Privy Council Appeal No. 55 of 1948

Commonwealth of Australia and others - - - - *Appellants*

v.

Bank of New South Wales and others - - - - *Respondents*

Commonwealth of Australia and others - - - - *Appellants*

v.

Bank of Australasia and others - - - - - - *Respondents*

Commonwealth of Australia and others - - - - *Appellants*

v.

State of Victoria and another - - - - - - *Respondents*

Commonwealth of Australia and others - - - - *Appellants*

v.

State of South Australia and another - - - - *Respondents*

Commonwealth of Australia and others - - - - *Appellants*

v.

State of Western Australia and another - - - - *Respondents*

and

State of New South Wales and others - - - - *Interveners*

Consolidated Appeals

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH OCTOBER, 1949

Present at the Hearing:

LORD PORTER
LORD SIMONDS
LORD NORMAND
LORD MORTON OF HENRYTON
LORD MACDERMOTT

[*Delivered by* LORD PORTER]

These consolidated appeals from orders of the High Court of Australia raise important and difficult questions as to the legislative power of the Commonwealth Government under the Australian Constitution and as to the limitations expressly or by implication imposed upon it by that Constitution.

The Act of which the validity is challenged is the *Banking Act* 1947 hereafter called "the Act". Its provisions will be referred to later in detail, but its objects as stated in section 3 may be at once set out. They are as follows:—

> "(*a*) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit;

(*b*) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business ;

(*c*) the prohibition of the carrying on of banking business in Australia by private banks."

The legislative power of the Commonwealth is defined in section 51 of the Constitution, which is, so far as is relevant, as follows:

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:—

(i) Trade and commerce with other countries, and among the States:

(xiii) Banking, other than State banking: also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

Purporting to exercise the power thus vested in it the Commonwealth enacted the Act. It does not touch State banking even within the limits authorised by placitum (xiii). The expansion of the Commonwealth Bank and the suppression of private banks are its aim. By "private banks" is meant the bodies corporate whose names are set out in the First Schedule to the Act. They are the banks authorised to carry on the business of banking in Australia under the provisions of the Banking Act of 1945. They are fourteen in number, eight of them incorporated in Australia, three of them in England and three elsewhere.

Forthwith upon the passing of the Act numerous actions were commenced in the High Court in which the plaintiffs claimed that the Act was invalid. It is unnecessary to state the parties to the several actions beyond saying that the plaintiffs included the eight private banks incorporated in Australia, the three private banks incorporated in England together with, in some cases, a director and representative shareholder, and, in addition, the States of Victoria, South Australia and Western Australia, while the defendants were the Commonwealth of Australia, the Right Hon. Joseph Benedict Chifley (the Treasurer of the Commonwealth), the Commonwealth Bank of Australia and Hugh Traill Armitage (the Governor of that Bank). The defendants are the appellants in the present consolidated appeals, while the plaintiffs in the several actions are the respondents. In addition the States of New South Wales and Queensland have by leave of their Lordships intervened in the appeal in support of the appellants.

Their Lordships are directly concerned in these appeals with one section only of the Act, section 46, the terms of which will be presently set out. But in the High Court not only section 46 but numerous other provisions of the Act were successfully attacked and in respect of their declared invalidity the appellants have brought no appeal. It will be convenient as an introduction to section 46 to state briefly the provisions of the Act and to explain what remains of them after the judgment of the High Court.

Section 3 stating the objects of the Act has already been set out. Other relevant provisions were of the following character:—

Section 6. A severability clause in terms at least as wide as and possibly wider than those to be found in section 15A of the Acts Interpretation Act 1901-1941.

Section 11. A declaration that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State or person requiring them.

Section 12. A power to acquire by agreement all or any of the shares in a private bank.

Section 13. Powers of compulsory acquisition of Australian shares in any of the Australian private banks where the Treasurer is satisfied that the majority in number of the shares in that bank are Australian shares, and a consequent provision (*section* 15) for the payment of fair compensation therefor.

Section 17. An enactment that where Australian shares are so acquired the existing directors shall cease to hold office and

Section 18 *et seq.* Power to the Governor of the Commonwealth Bank to appoint other directors in their stead, and certain provisions incidental thereto.

Section 22. Power to the Treasurer to invite a private bank to make an agreement with the Commonwealth Bank for the taking over of the business of that private bank.

Section 24. Where no such agreement is arrived at by a specified date provision for a compulsory transfer of the business in Australia of that bank to the Commonwealth Bank with the consequent transfer of assets and for the payment of fair compensation.

Sections 26-45. The setting up of a Court of Claims to assess compensation and a provision that the computation of its amount should be entrusted to the Court of Claims exclusively and should consequently be withdrawn from the jurisdiction of the High Court.

By Orders made by the High Court in each action it was declared that the following provisions of the Act were invalid namely Division 2 of Part IV (which contained sections 12 to 16 inclusive) except in so far as it related to the voluntary acquisition of shares and without prejudice as therein mentioned, and Division 3 of Part IV (which contained sections 17 to 21 inclusive) and sections 24, 25, 37 to 45 inclusive, 46, 59 and 60.

As has been already stated, these Orders have not been appealed, except in regard to section 46. This section is contained in and makes up the whole of Part VII of the Act. It is entitled " Prohibition of the Carrying on of Banking Business by Private Banks " and is as follows:—

" (1) Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section.

(2) Each private bank shall, subject to this section, carry on banking business in Australia and shall not, except on grounds which are appropriate in the normal and proper conduct of banking business, cease to provide any facility or service provided by it in the course of its banking business on the fifteenth day of August, One thousand nine hundred and forty-seven.

(3) The last preceding sub-section shall not apply to a private bank if its business in Australia has been taken over by another private bank or after that business has been taken over by the Commonwealth Bank.

(4) The Treasurer may, by notice published in the *Gazette* and given in writing to a private bank, require that private bank to cease, upon a date specified in the notice, carrying on banking business in Australia.

(5) The date specified in a notice under the last preceding sub-section shall be not more than two months after the date upon which the notice is published in the *Gazette*.

(6) The Treasurer may, from time to time, by notice published in the *Gazette* and given in writing to the private bank concerned, amend a notice under sub-section (4) of this section (including such a notice as previously amended under this sub-section) by substituting a later date for the date specified in that notice (or in that notice as so amended).

(7) That later date may be a date either before or after the expiration of the period of two months referred to in sub-section (5) of this section.

(8) Upon and after the date specified in a notice under sub-section (4) of this section (or, if that notice has been amended under sub-section (6) of this section, upon and after the date specified in that notice as so amended), the private bank to which that notice was given shall not carry on banking business in Australia.

Penalty: Ten thousand pounds for each day on which the contravention occurs."

It is the validity of this section, divorced from the other sections of the Act which have been declared invalid, that the appellants seek to maintain. In the High Court and before this Board its validity has been challenged upon grounds, which, though not all of them will be discussed, it is convenient to set out. It is attacked upon the grounds:—

(i) that its provisions do not constitute a law for the peace order and good government of the Commonwealth with respect to any of the matters with respect to which the Commonwealth Parliament has by virtue of section 51 of the Constitution or otherwise, power to make laws;

(ii) that they contravene section 92 of the Constitution;

(iii) that they are inconsistent with the maintenance of the constitutional integrity of the States;

(iv) that they are inconsistent with section 105A of the Constitution and the Financial Agreement made thereunder;

(v) that they are inseparable from other provisions of the Act which are themselves invalid.

The appellants, contending that upon none of these grounds was the decision of the High Court adverse to them except that which was based upon the contravention of section 92, seek to obtain from the Board a contrary decision upon this point, and, as will appear, their Lordships will express their opinion upon it. But before doing so they must examine and deal with another question of far-reaching importance.

Special leave to appeal against the several orders of the High Court of Australia was granted to the appellants upon the footing that at the hearing of the appeals the right should be reserved to the respondents to raise the preliminary plea that such appeals did not lie without the certificate of the High Court. It is this plea, which was duly raised by the respondents, that must now be considered, no such certificate having been sought or given.

Chapter III of the Constitution which is entitled "The Judicature" consists of section 71 to section 80 inclusive, of which section 73 defines the appellate, and section 75 the original, jurisdiction of the High Court of Australia thereby established. Section 74 which for the present purpose is all important is in the following terms:—

"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the

High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

The question for determination is whether by reason of the provisions of this section the right of His Majesty by virtue of His Royal Prerogative to grant to the appellants special leave to appeal was, in the circumstances to which their Lordships must now refer, abrogated unless the High Court certified in the manner required by the section. It will be convenient to refer to a question of the kind described in s. 74 as an "*inter se* question".

The relevant circumstances appear to be these:

(1) The formal orders of the High Court make no reference to any "*inter se*" question. Declarations of invalidity are made and injunctions are granted, but upon the face of the orders the necessity for a certificate under s. 74 is not apparent.

(2) The several cases were heard without pleadings upon motion. It is therefore only from the evidence which was given on affidavit, the statements made at the Bar as to the argument and the contents of the judgments of the learned Judges of the High Court that it can be ascertained what were the issues raised and debated.

(3) A consideration of these matters places it beyond doubt that the validity of the Act in general and of s. 46 in particular was, as has already been stated, challenged upon (*inter alia*) the grounds (*a*) that its provisions were not a law for the peace order and good government of the Commonwealth with respect to any of the matters with respect to which the Commonwealth Parliament had power by virtue of s. 51 of the Constitution or otherwise to make laws, (*b*) that they were inconsistent with the maintenance of the constitutional integrity of the States, and (*c*) that they were inconsistent with s. 105A of the Constitution and the Financial Agreement made thereunder. These grounds admittedly raise *inter se* questions.

(4) The determination of each of these *inter se* questions in favour of the appellants was a necessary condition of a successful defence of the impugned Act in the High Court and it remains a necessary condition of obtaining the relief sought upon the appeal to His Majesty in Council. If these *inter se* questions are so determined the question whether the Act or any of its provisions contravenes s. 92 of the Constitution must then be decided. But this question appears not to be an *inter se* question.

(5) A clear majority of the Judges of the High Court were of opinion that s. 46 of the Act contravened s. 92 of the Constitution and was accordingly invalid. The present appeal is brought to challenge the correctness of this opinion. Upon the *inter se* questions (except that of inconsistency with the maintenance of the constitutional integrity of the States) there was a considerable diversity of opinion and in regard to this there was some controversy before their Lordships whether, if indeed it became necessary to determine whether a "decision" had been given on any *inter se* question, a final opinion could be attributed to some members of the Court.

It is to these circumstances that the provisions of s. 74 of the Constitution must be applied, and it is convenient to state summarily the rival submissions of the parties. By the respondents, who contend that in the absence of a certificate no appeal lies, it is urged that upon its true construction the section means that no appeal to His Majesty is permissible without certificate, if the relief sought upon the appeal cannot be granted without the determination of an *inter se* question. The appellants on the other hand, though they agree that it may be necessary to look beyond the terms of the formal order, contend that a certificate is not necessary unless there has been a specific decision adverse to

an appellant upon an *inter se* question, which he and he alone wishes to challenge, and that it is erroneous to contend that a certificate is required merely because an *inter se* question has been raised in the proceedings before the High Court and may have to be decided in the appeal to His Majesty in Council.

Before considering how far these conflicting views accord with the actual language of s. 74 their Lordships would briefly examine the section in a somewhat wider aspect. It is, in the first place, clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike. Reference may be made upon this aspect of the matter to the judgment of Griffith C.J. and Barton and O'Connor JJ. in *Baxter's case,* 4 C.L.R. 1087. In its broad outlines s. 74 speaks for itself in this respect and the policy which it embodied is emphasised in later Judiciary Acts: see s. 38A of the Judiciary Act 1903-1934 which reproduces s. 2 of Act No. 8 of 1907. It would be a paradoxical result if, in the face of s. 74, the determination of *inter se* questions, which might be of transcendent importance, was left to this Board by the accident that the respondent, having won before the High Court on some other point, yet wished to rely also on a contention which raised an *inter se* point. To this matter their Lordships will return when they consider the practical aspect of their decision. It is sufficient here to say that this argument appears to weigh heavily against the submission of the appellants.

In the second place there appears to their Lordships to be no ground for suggesting that any new kind of jurisdiction is created by s. 74. It deals with the Royal Prerogative to grant special leave to appeal and imposes certain limitations upon, or, in the language of the section, in some degree "impairs", that right. But the appeal by special leave is what it always has been, an appeal from an order or other judicial act which affects adversely the rights claimed by the appellant party. It is in the light of this consideration that the section must if possible be construed. To give effect to the appellants' submission would appear to involve the admission of an appeal not from a judicial act but from the pronouncement of an opinion upon a question of law.

The conclusion to which these broad considerations point is in their Lordships' opinion assisted by a closer examination of the section, though its language suggests that the difficulty which now arises had not been in the mind of its authors.

As its opening words show, the section deals with "appeals" to His Majesty in Council and, as already observed, an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a Court set aside or varied in his favour by an appellate Court. It is only from such an order that an appeal can be brought. In s. 74 the appeal is described as an appeal "from a decision of the High Court" and so far no difficulty arises. "Decision" is an apt compendious word to cover "judgments decrees orders and sentences", an expression that occurs in s. 73. It was used in the comparable context of the Judicial Committee Acts of 1833 and 1844 as a generic term to cover "determination sentence rule or order" and "order sentence or decree". Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the "natural, obvious and *prima facie* meaning of the word 'decision' is decision of the suit by the Court": see L.R. 30 Indian Appeals p. 35 where the question was whether in the Indian Civil Procedure Code "decision" meant the formal expression of an adjudication in a suit or the statement given by the Judge of the grounds of a decree or order, and Lord Davey delivering the opinion of this Board used the words that have been cited above.

It is however upon the words next following that the appellants primarily rely. The appeal which is not permitted is an appeal "from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* etc.," and it is said by the appellants that the words "upon any question" are to be read with the immediately preceding word "decision" and that, so read, they qualify the meaning of that word so that it must be interpreted as the expression of an opinion by the Court upon a particular *inter se* question, with the result (as their Lordships understand the argument) that the only prohibited appeal is one in which the appellants seek to obtain a reversal of that expression of opinion in an appellate Court. In support of this contention the appellants rely also on the repetition of the word "question" at the end of the first paragraph, and again in the second paragraph of the section.

It appears to their Lordships to be of little significance whether the words "upon any question" are linked (as the appellants contend) with "decision" or (as the respondents contend) with "appeal". The former is the natural grammatical meaning and is to be preferred. Then, so runs the appellants' argument, the respondents' construction requires that the word "upon" should be read as equivalent to "involving" and this, they say, is an illegitimate straining of language. It may be conceded that the word "upon" is not the word most apt to the occasion. But, if the alternative construction involves (as it appears to involve) giving to both the words "appeal" and "decision" some other than their natural and primary meaning and further involves a grave departure from the policy which clearly inspires this part of the Constitution, it does not appear to their Lordships that the use of the word "upon" where "involving" would more aptly be used should deter them from adopting the respondents' construction. It is a somewhat elliptical but by no means an impossible use of language to speak of a decision upon a certain question when what is meant is a decision in a suit, which cannot be decided without the determination of that question, or, more shortly, a decision involving a certain question or involving the determination of a certain question.

Moreover, if the construction for which the respondents contend may be criticised as departing from the strict meaning of the word "upon", the construction put forward by the appellants cannot escape a similar criticism. It was urged that, if the phrase, "No appeal . . . from a decision of the High Court upon any question" is read as a whole without pausing upon its several elements, its meaning is clear. But, so read, it has not, or at least has not clearly, the meaning attributed to it by the appellants unless it is amplified so as to read "No appeal from an order of the High Court being a decision adverse to the appellant upon a question" (or "in so far as it is a decision adverse to the appellants upon a question"). For this paraphrase, which is not artistic nor itself free from ambiguity, there seems to be no justification. To their Lordships it appears preferable to adhere strictly to the proper meaning of "appeal" and of "decision" when it is used in relation to an appeal. If any other interpretation is adopted, the word "decision" is required to do double duty meaning at the same time the order of the Court and an expression of opinion by the Court.

The appellants, as has already been said, rely on the further references in the section to "the question"; so also do the respondents who contend that the phrase in the second paragraph "an appeal . . . on the question" not only supports their view that the words "upon any question" are to be linked with "appeal" rather than with "decision" but also, since "appeal" can have only one meaning, emphasises the contention that the "question" means the suit in which the question is raised. In their Lordships' opinion, however, little assistance is given by the repetition of the word: the meaning of the first paragraph of the section must be determined by its own language.

In the next place their Lordships must consider what is the scope and meaning of the section if the respondents' submission is not accepted. They have not found it easy to ascertain or to state precisely what is

at this stage of the argument the contention of the appellants. It is clear that no difficulty arises unless it is sought to bring an appeal in a suit in which two pleas are involved, the one a plea which challenges the validity of a statute upon an *inter se* question, the other a plea which may be a challenge of its validity on some other ground, e.g., that it offends against s. 92 of the Constitution, or may turn purely on some question of fact. Further it is clear that no difficulty arises, if both pleas are decided against the same party. It could not in that case be contended (subject only to a qualification appearing later) that an appeal would lie without a certificate of the High Court. But the difficulty arises where there are two pleas of the kind described and either the *inter se* plea (as it may briefly be called) is decided one way and the other plea the other way, or, a decision on the other plea being sufficient to determine the rights of the parties, the High Court think it unnecessary to express any, or any final, opinion upon the *inter se* plea. And, as the present appeal well illustrates, the situation is capable of numerous and by no means fanciful variations. Thus in a case in which two or three or more pleas, amongst them an *inter se* plea, were raised, it might well not be possible to say that there had been in favour of one party or the other a decision, or even an expression of opinion upon the *inter se* plea, by a majority of the Judges constituting the Court; yet in such a case it might be clear that the unsuccessful party who sought to appeal could not succeed upon his appeal unless the Appellate Court decided the *inter se* plea in his favour. It appears to their Lordships that, as soon as it is conceded (as both sides concede) that s. 74 cannot be confined to simple cases of declaratory judgments where the validity or invalidity of the impugned statute and the reason therefor appear on the face of the order, the limitation of its scope, for which the appellants contend, ought not to be accepted. They have already stated that in their opinion the definition for which the respondents contend gives a legitimate meaning to its actual language and is consonant with its obvious purpose.

Their Lordships in coming to this conclusion perforce disagree with the views expressed by the majority of the Court in *Baxter's case* (*supra*) as to the meaning of the word "decision" in s. 74, preferring that expressed by Mr. Justice Higgins. They would however observe that in that case it was unnecessary for the Court to consider a case such as the present appeal, in which different pleas have been decided in favour of different parties, and to pursue to its logical conclusion the construction of the section which they favoured. Nor, valuable and important though their observations were, were they necessary to the decision of the case. The appellants further relied on the opinion expressed in a book entitled "The Annotated Constitution of the Australian Commonwealth" a work published in 1901 in the early days of the Constitution. It does not appear to their Lordships that, however learned and distinguished its authors, they can give authoritative weight to an opinion which was expressed before the construction of the section had been tested before the Court.

Before leaving this question their Lordships think it right to deal with a point that arises on the second paragraph of the section. It is there provided that, if the High Court grants a certificate, "thereupon an appeal shall lie to His Majesty in Council on the question without further leave". If, as their Lordships hold, the certificate of the High Court is necessary whenever the appellant cannot obtain the relief that he claims without the determination of an *inter se* question, does it follow that, when such a certificate has been given, no further leave is required, even though other questions, which are not *inter se* questions, will have to be determined? In their Lordships' opinion it does. Upon this question no settled practice has or could be established until the scope of section 74 had been finally determined. It may now be stated that in every case in which the relief sought upon the appeal cannot be granted without the determination of an *inter se* question, (*a*) no appeal will lie without the certificate of the High Court and (*b*) when that certificate has been

given no further leave from His Majesty in Council will be necessary It was suggested that the prerogative right to grant leave to appeal might in this way be unduly restricted, for a litigant might raise an *inter se* question upon some unsubstantial pretext in the hope that thus the way to an appeal to His Majesty in Council would be barred. But the possibility of abuse is no reason for departure from what appears to be the logical procedure and it can be assumed that the High Court or this Board will deal with such action summarily.

Finally mention should be made of one class of case which requires special treatment. If, for example, a party to a suit contends (1) that the facts of his case do not bring him within the operation of a statute and (2) that, even if they do, the statute is invalid upon some *inter se* ground and both pleas are decided against him, there appears to be no reason why he should not accept the decision of the High Court upon the *inter se* question but present a petition to His Majesty in Council for special leave to appeal on the other question. In such a case, if leave were granted, the Board would, upon the hearing of the appeal, have no concern with any *inter se* question and in harmony with the formula already stated the appellant could obtain the relief he claimed without the determination by the Board of any such question. The example given is not exhaustive of this class of case. The plea other than the *inter se* plea might be founded not on fact but upon some other ground of invalidity, in which case the same principle would apply.

The view which their Lordships have expressed that no appeal lies to them without a certificate from the High Court of Australia is conclusive of the case and in normal circumstances they would not give any opinion upon the many other matters argued before them. Nor do they propose to express any opinion upon the "*inter se*" questions which it is the function of the High Court finally to determine unless a certificate is given under section 74. But for two reasons they think it right to state their views upon the question to which so large a part of the argument of the appellants was directed, viz. whether section 46 of the Act offends against section 92 of the Constitution; first, because it might yet be possible to apply for, and if the High Court should think fit to grant it, to obtain a certificate which would enable the appellants to re-argue a case already fully argued, and, secondly, because it appears to them that a large part of the appellants' argument was based upon a misapprehension of two cases already decided by this Board which it is their Lordships' duty so far as they can to correct.

The familiar terms of the first part of section 92 may be set out:

> "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

Forty years of controversy upon these words have left one thing at least clear. It is no longer arguable that freedom from customs or other monetary charges alone is secured by the section. Upon that the contending parties, while differing on almost every other point, are agreed. The questions remaining are what is included, and in particular, is the business of banking included in the expression trade commerce and intercourse? What is the freedom guaranteed by the section, and is it infringed by the Act?

Upon these questions the parties put forward conflicting contentions. The appellants (who claim support in the dissenting judgments of the Chief Justice and McTiernan J.) contend that banking, though it may be carried on by means of inter-State transactions, is not "trade commerce and intercourse among the States" within section 92 and, further, that, even if it is, the Act does not infringe any guaranteed freedom. The contrary on both points is contended by the respondents whose contention was upheld by the other four Judges of the High Court. In considering these rival contentions, their Lordships will examine the decisions in the *James* cases, claimed by both sides to be decisive in their

favour, and then consider the bearing of those decisions and the reasoning which appears to be implicit in them upon the present case.

But before this is done it remains to complete the statement of relevant facts and to deal with one matter, not indeed of general importance but peculiar to the present case, viz.: the question whether section 46 as a whole is severable from the parts of the Act which have been declared invalid and the further question whether, if part of section 46 itself is invalid, yet the rest of it is valid.

As may be surmised from what has already been said, the business of banking in Australia is at the present time carried on by three kinds of organisation (1) the Commonwealth Bank of Australia (2) State Banks and (3) the private banks which have been already described. The private banks carry on a substantial volume of inter-State business amounting to about 15 per cent. of their total business and some of them act as bankers for certain of the States. The Act does not differentiate, or authorise a differentiation, between their inter-State and intra-State business. It has not been suggested that it would be possible to do so. They are already under a large measure of control by the Commonwealth Bank under the Banking Act of 1945, the provisions of which Act have not been challenged in these proceedings. The expansion of the Commonwealth Bank is one of the avowed objects of the Act and must inevitably follow from the prohibition of private banking. Since the appellants rely upon it for one part of their argument, it may be well to repeat that section 11 of the Act imposes on the Commonwealth Bank the duty:

> "(*a*) to provide, in accordance with the conditions appropriate in the normal and proper conduct of banking business adequate banking facilities for any State or person requiring them;
>
> (*b*) to conduct its business without discrimination except on such grounds as are appropriate in the normal and proper conduct of banking business; and
>
> (*c*) to observe, except as otherwise required by law, the practices and usages customary among bankers and, in particular, not to divulge any information relating to, or to the affairs of, a customer of the Commonwealth Bank except in circumstances in which it is, in accordance with law or the practices and usages customary among bankers, necessary or proper for the Commonwealth Bank to divulge that information."

These being the relevant facts, their Lordships turn first to what has been called the severability point.

It is enacted by s. 6 of the Act as follows:—

> "It is hereby declared to be the intention of the Parliament—
>
> (*a*) that if any provision of this Act is inconsistent with the Constitution, that provision and all the other provisions of this Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution;
>
> (*b*) that the provisions of the last preceding paragraph shall be in addition to, and not in substitution for, the provisions of section fifteen A of the *Acts Interpretation Act*, 1901-1941; and
>
> (*c*) that this section and section fifteen A of the *Acts Interpretation Act*, 1901-1941, shall have effect notwithstanding that their operation may result in this Act having an effect different, or apparently different, in substance from the effect of the provisions contained in this Act in the form in which this Act was enacted by the Parliament."

Taking into consideration the wide terms of this section supplementing those of s. 15A of the Interpretation Act, 1901-1941, their Lordships have come with some hesitation to the conclusion that s. 46 is severable from the invalidated provisions of the Act and that its validity must be tested as if it were a separate enactment. It may be observed however that, since, as will appear, so regarded it falls by its own offence against s. 92,

it is an academic question whether it should suffer from association with other sections. The further question, whether the validity of any part of s. 46 can be maintained if other parts of it are invalid, is in the same sense academic: it will not help the appellants, if, for example, sub-sections (1) to (3) inclusive can be considered as one enactment and sub-sections (4) to (8) as another. But, since the matter has been argued before them, their Lordships state their opinion that upon its true construction s. 46 contains one indivisible scheme, no part of which can be severed from the rest. Sub-section (1) contains the primary enactment, the probihition of private banking: sub-section (2), which is barely intelligible except by reference to provisions for compulsory acquisition now excised from the Act, is intended to ensure an orderly continuance of banking facilities, until the private banks are dissolved, by compelling each of them to carry on its business "subject to the section". From the date specified by notice given by the Treasurer under sub-section (4) or a substituted date (sub-sections (6) and (7)) the bank to which notice has been given must not carry on business in Australia (sub-section (8)). There is upon the true construction of the section a single indivisible scheme by which the extinction of all private banking is to be brought about immediately or step by step at the will of the Treasurer. It is upon this footing that the validity of the section will be examined. As was observed by the learned Chief Justice in the course of his judgment: "There is no doubt that the provisions mentioned are directed towards putting the plaintiff banks out of business or that, if put into operation, they will achieve that result." From this way of stating the problem the appellants do not shrink. The question then is whether an Act which, leaving untouched the Commonwealth and State Banks, authorises the total prohibition of all private banking, offends against s. 92.

The problem being thus stated the first question that must be answered is whether a prohibition of banking business is in any view within the ambit of s. 92. This question can itself be resolved into two questions: (1) is the business of banking included among those activities described as trade commerce and intercourse in s. 92? (2) If not, is a prohibition of private banking, involving the denial of a choice of banking facilities to those engaged in trade and commerce among the States, a restriction upon the freedom of that trade and commerce which is guaranteed by s. 92? Concluding, as they do, that the first question must be answered in the affirmative, their Lordships do not think it necessary to discuss the second, which presents many difficulties. It is in their opinion clear that such words as trade commerce and intercourse are not naturally susceptible of such a narrow interpretation as the appellants would put upon them. And, if they may say so with all respect to the learned Chief Justice who has taken the opposite view, it would be contrary to the trend of judicial decision both in Australia and (so far as that is relevant) in the United States of America to hold otherwise. The view which at one time appeared to be put forward in argument that the words in s. 92 "whether by means of internal carriage or ocean navigation" restricted its operation to such things and persons as are carried by land or sea, has long since been rejected and cannot be entertained. The business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities, is a part of the trade commerce and intercourse of a modern society and, in so far as it is carried on by means of inter-State transactions, is within the ambit of s. 92. Upon this part of the case they respectfully adopt the language and reasoning of Dixon J. to which they can add nothing.

The business of banking being an activity of which the freedom is protected by s. 92 the next question is whether the Act offends that section, and their Lordships turn at once to the cases of *James* v. *Cowan* and *James* v. *The Commonwealth*. Of these two cases the more important, for what it decided, is *James* v. *Cowan*.

The facts in *James* v. *Cowan* can only be understood if they are read in conjunction with the earlier case of *James* v. *The State of S. Australia*,

40 C.L.R. 1. James carried on business in S. Australia as a grower and producer of dried fruits and in the course of it sold his products outside that State. For reasons, which have been many times stated in judgments of this Board and of the High Court and need not be repeated, the Commonwealth and certain of the States, including South Australia, had recourse to legislation to deal with the whole question of marketing dried fruits. In 1924 the South Australian Legislature enacted the Dried Fruits Act, 1924. The material provisions of this Act are set out at large in the judgment of *James* v. *Cowan*. It is essential only to notice that the Act contained two sections, s. 20 and s. 28, each of which authorised an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the Minister to purchase by agreement, or acquire compulsorily, any dried fruits in S. Australia grown and dried in Australia subject to certain exceptions which need not be particularised.

In the earlier case of *James* v. *The State of S. Australia* it was in the first place the validity of s. 20 of the Act and of determinations made under it that came in question and it was held by the whole Court (Isaacs A.C.J., Gavan Duffy, Rich, Starke and Powers JJ.) that that section, so far as it authorised a determination by the Board limiting the quantities of dried fruits which might be marketed within the Commonwealth, was obnoxious to s. 92. From the decision of the High Court no appeal was brought to this Board. But, s. 20 failing him, the Minister of Agriculture in S. Australia sought to make use of his powers under s. 28. Once more James invoked s. 92 of the Constitution and in the case of *James* v. *Cowan* challenged the validity of the executive action taken under s. 28 and it was in this case when it came before the Board that the decision was given, which, as their Lordships think, goes far to determine the present case. For, as part of the *ratio decidendi* of the case and by no means *obiter* or by way of a historical narrative, the Board expressly affirmed the decision of the High Court in *James* v. *The State of S. Australia*. The primary importance of the decision lies in this, that in regard to s. 20 Lord Atkin delivering the opinion of the Board said at p. 559 : " In the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister crediting him with the precise object and intention found by the High Court were also invalid."

Before further examining what is involved in this decision their Lordships think it convenient to note what was actually decided in the other of the two cases which have come before them. In *James* v. *The Commonwealth* it was a similar Act, but in this case an Act of the Commonwealth, that was under attack, and the substantial issue was whether the Commonwealth, as well as the States, was bound by s. 92. If it was bound, then the further question arose whether the Act in question was obnoxious to s. 92. The decision of the Board was that the Commonwealth was bound by s. 92 and it is significant that the judgment thus proceeds at p. 633 : " For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-35, must be held to be invalid. On the interpretation of 'free' in s. 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed, the contrary was but faintly contended, if the Commonwealth were held to be bound by the section." There does not in fact appear to have been any ground for contending that, if the Act which was challenged in *James* v. *Cowan* was invalid, that challenged in *James* v. *The Commonwealth* could be valid.

It might well appear that these two decisions were a serious obstacle to the present appellants' case. Section 20 of the South Australian Act was invalid. It was general in its terms: it did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorised a

determination at the will of the Board, the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid. And for the same reason the Commonwealth Act fell.

The necessary implications of these decisions are important. First may be mentioned an argument strenuously maintained on this appeal that s. 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James vindicated his freedom in hard won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call upon the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.

Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader, and it might be, the forcible acquisition of his goods, then the freedom of trade among the States remained unimpaired. In the first place this view seems to be in direct conflict with the decisions in the *James cases*; for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James, from State to State that was impeded. Secondly, the test of total volume is unreal and unpractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in s. 92 "trade and commerce" are joined with "intercourse" and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require.

The bearing of those decisions with their implications upon the present appeal is manifest. Let it be admitted, let it, indeed, be emphatically asserted, that the impact of s. 92 upon any legislative or executive action must depend upon the facts of the case. Yet it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against the prohibition would invoke s. 92 in vain. In their Lordships' opinion there is no justification for such an anomaly. On the contrary the considerations which led the Board to the conclusion that s. 20 of the South Australian Dried Fruits Act, 1924, offended against s. 92 of the Constitution lead them to a similar conclusion in regard to s. 46 of the Banking Act, 1947. It is no answer that under the compulsion of s. 11 of the Act the Commonwealth Bank will provide the banking facilities that the community may require, nor, if anyone dared so to prophesy, that the volume of banking would be the same. Nor is it relevant that the prohibition affects the intra-State transactions of a private bank as well as its inter-State transactions: so also in the *James cases* there was no discrimination: his fruit, for whatever market destined, was liable to be the subject of a "determination".

Yet it is upon these very decisions and in particular upon that in *James* v. *The Commonwealth* that the appellants rely. The third of their reasons in their formal Case is that "the decision of the majority of the High Court in relation to s. 92 is inconsistent with the decisions of the Judicial Committee [in the two cases cited]".

It appears to their Lordships that this contention ignores the actual decisions and is based upon a misapprehension of certain language used in the judgments of the Board. In *James* v. *Cowan* Lord Atkin at p. 555 speaks of s. 20 and the determinations made under it as " directed at inter-State commerce as such ". Elsewhere he speaks of the " objects " of the Minister and the Board and of the " real object " of arming the Minister with a certain power. It is possible that this language is open to misconception. But, in whatever sense the word " object " or " intention " may be used in reference to a Minister exercising a statutory power, in relation to an Act of Parliament it can be ascertained in one way only, which can best be stated in the words of Lord Watson in *Salomon's* case 1897 A.C. 22 at p. 38: " In a Court of law or equity what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication ". The same idea is felicitously expressed in an opinion of the English Law officers Sir Roundell Palmer and Sir Robert Collier cited by Isaacs J. in *James* v. *Cowan*, 43 C.L.R. 386 at p. 409: " It must be presumed that a legislative body intends that which is the necessary effect of its enactments: the object, the purpose, and the intention of the enactment is the same ". The same learned Judge adds: " By the ' necessary effect ' it need scarcely be said these learned jurists meant the necessary legal effect not the ulterior effect economically or socially ". It was because s. 20 of the Dried Fruits Act of South Australia operated according to the natural meaning of its words to authorise a direct restriction upon the manner in which James could dispose of his product by an inter-State transaction that it offended against s. 92, not because some other extraneous purpose, object or intention was ascribable to the South Australian Legislature.

So also, in *James* v. *The Commonwealth* Lord Wright in delivering the opinion of the Board uses somewhat similar language: he speaks at p. 618 of the " real object " of an Act, at p. 622 of " its admitted object ", citing words used by Lord Atkin in the earlier case, and again of an Act being " directed against " or " aimed at " a particular result. Upon these expressions the appellants have fastened, contending that an Act cannot offend against s. 92 unless it can be shown that the intention of the Legislature was to interfere in some way with inter-State trade, and they go on to say that in the Banking Act, 1947, there is to be found no intention to interfere with inter-State trade: that Act, they say, is not directed or aimed at such trade. To this their Lordships would say that the test is clear: does the Act, not remotely or incidentally (as to which they will say something later) but directly, restrict the inter-State business of banking? Beyond doubt it does since it authorises in terms the total prohibition of private banking. If so, then in the only sense in which those words can be appropriately used in this case, it is an Act which is aimed or directed at, and the purpose, object and intention of which is to restrict, inter-State trade commerce and intercourse.

It is not however only upon a misunderstanding of the expressions last mentioned that the appellants base their claim that *James* v. *The Commonwealth* is decisive in their favour. They further find support in such phrases as " freedom as at the frontier or . . . in respect of goods passing into or out of the State " and " freedom at what is the crucial point in inter-State trade, that is at the State barrier ", which are to be found in the course of the judgment in that case. These words must (as must every word of every judgment) be read *secundum subjectam materiam*. They were appropriate to their context and must be read in their context. They cannot be interpreted as a decision either that it is only the passage of goods which is protected by s. 92 or that it is only at the frontier that the stipulated freedom may be impaired. It is not to be doubted that a restriction, applied not at the border but at a prior or subsequent stage of inter-State trade commerce or intercourse, may offend against s. 92. Nor, as their Lordships hold, in accordance with the view long entertained in Australia, is it in respect of the passage of goods only that such trade commerce and intercourse is protected.

Lastly the judgment in *James* v. *The Commonwealth* was invoked by the appellants upon the ground that it contained expressions of approval of certain decisions previously given by the High Court of Australia, and (so the argument ran), if those decisions were right, then the judgment of the High Court in the present case could not be maintained. This is a dangerous line of argument. It is true that in the course of a narrative of the leading High Court decisions upon s. 92 Lord Wright observed in regard to a passage in the judgment of Evatt J. in *Vizzard's case* (50 C.L.R. 30) : " If this reasoning, which in Vizzard's case was primarily applied to the States, is, as it seems to be, correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under s. 51 (i) . . . " But it does not appear to their Lordships that the whole of that learned Judge's reasoning received the considered approval of the Board. Nor, even if it were otherwise, would it follow that the judgment of the High Court in the present case could not be maintained. " In every case " it was said in the same case " it must be a question of fact whether there is an interference with this freedom of passage." The facts in relation both to subject matter and to manner of restriction or interference are so widely different in the two cases that it is difficult to apply to one case all that was said in the other. In this connection it may be noted that in *James* v. *Cowan* their Lordships observed that they found themselves " in accord with the convincing judgment delivered by Isaacs J. in the High Court ". The decisions in *James* v. *Cowan* and in *Vizzard's case* may be reconciled : it would not be easy to reconcile all that was said by Evatt J. in the one case with all that was said by Isaacs J. in the other.

Their Lordships have thought it proper to deal at considerable length with the earlier decisions of this Board because so much reliance was placed upon them by the appellants. It is, they think, clear that, far from assisting the appellants, these two decisions are, as the respondents have throughout contended, strongly against them.

In observing upon the *James* cases and their bearing upon the present case their Lordships noted that the Act now under consideration operated to restrict the freedom of inter-State trade commerce and intercourse not remotely or incidentally but directly. Upon this and upon a cognate matter, the distinction between restrictions which are regulatory and do not offend against s. 92 and those which are something more than regulatory and do so offend, their Lordships think it proper to make certain further observations.

It is generally recognised that the expression " free " in s. 92 though emphasised by the accompanying " absolutely ", yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual. As long ago as 1916 in *Duncan* v. *The State of Queensland*, 22 C.L.R. at p. 573, Sir Samuel Griffiths C.J. said: " But the word ' free ' does not mean *extra legem* any more than freedom means anarchy. We boast of being an absolutely free people but that does not mean that we are not subject to law ", and through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a Court of Law. For where the dispute is, as here, not only between Commonwealth

and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue. It is vain to invoke the voice of Parliament.

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given. In the recent case of *Australian National Airways Proprietary Ltd.* v. *The Commonwealth,* 71 C.L.R. 29, the learned Chief Justice at p. 61 used these words: " I venture to repeat what I said in the former case [viz. the ' Milk Case ', 62 C.L.R. 116]: One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further a law which is ' directed against ' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92 ". With this statement which both repeats the general proposition and precisely states that simple prohibition is not regulation their Lordships agree. And it is, as they think, a test which must have led the Chief Justice to a different conclusion in this case had he decided that the business of banking was within the ambit of s. 92. They do not doubt that it led him to a correct decision in the *Airways* case. There he said: " In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is based simply upon the fact that the competing services are themselves inter-State services. . . . The exclusion of competition with the Commission is not a system of regulation and is in my opinion a violation of s. 92. . . . ". *Mutatis mutandis* these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time.

Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolised remained absolutely free.

Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark upon inter-State trade, and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must therefore add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved which is nowhere better exemplified than in the Potato Case (*The State of Tasmania* v. *The State of Victoria,* 52 C.L.R. 157) where at pages 168-9 the following passage occurs in the judgment of Gavan Duffy C.J. and Evatt and McTiernan J.J.; " In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease into the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed ".

The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade commerce and intercourse among the States.

Their Lordships will not attempt to define this boundary. An analogous difficulty in one section of constitutional law, viz., in the determination of the question where legislative power resides, has led to the use of such phrases as " pith and substance " in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade commerce and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words " direct " and " remote " as to " pith and substance ". But it appears to their Lordships that, if these two tests are applied: first, whether the effect of the Act is in a particular respect direct or remote; and, secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed.

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In the Privy Council

COMMONWEALTH OF AUSTRALIA
AND OTHERS

v.

BANK OF NEW SOUTH WALES
AND OTHERS

COMMONWEALTH OF AUSTRALIA
AND OTHERS

v.

BANK OF AUSTRALASIA AND OTHERS

COMMONWEALTH OF AUSTRALIA
AND OTHERS

v.

STATE OF VICTORIA AND ANOTHER

COMMONWEALTH OF AUSTRALIA
AND OTHERS

v.

STATE OF SOUTH AUSTRALIA
AND ANOTHER

COMMONWEALTH OF AUSTRALIA
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AND ANOTHER

and

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AND OTHERS

Consolidated Appeals

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