

AUSTRALIA

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THE GRAIN POOL OF WA vs. THE COMMONWEALTH OF AUSTRALIA & ANOR
(P34/98)

The plaintiff (the Grain Pool) is a statutory authority established under the Grain Marketing Act 1975 (WA) as the sole marketing authority of prescribed grains in Western Australia. Barley is a prescribed grain.

The Plant Variety Rights Act 1987 (Cth) (the PVR Act) commenced in 1987 and was repealed by the Plant Breeder's Rights Act 1994 (Cth) (the PBR Act). Australia also undertook international obligations in relation to plants by becoming a party to the 1978 International Convention for the Protection of New Varieties of Plants. The 1978 Convention provided for the recognition in member States, of certain rights in the breeders of new plant varieties. The 1978 Convention was revised in 1991 to provide for each member to grant and protect plant breeders' right. Australia acceded to the 1991 Convention in 1999.

The Grain Pool alleged that the PVR Act was not appropriate to give effect to the terms of the 1978 Convention and that the PBR Act was not appropriate to give effect to the terms of either the 1991 Convention or the 1978 Convention. The Grain Pool contended that neither the PVR Act nor the PBR Act were within the constitutional power of the Commonwealth and were therefore invalid. The Grain Pool further contended that the purported grant of PVR and/or PBR in 'Franklin' barley was invalid and of no effect.

The second defendant was Cultivaust Pty Ltd (Cultivaust). Cultivaust alleged that it is a licensee of 'Franklin' barley rights from the State of Tasmania, which gives it the exclusive right to sell and export 'Franklin'. Cultivaust alleges that the Grain Pool, in selling and exporting 'Franklin', has acted in breach of Cultivaust's rights in 'Franklin'.

Both defendants contended that PVR Act and the PBR Act were each

- (i) a law with respect to external affairs by virtue of Australia's membership of the Union for the Protection of New Varieties of Plants and the 1978 Convention
- (ii) a law with respect to matters incidental to the external affairs power and
- (iii) a law with respect to patents for invention.

Notice of a Constitutional Matter was served and the Attorneys-General for Western Australia and Tasmania intervened. Attorneys-General for Queensland withdrew his intervention.

In a lengthy judgment the full bench of the High Court unanimously concluded that both the PVR Act and the PBR Act were valid as they were directly supported by the patent powers included in the Constitution. The Court therefore found it unnecessary to consider whether validity of the Acts was also supported with respect to the "external affairs" or any other head of Commonwealth power.

Costs were awarded to the defendants.