.]

PEPPERS SELF SERVICE STORES PRO- }
PRIETARY LIMITED } APPELLANT ;
DEFENDANT,

AND

SCOTT RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Marketing of Primary Products—Egg and Pulp Egg Marketing Board—Regulation*
1958. —*Validity—Directed to informing intending customers by display of card by*
MELBOURNE, *retailer of State or country of origin of eggs and, if obtained from board, that*
May 13; *fact—Statutory power to make regulations—For purposes necessary or expedient*
SYDNEY, *for the administration of the Act or for carrying out the objects of the Act—Regu-*
Aug. 28. *lating the “labelling . . . marketing selling . . . of the commodity”—Regulating*
the “display of any of the commodity . . . for sale . . .”—Marketing of
Primary Products Acts 1935-1953 (No. 4337—No. 5710) (Vict.), s. 43 (1) (b)
(iv) (ix)—Egg and Egg Pulp Marketing Board Regulations 1953-1956, reg. 39 (b).
Dixon C.J.,
McTiernan
and
Taylor JJ.

The defendant company was charged by information with breach of reg. 39 (b) of the *Egg and Egg Pulp Marketing Board Regulations 1953-1956* which provides that no person shall within Victoria display eggs for sale by retail unless within the vicinity of the eggs there be placed a card showing the country or state or territory of origin and, if they were obtained from the board or its authorised agent, the words “Board Eggs”. Regulation 39 (b) 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* (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) ascertaining whether the commodity is of the prescribed quality and prescribing a quality therefor and for an increase or decrease in the amount otherwise payable to any producer or other person for any of the commodity delivered by him or any other person to the board or to an authorized agent of the board according to the quality of the

commodity whether at the time of delivery or subsequently ; and 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 ; . . . (ix) the care or the precautions to be taken and the methods to be used by any person in the display of any of the commodity (in relation to which the board is constituted) for sale or in storage or custody of any of the commodity held or offered for sale whether in any of such cases the commodity is owned by the board or not." The defendant appealed from the refusal by the Supreme Court to review its conviction by a court of petty sessions.

Held, that the regulation was *ultra vires* in that (a) it could not be justified under the general power contained in the opening words of the section : *Shanahan v. Scott* (1957) 96 C.L.R. 245, applied ;

(b) its purpose of acquainting prospective purchasers with the territorial origin of the commodity was outside the conception of sub-par. (iv) which was the regulation of labelling, marketing and selling and outside that of sub-par. (ix) which was the regulation of the care and precautions to be taken in displaying the commodity for sale.

Held, further, by *Dixon C.J.* and *Taylor J.* that on its proper construction the whole of sub-par. (iv) related only to the portion of the commodity delivered to the board or an authorised agent.

Decision of the Supreme Court of Victoria (*Herring C.J.*) : *Scott v. Peppers Self Service Stores Pty. Ltd.* (1958) V.R. 301, reversed.

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APPEAL from the Supreme Court of Victoria.

By information dated 13th August 1957 George Scott as informant charged Peppers Self Service Stores Proprietary Limited for that it, on 6th March 1957, at Bentleigh, Victoria, did display for sale by retail eggs which did not have placed in a readable position thereon or upon the container containing the eggs or within six inches of such eggs or receptacle a card on which was printed stencilled or written in letters not less than one-half inch in height and three thirty-seconds of an inch in thickness the words " Eggs/ Produce of " together with the full name of the country or Territory or State in which the eggs were produced in contravention of reg. 39 (b) of the *Egg and Egg Pulp Marketing Board Regulations* 1953.

The information was heard by the court of petty sessions at Brighton which, on 30th August 1957, convicted the defendant and fined it £5 together with certain costs.

The defendant obtained from the Supreme Court of Victoria an order nisi to review the decision of the court of petty sessions. On 15th November 1957 *Herring C.J.* ordered that the order nisi

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be discharged : *Scott v. Peppers Self Service Stores Pty. Ltd.* (1).

From this decision, pursuant to special leave granted on 5th December 1957, the defendant appealed to the High Court.

Gregory Gowans Q.C. (with him *W. H. Tredinnick*), for the appellant. The general power to make regulations contained in s. 43 of the *Marketing of Primary Products Acts* 1935-1953 was considered in *Shanahan v. Scott* (2). In the present case *Herring* C.J. held that reg. 39 (b) could not be justified under the general power but under s. 43 (1) (b) (ix). That power to make regulations must vary in its ambit according to the degree of connexion of the board with the commodity. In particular, in its application to eggs which have never vested in the board and are not to be delivered to it, its operation is very limited. Regulation 39 (b) is *ultra vires* in applying to non-board eggs a requirement to identify their country of origin. It is not concerned with the methods to be used in the display of eggs but with an extraneous matter. In the introductory words in s. 43 "and in particular without affecting the generality of the foregoing" the words "and in particular" do not extend the preceding general words. The particular subject matters which follow must be read in the light of the purpose and scope of the Act and in the light of the opening words "the purposes necessary or expedient for the administration of the Act or for carrying out the objects of the Act". [He referred to *Ex parte Provera*; *Re Wilkinson* (3).] Section 43 (1) (b) (iv) is confined in its operation to the portion of the commodity delivered to the board.

Dr. *E. G. Coppel* Q.C. (with him *H. G. Ogden*), for the respondent. The methods used in the display of the commodity for sale include every step which is taken by a vendor in an endeavour to induce purchasers to purchase. Accordingly it is submitted that reg. 39 (b) is authorised by s. 43 (1) (b) (ix). It was not decided in *Shanahan v. Scott* (4) that, if the regulation there in question had been regulatory and not prohibitory, it could not have applied to all eggs in Victoria. Section 43 (1) (b) (ix) in using the words "whether the commodity is owned by the board or not" make it clear that regulations may deal with portions of the commodity never owned by the board. Moreover the very notion of displaying a commodity for sale points to retail sale.

Gregory Gowans Q.C., in reply.

Cur. adv. vult.

(1) (1958) V.R. 301.

(2) (1957) 96 C.L.R. 245, at pp. 253 et seq.

(3) (1952) 69 W.N. (N.S.W.) 242.

(4) (1957) 96 C.L.R. 245.

The following written judgments were delivered :—

DIXON C.J. and TAYLOR J. The appellant company was convicted summarily of an offence consisting in a contravention of reg. 39 (b) of the *Egg and Egg Pulp Marketing Board Regulations* 1953. These regulations are made under the *Marketing of Primary Products Acts* of the State of Victoria. The company obtained from the Supreme Court of Victoria an order nisi to review the conviction on the ground that the regulation or the material part of it is invalid. On the return of the order nisi *Herring C.J.* upheld the validity of the regulation and discharged the order nisi : *Scott v. Peppers Self Service Stores Pty. Ltd.* (1). This Court granted the company special leave to appeal from the decision and we have now to determine the appeal.

Regulation 39 obtained its present number from a regulation adopted by the Governor in Council on 17th July 1956 which at the same time amended the provision in some particulars. Regulation 39 (b) is anything but grammatical and for present purposes it is better to state its purport than to repeat its text. It is a provision that no person shall within Victoria sell offer or display for sale by retail any eggs unless there be a compliance with the injunctions it proceeds to give. There must be a card bearing an inscription and it must be placed on the eggs or on the container containing the eggs or within six inches of the eggs or the “receptacle”, a word doubtless meaning the container. It must be placed in a “readable position”. On the card must be inscribed “Eggs/Produce of” together with the full name of the country in which the eggs were produced and, if they are produced in Australia, of the Territory or State. If the eggs were obtained from the Egg and Egg Pulp Marketing Board or its authorised agent there must be added the words “Board Eggs”. All this must be printed stencilled or written in letters not less than half an inch in height and three thirty-seconds of an inch “in thickness”. A description of the quality and grade of the eggs must be added by the use of the words “First Quality” and “Large” or “Small”. These words must be in type of not less than three-quarters of an inch in height and five thirty-seconds of an inch “in thickness”.

The appellant company’s offence against this provision consisted in placing on a shelf on the wall of their shop ten dozen eggs in a carton without any card. The eggs had been supplied by an agency which obtained them from New South Wales. The offence charged by the information was displaying the eggs for sale by retail without the required card.

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It will be seen from the foregoing account of the sub-regulation that what it is directed to is acquainting an intending customer with the origin of the eggs, that is to say telling him if the eggs come from abroad or another State or Territory and in that case what country State or Territory they were laid and telling him further that the eggs have been obtained from the board, if that be so.

For its validity the sub-regulation must depend on s. 43 (1) of the *Marketing of Primary Products Acts* and an inspection of that section will show that support for the sub-regulation must be found either in the general words with which s. 43 (1) begins or in sub-par. (iv) or sub-par. (ix) of par. (b) or not at all.

The scope of the legislation was discussed in *Shanahan v. Scott* (1) and it is unnecessary to go over the same ground again. Consistently with the judgment of the majority of the Court it would seem quite impossible to hold that reg. 39 (b) could be authorised by the general words with which s. 43 (1) opens. The power given by them is to make regulations for all or any purposes necessary or expedient for the administration of the Act or for carrying out the objects of the Act. Once the view of the Act is accepted which the majority judgment expresses, it is plain that reg. 39 (b), dealing as it does with eggs generally and requiring that their place of origin shall be notified goes quite beyond such a power. For in the language of the judgment (2) such a power does not enable the regulating authority 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" (2).

Regulation 39 (b) not only relates to eggs in general as distinguished from eggs which are or have been the concern of the board, but it also seeks to give effect to a policy which lies outside any general purpose discernible in the provisions of the statute. There is nothing in the enactment suggesting a policy of ensuring that purchasers of such a commodity as eggs should know the geographical origin of what they buy or that sellers of the commodity by retail should acquaint their customers of the fact that what they sell has been through the hands of a statutory board. The theme of the *Marketing of Primary Products Acts* of Victoria is collective marketing of the products of rural pursuits, with fishing added.

(1) (1957) 96 C.L.R. 245.

(2) (1957) 96 C.L.R., at p. 250.

“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” (1). In the judgment of the majority the provisions for effecting this purpose are briefly examined. It is remarked that “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” (2). But a board is armed with a power of voluntary purchase and under that power it may “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 : see. 18 (1) (e)” (2).

This power of entering into arrangements for the voluntary purchase of the commodity is granted in aid of the marketing powers of a board and works no extension of the scope of the legislation which must govern the application of the general words found at the beginning of s. 43 (1).

In fact *Herring C.J.* placed no reliance upon the general words in deciding that reg. 39 (b) is valid. His Honour put his decision on s. 43 (1) (b) (ix). After the general words of s. 43 (1) there follows an enumeration of particular subjects for which regulations may be made. The particular powers are divided into two lists lettered (a) and (b). List (a) begins with the words “generally for or with respect to” and list (b) with the words “in relation to any board, for or with respect to”. The intention seems to be to provide under list (a) powers of regulation which the Governor in Council may exercise for the purpose of directing how all boards may proceed or act and under list (b) powers which he may exercise in the case of a single board considered as the authority set up with respect to a particular commodity. When the words are extracted from s. 43 (1) which grant the power contained in par. (b) (ix) they are as follows : “The Governor in Council may make regulations . . . (b) in relation to any board, for or with respect to—. . . (ix) the care or the precautions to be taken and the methods to be used by any person in the display of any of the commodity (in relation to which the board is constituted) for sale or in storage or custody of any of the commodity held or offered for sale whether in any of such cases the commodity is owned by the board or not.” It was under this power that the validity of reg. 39 (b) was upheld.

(1) (1957) 96 C.L.R., at p. 250.

(2) (1957) 96 C.L.R., at p. 251.

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Herring C.J. adopted the view that the sub-regulation so far as display for sale is concerned clearly fell within this power to make regulations unless, contrary to the opinion he reached, it was to be read down.

With great respect this view of the relation of the sub-regulation and the power conferred by s. 43 (1) (b) (ix) does not recognise the great distinction between the purpose of the power and the object to which the sub-regulation is directed. The material part of the power is concerned with the care or precautions that should be taken in the display of the board's commodity for sale and in the "methods to be used" in displaying it. This has nothing to do with the question whether a possible buyer should know from what country or what State or Territory of the Commonwealth the commodity, that is to say the eggs, came; what was the country of origin; in what State or federal territory they were produced. It has nothing to do with the question whether they should be told that it is a commodity derived from or through the board—"Board Eggs". The relevant part of the power relates to the manner of display for sale: to the care and precautions to be taken in displaying the commodity. The purpose of reg. 39 (b) is quite outside the scope of such a power. Many other objections were urged against the view that the sub-regulation could be justified under sub-par. (ix) of s. 43 (1) (b). For example the question was raised how the introductory words "in relation to any board" might affect the application of sub-par. (ix), and how the definition in reg. 2 of the word "sell" might affect the sub-regulation. But it is enough to say that the power is not addressed to the purpose which the sub-regulation seeks to achieve.

There is no other power conferred by s. 43 (1) which could support reg. 39 (b) unless it be the power contained in sub-par. (iv). The words in which that power is conferred are these:—"The Governor in Council may make regulations . . . (b) in relation to any board, for or with respect to— . . . (iv) ascertaining whether the commodity is of the prescribed quality and prescribing a quality therefor and for an increase or decrease in the amount otherwise payable to any producer or other person for any of the commodity delivered by him or any other person to the board or to an authorized agent of the board according to the quality of the commodity whether at the time of delivery or subsequently; and 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." The material

words are "regulating the . . . labelling . . . marketing selling . . . of the commodity (whether the same is produced within or outside Victoria) or the packages containing such commodity".

Of the reasons suggested for the inapplicability of this power, it is enough to state two which seem decisive. In the first place sub-par. (iv) relates entirely to "any of the commodity delivered . . . to the board or an authorized agent of the board". That is true of the last limb of sub-par. (iv) as well as of the earlier part. Context would be enough to show this but it is confirmed by the expression "such commodity" forming the last two words. The antecedent of the relative "such" is to be found in the phrase "any of the commodity delivered . . . to the board or to an authorized agent of the board". The second reason is analogous to that making sub-par. (ix) inapplicable. The whole purpose of reg. 39 (b) is outside the conception of regulating labelling marketing and selling. That conception has no concern with what the potential buyer knows about the territorial origin of the eggs and to acquaint him with that is the object to which sub-reg. (b) of reg. 39 is pointed. It seems impossible to bring the sub-regulation under s. 43 (1) (b) (iv).

It follows from the foregoing that no power can be found authorising the Governor in Council to adopt reg. 39 (b) which accordingly must be held void.

The appeal should be allowed and order of the Supreme Court discharged. In lieu thereof the order nisi to review should be made absolute and the conviction quashed.

McTIERNAN J. The question upon this appeal is whether reg. 39 (b) of the *Egg and Egg Pulp Marketing Board Regulations* exceeds the powers of making regulations given by s. 43 of the *Marketing of Primary Products Acts*. The provision of the regulation which is called into question makes it an offence to omit to use a card in the way thereby prescribed in connexion with the display of any eggs for sale by retail. The card must have inscribed on it the name of the country where the eggs were produced and it must be placed on or near the eggs so displayed. It is argued that the provision in question is authorised by s. 43 (1) (b) (ix) for the reason that what it prescribes is a method to be used in the display of the commodity for sale and the power in question extends to the display of eggs for sale which are not owned by the board. I think that the placing of a card with eggs which a person has for sale is not a procedure constituting a method of displaying them for sale, even though the card gives such information as their place of origin. If this is right, reg. 39 (b) cannot be supported by reference

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to sub-par. (ix). The words of the second part of s. 43 (1) (b) (iv) are not apt to justify the provision of the regulation which is called into question. Finally, as the regulation is expressed to extend to eggs beyond the province of the board, the general power with which s. 43 begins cannot justify it: *Shanahan v. Scott* (1). I would allow the appeal and quash the conviction.

Appeal allowed with costs.

Order of the Supreme Court discharged.

In lieu thereof order that the order nisi be made absolute with costs and the conviction be quashed and the information be dismissed with 20 guineas costs.

Solicitors for the appellant, *Moule, Hamilton & Derham*.

Solicitors for the respondent, *Henderson & Ball*.

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(1) (1957) 96 C.L.R. 245.