

1946  
NEW ZEALAND

---

# COMMISSION OF INQUIRY TO DETERMINE WHETHER CERTAIN COSTS COULD BE DEBITED TO THE DAIRY INDUSTRY STABILIZATION ACCOUNT

(REPORT OF)

---

*Presented to both Houses of the General Assembly by Command of His Excellency*

---

*Commission of Inquiry to determine whether certain Costs could be debited  
to the Dairy Industry Stabilization Account*

---

C. L. N. NEWALL, Governor-General

To all to whom these presents shall come, and to the Right Honourable Sir Michael Myers, G.C.M.G., Chief Justice of New Zealand; and the Honourable Mr. Robert Kennedy, a Judge of the Supreme Court; and the Honourable Mr. Harold Featherston Johnston, a Judge of the Supreme Court: Greeting.

WHEREAS on the eighteenth day of June, one thousand nine hundred and forty-three, the Honourable Mr. Daniel Giles Sullivan, Minister of Industries and Commerce, wrote to the Secretary of the Farmers' Federation a letter, a copy of which is set out in the Schedule hereto, and on the same date Mr. Walter William Mulholland, as Chairman of the Farmers' Federation, wrote to the Honourable the Minister in Charge of Stabilization—namely, the said Honourable Mr. Daniel Giles Sullivan—the letter a copy of which is also set out in the Schedule hereto:

And whereas a certain question has arisen out of the administration of the Government—namely, the question whether, having regard to all circumstances—relevant to the agreement between the Government

and the Farmers' Federation consisting of the letters aforesaid—the costs above the price realized incurred in holding the retail price of butter and cheese in New Zealand can, under the provisions of the said agreement, be debited to the Dairy Industry Stabilization Account, being an account raised in the Marketing Department pursuant to the said agreement :

And whereas it is expedient that a Commission be appointed to inquire into and report upon the aforesaid question :

Now, therefore, I, Cyril Louis Norton Newall, the Governor-General of the Dominion of New Zealand, in exercise of the powers conferred on me by the Commissions of Inquiry Act, 1908, and all other powers and authorities enabling me in this behalf, and acting by and with the advice and consent of the Executive Council, do hereby nominate constitute and appoint you the said

Sir Michael Myers, and  
Robert Kennedy, and  
Harold Featherston Johnston

to be a Commission to inquire into and report upon the aforesaid question :

And in exercise of the powers and authorities aforesaid, and with the like advice and consent, I do hereby appoint you the said

Sir Michael Myers

to be the Chairman of the said Commission :

And for the better enabling you to carry these presents into effect you are hereby authorized and empowered to make and conduct any inquiry under these presents at such times and places as you deem expedient, with power to adjourn from time to time and from place to place as you think fit, and so that these presents shall continue in force, and the inquiry may at any time and place be resumed although not regularly adjourned from time to time or from place to place :

And you are hereby strictly charged and directed that you shall not at any time publicly or otherwise disclose, save to me in pursuance of these presents or by my direction, the contents of any report so made or to be made by you or any evidence or information obtained by you in the exercise of the powers hereby conferred upon you, except such evidence or information as is received in the course of a sitting open to the public :

Provided always that nothing in these presents shall be deemed to require you to receive any evidence or information in public or to hold in public any sitting of the Commission unless you think fit so to do :

And, using all due diligence, you are required to report to me in writing under your hands not later than the thirty-first day of March, one thousand nine hundred and forty-six, your findings and opinions on the question hereby referred to you.

THE SCHEDULE HEREINBEFORE REFERRED TO

---

COPY OF LETTER FROM THE HONOURABLE MR. DANIEL GILES SULLIVAN TO THE  
SECRETARY OF THE FARMERS' FEDERATION

18th June, 1943.

The Secretary,  
The Farmers' Federation,  
P.O. Box 715,  
Wellington, C. I.

DEAR SIR,—

*Farm Products Stabilization Accounts*

Referring to your letter of the 31st May and to discussions that have taken place between representatives of your Federation and of the Stabilization organization, I understand that agreement has been reached on the points involved subject to my approval. The form in which the arrangement now stands is as follows:—

1. A separate account will be kept in respect of each product or group of products as may be determined by the Government after consultation with the industry.

2. Stabilization accounts will be kept in the Marketing Accounts with the Reserve Bank, but will be recorded separately from existing pool and other accounts.

3. Into the stabilization account for any product will be paid any increase in price received from sales overseas for that product after the determined date unless the increase, although related to a specific product or products has been paid for a general national purpose, in which case it will be applied as provided in clause 5 below.

4. If any increase in price is paid to meet increased costs in respect of more than one product the increase will, after consultation with the particular organizations dealing with the products involved, be allocated among the respective stabilization accounts in proportions related to the cost increases.

5. If any increase paid from overseas on any product is paid for any general national purpose such as to maintain sterling balances to offset general import price increases or Government expenditure in holding costs that increase will be applied as follows:

(i) if it includes compensation for any cost increase held by subsidy which is charged against a stabilization account, a credit equivalent to the amount of the subsidy will be made to the appropriate stabilization account.

(ii) the balance of the payment will be credited as the Government determine.

6. Where a subsidy is required to keep costs of production of any product down to the level existing on the determined date, the amount of that subsidy, excluding the continuation at the level on the determined date of any subsidy paid or payable prior to that date, will be debited to the appropriate stabilization account subject to the provisions in 7.

7. If any increase credited to a stabilization account is paid specifically to cover increases in costs including increase in costs held by subsidy paid or payable before the determined date, the account will also be debited with any part of that earlier subsidy which relates to increases specifically covered.

8. Any debit still remaining in a stabilization account on the closing of the account will be transferred to War Expenses Account.

9. Any credit still remaining in a stabilization account on the closing of the account will be used for the benefit of the appropriate industry after consultation with representatives of that industry and no payment will be paid out of the account pursuant to this clause except with the consent of the producers' organization dealing

with any products concerned ; it being understood (i) that this shall not be construed as an undertaking that credits will be used at the time the scheme of stabilization ends ; and (ii) that such credits will not be paid out in respect of produce sold during the period when the scheme of economic stabilization was in operation ; (iii) that agreement will be reached within twelve months of the closing of the account.

10. Reasonable information concerning stabilization accounts will be made available to the producers' organization dealing with the particular product. Reasonable information concerning the basis on which any increases under clause 5 have been arranged will be furnished from time to time to the Farmers' Federation.

11. The "determined date" will be 15th December 1942 unless by agreement between the producers' organizations and the Government a different date is fixed to meet particular circumstances.

12. While this stabilization policy continues, prices for farm products be not allowed to fall below the level of prices ruling at the date that stabilization became effective (15th December 1942) irrespective of the effect of internal or external markets.

I am pleased that agreement has been reached in these terms which I formally approve, and I would be grateful to have your confirmation as early as possible.

Yours faithfully,

(Sgd.) D. G. SULLIVAN,  
Minister of Industries and Commerce.

COPY OF LETTER FROM MR. WALTER WILLIAM MULHOLLAND AS CHAIRMAN OF THE FARMERS' FEDERATION TO THE HONOURABLE THE MINISTER IN CHARGE OF STABILIZATION

Farmers' Federation,  
P.O. Box 715,  
Wellington, 18th June, 1943.

The Hon. Minister in Charge of Stabilization, Wellington.

SIR,—

I acknowledge receipt of your memorandum of the 18th June *re* Farm Products Stabilization Accounts and I have to say that I have discussed the proposals contained therein with members of my Federation and am now in a position to agree to all of them as now set out.

Would you please accept this letter as confirmation of the acceptance by the Farmers' Federation of the terms, which I observe you have formally approved.

I am pleased, with you, that this agreement has been satisfactorily arrived at.

I have the honour to be,

Sir,  
Your obedient servant,  
(Sgd.) W. W. MULHOLLAND,  
Chairman.

Given in Executive Council under the hand of His Excellency the Governor-General, and issued under the Seal of the Dominion of New Zealand, this 18th day of January, 1946.

T. J. SHERRARD,  
Acting Clerk of the Executive Council.

Approved in Council—

T. J. SHERRARD,  
Acting Clerk of the Executive Council.

*Extending the Period within which the Commission of Inquiry shall report*

---

C. L. N. NEWALL, Governor-General

To all to whom these presents shall come, and to the Right Honourable Sir Michael Myers, G.C.M.G., Chief Justice of New Zealand; and the Honourable Mr. Robert Kennedy, a Judge of the Supreme Court; and the Honourable Mr. Harold Featherston Johnston, a Judge of the Supreme Court: Greeting.

WHEREAS by Warrant issued on the eighteenth day of January, one thousand nine hundred and forty-six, under the hand of the Governor-General and the Public Seal of the Dominion, with the advice and consent of the Executive Council, you, the said Sir Michael Myers, Robert Kennedy, and Harold Featherston Johnston, were appointed under the authority of the Commissions of Inquiry Act, 1908, to be a Commission of Inquiry to inquire into and report whether certain moneys could be debited to the Dairy Industry Stabilization Account:

And whereas by the said Warrant you were required to report not later than the thirty-first day of March, one thousand nine hundred and forty-six, your findings and opinions on the question referred to you:

And whereas it is expedient that the time for so reporting should be extended as hereinafter provided:

Now, therefore, I, Cyril Louis Norton Newall, the Governor-General of the Dominion of New Zealand, in exercise of the powers conferred by the Commissions of Inquiry Act, 1908, and all other powers and authorities enabling me in this behalf, and acting by and with the advice and consent of the Executive Council, do hereby extend until the thirty-first day of May, one thousand nine hundred and forty-six, the time within which you are so required to report:

And, in further exercise of the said powers and authorities and with the like advice and consent of the Executive Council, I do hereby confirm the said Warrant hereinbefore referred to and the Commission thereby constituted except as modified by these presents.

Given in Executive Council under the hand of his Excellency the Governor-General, and issued under the Seal of the Dominion of New Zealand, this 27th day of March, 1946.

W. O. HARVEY,  
Acting Clerk of the Executive Council.

---

*Further extending the Period within which the Commission of Inquiry shall report*

---

C. L. N. NEWALL, Governor-General

To all to whom these presents shall come, and to the Right Honourable Sir Michael Myers, G.C.M.G., Chief Justice of New Zealand; and the Honourable Mr. Robert Kennedy, a Judge of the Supreme Court; and the Honourable Mr. Harold Featherston Johnston, a Judge of the Supreme Court: Greeting.

WHEREAS by Warrant issued on the eighteenth day of January, one thousand nine hundred and forty-six, under the hand of the Governor-General and the Public Seal of the Dominion, with the advice and consent of the Executive Council, you, the said Sir Michael Myers, Robert Kennedy, and Harold Featherston Johnston, were appointed, under the authority of the Commissions of Inquiry Act, 1908, to be a Commission of Inquiry to inquire into and report whether certain moneys could be debited to the Dairy Industry Stabilization Account:

And whereas by the said Warrant you were required to report not later than the thirty-first day of March, one thousand nine hundred and forty-six, your findings and opinions on the question referred to you:

And whereas by a further Warrant issued on the twenty-seventh day of March, one thousand nine hundred and forty-six, the time for so reporting was extended to the thirty-first day of May, one thousand nine hundred and forty-six:

And whereas it is expedient that the time for so reporting should be further extended as hereinafter provided:

Now, therefore, I, Cyril Louis Norton Newall, the Governor-General of the Dominion of New Zealand, in exercise of the powers conferred by the Commissions of Inquiry Act, 1908, and all other powers and authorities enabling me in this behalf, and acting by and with the advice and consent of the Executive Council, do hereby extend until the thirty-first day of July, one thousand nine hundred and forty-six, the time within which you are so required to report:

And in further exercise of the said powers and authorities, and with the like advice and consent of the Executive Council, I do hereby confirm the said Warrant dated the eighteenth day of January, one thousand nine hundred and forty-six hereinbefore referred to and the Commission thereby constituted, except as modified by the said Warrant dated the twenty-seventh day of March, one thousand nine hundred and forty-six, and by these presents.

Given in Executive Council under the hand of his Excellency the Governor-General, and issued under the Seal of the Dominion of New Zealand, this 18th day of April, 1946.

W. O. HARVEY,  
Acting Clerk of the Executive Council.

# INTERIM REPORT

Wellington, New Zealand, 14th March, 1946.

MAY IT PLEASE YOUR EXCELLENCY,—

We have the honour to refer to the Commission directed to us by Your Excellency dated the 18th January, 1946, appointing us to be a Commission to inquire into and report upon a certain question arising out of the administration of the Government and relating to an agreement constituted by two letters of the 18th June, 1943, which passed between the Honourable Minister of Industries and Commerce and the Chairman of the Farmers' Federation.

We appreciate the importance of the question raised to the Government, the Dairy Industry, and the public generally, and we are most anxious to give the fullest effect to Your Excellency's Commission. But a difficulty has arisen regarding which we feel it to be our duty to make what may be regarded as an interim report. The difficulty is one which Your Excellency's Advisers may be able to overcome, but as at present advised we feel that a final report cannot be made until it has been overcome.

Recognizing the public importance of the question submitted to us and the necessity for a prompt report, we proceeded with our inquiry during the long vacation, commencing our work on the 24th January. Both the Government and the dairy industry were represented by counsel. No evidence was called, but voluminous documents were submitted as having a bearing upon the question involved. Counsel argued their respective viewpoints at considerable length, the argument lasting for five days.

The difficulty to which we now propose to advert was not mentioned to us by any of the counsel during the argument and did not come under our notice until discovered by ourselves during a conference a few days ago, when we had the first opportunity of meeting after finishing our circuit engagements in various parts of New Zealand. It seemed plain to us then that the agreement which Your Excellency's mandate requires us to interpret was *ultra vires* the powers of the Minister or, indeed, of the Government — *ultra vires* because it purports to provide for the disposition of moneys which by the Marketing Act, 1936, are moneys of the Crown, in a manner different from that provided for by the existing statutes and not authorized by Parliament. We searched anxiously to find some statutory provision validating the transactions provided for by the agreement. The only statutory enactment that we were able to find is contained in section 2 of the Finance Act, 1945. We regret, however, that so far as we can see section 2 of the Finance Act is not sufficient. All that it does is to permit the payment out of any account established under the Marketing Act, 1936, of such sums as the Minister of Marketing may, in accordance with agreements entered into with representatives of the industry concerned, approve as payment of or contributions towards any expenditure incurred or required to be incurred for the purpose of subsidizing the costs of the production or marketing of any goods of the class or classes in relation to which the account has been established, or for the purpose of equalizing as far as possible the net returns received or payable in respect of any such goods.

The agreement of the 18th June, 1943, constituted by the letters to which we have already referred, deals first with the payment into a stabilization account of moneys which under the Marketing Act should be paid into an account established under that Act, and then with the payment of moneys not out of any account established under the Marketing Act, but out of the stabilization account for which there is no warrant under the Marketing Act.

In these circumstances we feel great difficulty in making a report on the matter as it now stands, as we are asked to construe as a valid agreement a document which, so far as we can see, at present has no validity at all, and any report not only might be valueless in that the Government could not lawfully act upon it, but might also create great confusion.

We venture to suggest that Your Excellency's Advisers and the representatives of the dairy industry might consider the position with a view to legislation declaring the agreement to have been *intra vires*, and that the time for making our report be extended so that as soon as the legislation has been passed we may complete our consideration of the question and furnish our report.

We may say that the President of the Commission has called counsel together and informed them of the difficulty. They have undertaken to discuss the matter with their respective principals with a view to seeing whether, and how, the difficulty may be overcome, but in the meantime we think we should report the position to Your Excellency, particularly because we have been charged by Your Excellency's Commission to make our report by the 31st March. We assume that this communication may be taken as an interim report.

We have the honour to be,

Sir,

Your Excellency's obedient servants,

(Sgd.) MICHAEL MYERS.

(Sgd.) R. KENNEDY.

(Sgd.) H. F. JOHNSTON.

His Excellency the Governor-General,  
Government House, Wellington.

---

## FINAL REPORT

---

Chief Justice's Chambers,

Wellington, 29th July, 1946.

MAY IT PLEASE YOUR EXCELLENCY,—

We now have the honour to make our report upon the subject-matter of the Commission dated the 19th January, 1946, into which Your Excellency's predecessor directed us to inquire.

The parties to the controversy are, on the one hand, the Government and, on the other, the New Zealand Dairy Board, as representing the dairy industry of New Zealand and all the producers engaged therein. Both sides were represented by counsel, Mr. Cooke, K.C., and Mr. Cleary for the Government, and Mr. Watson and Mr. Biss for the Dairy Board. The question involved in the controversy being one of interpretation of a written document and therefore a question of law only, the parties did not call oral evidence, but a mass of documentary material was placed before us, and the *viva voce* proceedings consisted of the arguments of counsel, which occupied five days.

On the 14th March we made an interim report to your Excellency's predecessor in which we pointed out a difficulty that had arisen. We questioned whether the agreement that we were directed to interpret was *intra vires* the Government, and we ventured to suggest that His Excellency's Advisers and the representatives of the dairy industry might consider the position with a view to having legislation enacted declaring the agreement to have been *intra vires*. Subsequently, counsel for the parties appeared before us again, and we were informed that an undertaking had been given that, in order to remove any question of the agreement being *ultra vires*, the Government would, as soon as reasonably practicable after the beginning of the then next ensuing session of Parliament, introduce legislation to validate the agreement, and we were asked to proceed to make our final report on the assumption of the agreement being *intra vires*.



There being a difference of opinion amongst us as to the answer to the question propounded by the Commission, we have thought it best that there should be two reports, one by the majority consisting of the Chief Justice and Mr. Justice Kennedy, and the other by the minority consisting of Mr. Justice Johnston. We accordingly have the honour to forward these two reports, together with a complete transcription of the shorthand notes of argument and the various documents referred to in the argument and submitted to us for our consideration.

We have the honour to be,

Sir,

Your Excellency's obedient servants,

(Sgd.) MICHAEL MYERS.

(Sgd.) ROBERT KENNEDY.

(Sgd.) H. JOHNSTON.

#### MAJORITY REPORT: THE CHIEF JUSTICE AND MR. JUSTICE KENNEDY

In substance the Commission directs us to consider and report upon the interpretation of an agreement constituted by a letter of the 18th June, 1943, from the Honourable the Minister of Industries and Commerce to the Secretary of the Farmers' Federation, and the reply of the same date to that letter having regard to all relevant circumstances.

We have carefully considered the arguments of counsel and the documentary material placed before us, but many of the matters that were debated by counsel, although very properly introduced if only by way of narrative and for the purpose of explanation, do not, we think, call for reference in this report.

The agreement applies generally to all primary products produced in New Zealand. The particular products, the transactions in respect of which have given rise to the present controversy, are butter and cheese. By agreement between counsel, however, the inquiry was limited to the transactions in butter, because it is common ground that whatever conclusion is arrived at in regard to butter applies equally to cheese, and the findings on the one are to be deemed to apply to both. Although the proceedings took the form of a Commission of Inquiry, we were informed by counsel (and this is confirmed by the correspondence and by the recent history of the dispute) that they were intended to be in substance an arbitration, and the Commission was asked by counsel to hear and determine the matter on that basis. The position is different, therefore, from a Commission set up for the purpose of inquiring into some social or other question of a controversial nature where it is necessary for the Commission to make a lengthy report with detailed findings of fact. The subject-matter of this Commission is really in the nature of a commercial dispute between the Government and the dairy producers, and all those interested may be taken to be fully acquainted with the facts and the history of the matter. All that seems to be necessary, therefore, is that we should deal with the case very much as if it were an action at law or an arbitration in which we were giving judgment or publishing an award.

It is, however, necessary to give a brief explanation of the events leading up to the making of the agreement. Prior to 1936 the marketing and disposal of dairy products were under the free and unfettered control of the industry itself conducting its operations by dairy-factory companies and other agents. This was completely altered by the Primary Products Marketing Act, 1936, the title of which was later amended to "the Marketing Act, 1936." Under that Act all dairy-produce intended for export was to be acquired by the Crown. The produce was exported by the Government and sold in overseas markets. The proceeds of sale were paid into an account called "the Dairy Industry Account." As and when produce was placed on board ship for export it became the property of the Crown, and the Government paid to the owners of

the factory in which the produce was manufactured or processed, on account of the producers, a price fixed pursuant to the provisions of section 20 of the Act, which price has been called the “guaranteed price.” That price is fixed having regard to prices fixed in respect of dairy-produce previously exported, and to various additional considerations, namely :—

- (a) The necessity in the public interest of maintaining the stability and efficiency of the dairy industry :
- (b) The costs involved in the efficient production of dairy-produce :
- (c) The general standard of living of persons engaged in the dairy industry in comparison with the general standard of living throughout New Zealand :
- (d) The estimated cost to the Department of marketing the dairy-produce concerned, and also the cost of the general administration of this Act :
- (e) Any other matters deemed to be relevant.

Subsection (5) of section 20 of the Act is in the following terms :—

Due regard having been paid to the several matters mentioned in subsection four hereof, the prices fixed in respect of any dairy-produce exported after the thirty-first day of July, nineteen hundred and thirty-seven, shall be such that any efficient producer engaged in the dairy industry under usual conditions and in normal circumstances should be assured of a sufficient net return from his business to enable him to maintain himself and his family in a reasonable state of comfort.

The price to be paid by the Crown in respect of dairy-produce exported—that is, the guaranteed price—is required by section 20 (1) to be from time to time fixed by the Governor-General by Order in Council.

Inasmuch as it might generally be expected that the selling-price of the butter overseas would be in excess of the guaranteed price paid to the producers, the Government stood to make a substantial profit. In that profit the producers had absolutely no interest, as the produce became the property of the Government. If, however, the Government perchance made a loss in any year, such loss would be a community loss, though, taking one year with another, the probability always was that there never would be any real loss, as it might reasonably be expected that a loss in one year would be more than counterbalanced by a surplus in another. Approximately five-sixths of the butter produced in New Zealand was exported, and about one-sixth absorbed and consumed on the local market.

The locally consumed butter was dealt with differently altogether from the exported butter. With possible occasional exceptions, which may be regarded as negligible and which do not affect the matter into which we have been inquiring, it was disposed of to the retailers by the factories to or through licensed wholesale distributors. All this wholesale marketing was done under the control of the Internal Marketing Division, though the ownership of the butter did not pass to the Crown, but remained in the owners of the factories. Under section 22 of the Marketing Act, after fixation of prices in respect of dairy-produce exported or to be exported, the Governor-General had power by Order in Council to fix prices in respect of dairy-produce intended for consumption in New Zealand, and by subsection (3) of the same section it was enacted that in fixing such last-mentioned price to be paid to the dairy company the general purpose was to ensure to the producer a net return from his produce equivalent to the return that he would have received if such dairy-produce had been acquired by the Crown for export—that is to say, the “guaranteed price.” The wholesale price chargeable by the dairy factories to the distributors was fixed from time to time, but, by reason of the Butter Marketing Regulations 1937, the factory was not entitled to retain the whole of the price so fixed. In point of fact, all that the factory actually retains is the equivalent of the “guaranteed price”—that is to say, it actually retains only the same price as it would have received if the butter had been exported, plus certain additional items which may be regarded as out-of-pocket expenses.

The regulations require that there shall be added to the “guaranteed price” such additional cost as may be incurred for preparing the butter for local consumption, and there is then deducted the amount of the savings which are effected by not having to

export the butter. The factory is allowed to retain the guaranteed price plus the excess of the additional costs incurred in preparing the butter for local consumption over the savings which are effected by not having to export the butter; and the difference between the total amount so allowed to be retained and the wholesale price as fixed by regulations (subject apparently to the fixed distributor's allowance to which the distributor is entitled) is referred to as "differentials." These differentials are paid into a Butter Equalization Account, which is an account of the Internal Marketing Division. The retail price of butter was also in later years controlled and is the subject of Price Orders made by the Price Tribunal.

Such was the procedure adopted from 1936 onwards, and until 1943 all went well. Large surpluses accrued to the Government on the sale of exported butter, and large sums also accrued to the Government by means of the differentials in respect of the butter sold in New Zealand for local consumption.

Then came the stabilization policy of the Government, the object of which may be stated to have been to maintain, as far as possible, charges such as rent and interest, wages, and costs generally at the levels that existed on the 15th December, 1942, to keep prices of commodities from rising, and thus keep down the cost of living. Both prior and subsequent to the coming into operation of the Economic Stabilization Emergency Regulations efforts were made to effect this object by means of subsidies, which, in the case of imported articles, were paid for the most part to the merchant-distributors of the goods, and, in the case of articles manufactured in New Zealand, to the manufacturer. A very large number of articles were the subject of such subsidies—for example, sugar, tea, and salt, as well as such materials as fertilizers and fencing-wire and other materials used in farming operations. These subsidies were paid by the Government out of what was known as the War Expenses Account.

Pursuant to the stabilization policy, negotiations took place between the Government and the representatives of the farming industry, and these negotiations resulted in the agreement, which we are now asked to interpret. Under that agreement it was agreed that a separate account was to be kept in respect of each product or group of products as might be determined by the Government after consultation with the industry, and stabilization accounts were to be kept in the Marketing Accounts with the Reserve Bank, but to be recorded separately from existing pool and other accounts. Into the Stabilization Account for any product was to be paid any increase in price received from sales overseas for that product after "the determined date," which was the 15th December, 1942. This was subject to a certain exception, which need not be discussed now, but will have to be mentioned later, as will certain other clauses in the agreement dealing with the question of payment into the account. The crucial clause in the agreement is clause six, which is as follows:—

Where a subsidy is required to keep costs of production of any product down to the level existing on the determined date, the amount of that subsidy, excluding the continuation at the level on the determined date of any subsidy paid or payable prior to that date, will be debited to the appropriate stabilization account subject to the provisions in 7.

In fact, the Government did arrange with the Government of the United Kingdom for very large increases in the selling-price of the butter sold overseas. The moneys received to the extent of the pre-agreement price were paid into the Dairy Industry Account, out of which account the Government paid the factories the guaranteed price as fixed by the current Order in Council for the time being. The moneys representing the increase in price obtained for the butter sold overseas were paid in accordance with the agreement of the 18th June into the Dairy Industry Stabilization Account.

The guaranteed price for the season 1936-37 for the grade of butter that was taken in the proceedings before the Commission as the basis for our consideration was fixed at 12-5625d. per pound. In the year 1937-38 it was fixed at 13-25d. which was subsequently increased by Order in Council by 0-41d. per pound, making 13-66d., and was made retrospective. In the year 1938-39 the guaranteed price was fixed at 14-89d., at which figure

it remained until the 1942–43 season, when it was fixed at 15·39d. The extra halfpenny is shown by other documentary evidence, though it is not so stated in the Order in Council itself, as representing compensation for increased cost of production. That price of 15·39d. stands until a further Order is made. In fact, no further Order has been made, and consequently there has been no alteration in the “guaranteed price,” which has therefore remained unchanged at 15·39d. per pound. In the season of 1939–40 the New Zealand wholesale price for butter for local consumption was fixed at 16·5d. per pound, at which figure it has remained ever since. The retail price for butter for local consumption was fixed for the first time in 1941. It was fixed at 18d. per pound, and that price has ever since remained unchanged.

In the 1943–44 season, costs of production having increased, a system was adopted by the Government of making payment to the factories of what were called “costs allowances.” In that particular season the costs allowance so paid was at the rate of 1·036d. per pound of *butterfat*. That represented the increase in the cost of production on the farm and in the factory. In the 1944–45 season the payment on account of costs allowance was increased to 3·178d. per pound of *butterfat*, and in the 1945–46 season it was further increased to 4·315d. per pound of *butterfat*. As already stated, the wholesale and retail prices for butter sold for local consumption were not increased during these periods.

It is to be observed that the article which the Government acquired for export and sold overseas was butter, *not butterfat*, and the Marketing Act, by necessary implication requires that what is called in the trade, though not by the statute, the “guaranteed price,” shall be fixed in respect of the article so acquired and sold. It is a fact not without importance that while the guaranteed price is fixed in respect of the manufactured article, in the present case *butter*, the costs allowance is based upon *butterfat*, which is the unprocessed material. It need scarcely be pointed out that butter and *butterfat* are two different things, and that a pound of *butterfat* produces more than a pound of butter; and, as counsel for the industry admitted in reference to the guaranteed price and the costs allowance, “You cannot add them together, because one is butter and the other *butterfat*.”

Every producer, whether his butter was exported or sold locally, has been paid the same price—that is to say, the guaranteed price fixed by Order in Council. In addition, the producer who has sold for local consumption has received the small extra payment representing the adjustment as between his additional cost of preparation of the butter for the local market and his saving in respect of cost of preparation had the butter been exported—we mention this item though it is of no importance on the aspect of the matter that we are now discussing. In addition to the guaranteed price as fixed by Order in Council, each producer, whether of exported butter or butter sold locally, has been paid or credited by the factory, as representing costs allowance, the amount allowed in respect of that item in each year from the 1943–44 season onwards. These costs allowances amount to a very large sum, and the Government claims that it is entitled to debit that sum to the Dairy Industry Stabilization Account. This claim, in so far as it represents costs allowance in respect of butter sold for local consumption, the industry disputes.

The Government has also, since the agreement was made, paid moneys by way of subsidy to the manufacturers or suppliers of various materials, some of such subsidies being new and some representing increases beyond the amounts paid as subsidies on subsidized articles prior to the 15th December, 1942. The Government claims the right to debit the whole of these moneys to the Dairy Industry Stabilization Account, and here again the industry contends that the Government is not entitled to debit so much of this item as is referable to butter which has been sold for local consumption.

As already stated, during all these seasons when costs allowances were paid, the guaranteed price under the last Order in Council—namely, the Order in Council of the

17th February, 1943—remained the same, 15-39d. per pound of butter. The wholesale price and the retail price of butter for local consumption remained the same throughout—namely, 16-5d. and 18d. per pound respectively.

The question that we are asked to inquire into and report upon is expressed thus :—

Whether, having regard to all circumstances relevant to the agreement between the Government and the Farmers' Federation . . . the costs above the price realized incurred in holding the retail price of butter and cheese in New Zealand can, under the provisions of the said agreement, be debited to the Dairy Industry Stabilization Account, being an account raised in the Marketing Department pursuant to the said agreement.

The draftsman has framed the question rather unhappily. Counsel for the industry insistently reiterated that the question admits and postulates that the Government had made a loss on the sale of local butter, and that such loss was incurred not in subsidizing producers, but in holding down the retail price of butter. Obviously that cannot be what the question means. If that is what was meant, there would have been no need to refer the matter to a Commission because the question would have answered itself—against the Government. This submission of counsel for the industry is fallacious, and confuses cause and effect—a confusion contributed to by the elliptical manner in which the question is posed. It is probably true that the total cost of production (including the costs allowances), plus subsidies paid to manufacturers and others to keep down the price of farming materials, would be more than the wholesale price current during the period in question, and in that sense it may be said that these costs allowances and subsidies were incurred in holding the retail price of butter in New Zealand. In other words, no doubt the effect of what was done was to enable the retail price of butter to be held, and the real question is whether these costs or these moneys, or whatever one may like to call them, come within the ambit of clause 6 of the agreement as being subsidies required to keep the costs of production of butter down to the level existing on the 15th December, 1942. If they come within the ambit of clause 6 the Government is entitled to debit them to the Dairy Industry Stabilization Account—otherwise not.

It is convenient to consider first the question whether the Government is entitled to debit to the Stabilization Account the whole of the increase in subsidies—we mean subsidies in the true sense—incurred since the 15th December, 1942, or whether the debit is to be limited to a proportionate part of the amount so paid based upon the exported butter sold overseas; or, in other words, is the Government entitled to debit to the Stabilization Account so much of these items as may be referable as a matter of proportion to the butter sold locally in New Zealand? It is not disputed that the Government is entitled to debit to the Stabilization Account so much of the item as is referable to the exported butter.

The contention of counsel for the industry is that the agreement refers to exported butter and nothing else. They say that paragraphs 1 to 5 of the agreement all refer to increases in the price received from sales overseas. That is perfectly correct. It was necessary for the agreement, first of all, to deal with moneys paid into the account, because obviously nothing can be paid out until it is first paid in. The argument of counsel for the industry requires the reading into clause 6 of words that are not there. What the clause says is that where a subsidy is required to keep the cost of production of *any product* down to the level existing on the determined date, the amount of that subsidy will be debited to the appropriate Stabilization Account. Counsel for the industry wants the word "product" read as "exported product." We can see no justification for such a construction. After all, clause 9 of the agreement says that any credit still remaining in a Stabilization Account on the closing of an account will be used for the benefit of the appropriate industry. It further says that such credit shall not be paid out in respect of products sold during the period when the scheme of economic stabilization was in operation. When clause 9 speaks of the credit being

used for the benefit of the appropriate industry and also says that such credits will not be paid out in respect of products sold during the period, both these statements apply just as much to the producers of butter sold for local consumption as to the producers of butter sold for export. We consider it to be clear that the word "product" in clause 6 must be read without any gloss, and that for the purposes of this case the words "any product" must be read as if the one word "butter" were substituted for them. It follows that, so far as the disputed item consists of what counsel have referred to as true subsidies or subsidies *stricto sensu*, the Government is entitled to debit the whole amount to the Dairy Industry Stabilization Account.

As to the larger item, which has been referred to as "costs allowances," the contention of counsel for the Crown is that the payments were subsidies within clause 6 required to keep down the cost of production of butter. Counsel for the industry, on the other hand, contend that these moneys come under a different category altogether, and were, in fact and in law, part of the guaranteed price: in other words, that the "guaranteed price" was increased by these payments. We consider it to be quite clear that the payments must have been either subsidies, or an increase in, and therefore a part of, the guaranteed price. But nothing can be clearer, in our opinion, than that the payments were not in law an increase in, or in any way part of, the guaranteed price, because it would not be lawful for the Government to make any payment by way of guaranteed price except pursuant to an Order in Council. The Order in Council fixed 15-39d. per pound as the guaranteed price, and that price the Government could not exceed.

Counsel for the Dairy Industry endeavour to meet this position by saying that although the costs allowances may not *de jure* be part of the guaranteed price, still they are part of the guaranteed price *de facto*. We are unable to recognize any such distinction. All we are concerned with is the legal position. Either the payments were in law part of the guaranteed price or they were not, and clearly they were not. If the costs allowance is not part of the guaranteed price it cannot be anything else than a subsidy in the wide sense of that term, and we think it plain that the word is used in that wide sense in clause 6 of the agreement. The very expression "costs allowance" is significant: it means an allowance on account of costs, and the only costs in respect of which in the nature of things it can be allowed are costs of production. Counsel for the industry complain that the Government did not increase the wholesale price (and we would add the retail price also, because the one must follow the other) of butter for local consumption by an amount equivalent to the costs allowance paid to the producer, and they say that, had that been done, there would have been no loss to the Government or any one else. That is quite correct, but the statement overlooks the fact that the adoption of that course would have been the very negation of the stabilization policy in that, instead of the price of butter to the consumer remaining stable, it would have had to be increased by several pence per pound. Instead of adopting that course, the Government paid costs allowances to the producers (through the factories), and the allowances which it made represented the increased cost of production to the producer. The object of the payment of the costs allowance was therefore to keep down the cost of production of butter, and that brings the payment directly within the words of clause 6 of the agreement. If there had been no stabilization agreement, and the Government had desired to keep down the cost of production of butter and prevent any increase in price to the local consumer, it would have had to effect its purpose by means of the payment of costs allowances to the producers, and the payment would have had to be made out of the War Expenses Account. But it seems to have been one of the very objects of the agreement now in question, which, after all, involved very substantial advantages to the producer, that subsidies which but for the agreement would have had to be paid out of the War Expenses Account became by the agreement chargeable to the Stabilization Account. Seeing that the costs of production had increased, there were only two ways in which the Government could meet that increase—either (1) by a new Order in Council increasing the guaranteed price so as to include the extra costs, or (2) by subsidies or payments in the nature of subsidies equal to the amount of increase in the costs of production. The first course was apparently

considered inconsistent with the stabilization policy of the Government, and the second course was adopted. Counsel for the industry urge that, in the result, the payments have been made out of moneys which belong to the industry. That, we consider, is not correct. Under the Marketing Act, 1936, all surplus moneys in excess of the guaranteed price belonged to the Crown. In entering into the agreement of the 18th June, 1943, the Government made very substantial concessions to the industry, but the very agreement contemplated that subsidies, instead of being chargeable to the War Expenses Account, would be debited against the increase (if any) in the proceeds of the realization from butter sales overseas, which proceeds under the Act of 1936 would have belonged to the Crown and which become available for the benefit of the industry only by reason of the concessions made to the industry by the Government. The payment of the subsidies out of these moneys can be regarded only as part of the general consideration for the agreement of the 18th June, 1943.

It has previously been pointed out that, in order that the wholesale price of local butter could meet the guaranteed price plus the costs allowances, the wholesale price would have had to be increased by an amount equal to the increased cost of production. The wholesale price, however, was not increased because the cost of production had been kept down by the payment of subsidies made by the Government. The wholesale price has been throughout, and still is, more than sufficient to pay the "guaranteed price." The position may be summed up in this way; the payment of the costs allowances was the *alternative* to increasing the guaranteed price. They were made on account of costs—that is to say, to keep down the cost of production—and the fact that the cost of production was kept down enabled the price of the butter for local consumption also to be kept down.

Since the agreement of the 18th June, 1943, the operations in regard to differentials have continued as they previously existed. The basis has been the "guaranteed price" just as it was before, and the local wholesale price has been in excess of the "guaranteed price" plus the adjustments made in regard to the expense of preparing for sale on the local market. Differentials have been paid into the Butter Equalization Account just as they were before, and on the basis of the same guaranteed price. The fact that the amount at credit in the Butter Equalization Account has been transferred by the Government to the Dairy Industry Account does not affect the matter.

It is said that the costs allowance is made up mainly, if not entirely, of increased labour-costs, and that such labour-costs include an increased remuneration for the farmer's own labour. In our view, that makes no difference. The payment made to the producer on account of these costs allowances is none the less a payment to the producer to keep down the cost of production and is a subsidy within the meaning of clause 6 of the agreement.

It was never contended on behalf of the industry that the Government did not have the right to debit these costs allowances to the Stabilization Account in so far as they were referable as a matter of proportion to the exported butter. During the proceedings before the Commission, and in consequence of a suggestion made by a member of the Commission, counsel for the industry did argue, though faintly, that the right did not exist to debit even that proportion of the costs allowances to the Stabilization Account, but eventually that contention was, and we think very properly, abandoned. And if that proportion of the costs allowances can be rightly debited by the Government to the Stabilization Account, it follows, inasmuch as clause 6 of the agreement applies to all butter, whether exported or sold locally, that the same right must exist to debit to the Stabilization Account the proportion of the costs allowances referable to butter sold locally.

A good deal was said during the proceedings before the Commission about the course adopted by the Government in regard to payments on account of meat. It was suggested that the Government made large payments to butchers in order to keep down the cost of meat to the consumer, and that the Government did not claim as of right under its agreement with the producers to debit those payments to the Meat Stabilization Account,

but insisted upon debiting all those payments to that account because it was necessary to do so in order to maintain the Government's stabilization policy. The suggestion was that the Government in the present case is taking a diametrically opposite course in that it claims as of right under the agreement to debit the costs allowance to the Dairy Industry Stabilization Account. There is no analogy between the two cases, but if any inference is to be drawn at all it is the direct opposite of the inference that counsel for the dairy industry suggests. The difference between this case and the case relating to meat is that the payments made to the butchers could not from any point of view, so it seems to us, be regarded as payments to keep down the cost of production. It would have been different if the payments had been made, as in the case of producers of dairy products, to the producers themselves. In the case of meat, any payments made to the butchers did not keep down the cost of production of the meat, but they did enable the butcher to sell at a lower price to the actual consumer. The payments to the butchers were subsidies, of course, but subsidies for a purpose different from that of keeping down the cost of production of the meat. As it seems to us, the Government would not have been entitled to debit those payments to the Meat Stabilization Account except by special arrangement with the meat industry, and such a special arrangement was apparently made.

Incidentally during the proceedings it was contended by counsel for the industry that, if the costs allowances are to be debited to the Dairy Industry Stabilization Account, a credit equivalent to the amount so debited should be made to the Stabilization Account by reason of clause 5 of the Agreement—

if any increase paid from overseas on any product is paid for any general national purpose such as to maintain sterling balances, to offset general import price increases or Government expenditure in holding costs.

It was suggested that the annual lump-sum payments made by the Government of the United Kingdom were payments within clause 5. It does not appear to us that these lump-sum payments are attributable to any increase in price of products, and we find ourselves unable to say that they come within the ambit of clause 5. In any event, the point does not seem ever to have been previously raised or to be within the terms of our Commission.

Counsel for the industry contend that, even if the Government is entitled to debit the costs allowances to the Stabilization Account, the actual debit made is in excess of the terms of the agreement in that the datum point was to be the 15th December, 1942, and that the costs allowances should have been based upon the increase of cost as from that date, but that the allowances had been taken back to the 1938-39 level. That, again, is a new point which seems to have been raised for the first time during the proceedings before the Commission. It is to be pointed out that by clause 11 of the agreement, the "determined date" will be the 15th December, 1942, "unless by agreement between the producers' organizations and the Government a different date is fixed to meet particular circumstances." If there had been no agreement as to the taking back of the allowances to the 1938-39 level, and if there had been any suggestion that the difference between the costs allowances actually made and the amount that would have been paid on the basis of the 15th December, 1942, being the datum point could not be debited to the Stabilization Account, it is highly improbable that the costs allowances actually made would have been as large as they were. But the material before the Commission shows that the going back to the 1938-39 level was in fact agreed to by the producers' organizations or their representatives.

Our answer to the question put by the Commission may be summed up by saying that the Government is entitled under the agreement to debit to the Dairy Industry Stabilization Account the amount represented by both the subsidies and the cost allowances.

(Sgd.) MICHAEL MYERS.

(Sgd.) ROBERT KENNEDY.

29th July, 1946.



## MINORITY REPORT OF MR. JUSTICE JOHNSTON

The question this Commission is asked to advise upon is whether, having regard to all the circumstances relevant to the agreement between the Government and the Farmers' Federation, the costs above the price realized incurred in holding the retail price of butter and cheese in New Zealand can, under the provisions of the said agreement, be debited to the Dairy Industry Stabilization Account, being an account raised in the Marketing Department pursuant to the said agreement.

The agreement is contained in letters dated the 18th day of June, 1943, passing between the Minister of Industries and the Chairman of the Farmers' Federation. The parties gave careful consideration to the framing of the question, and in presenting it to the Commission counsel for the Government said:—

The question submitted to the Commission is one of construction and effect of the agreement of the 18th June. That is purely a question of law, and is not a question of equity and good conscience. That being so, considerations of fairness or unfairness, justice or injustice, cannot arise or cannot fail to be considered except in one respect, and that is if and so far as the agreement is ambiguous and if so far as all other legitimate matters of construction fail, it may be possible to refer to possible injustices or otherwise that a particular construction would work.

Every question of law must rest on a basis of predetermined or assumed fact, and the first task is to ascertain what those facts are. The question placed before the Commission predicates that by holding the retail price of butter in New Zealand at less than cost price certain costs have been incurred. In other words, by selling below cost the dairy-farmer has suffered loss. The question of law is whether the cost of failure to equate price to cost can under the terms of the agreement be debited to the Stabilization Account.

The Government claim is that to the dairy-farmer a payment to recoup that loss is a subsidy, and by paragraph 6 of the agreement authorized to be made out of the Stabilization Account. Paragraph 6 is as follows:—

Where a subsidy is required to keep costs of production of any product down to the level existing on the determined date, the amount of that subsidy, excluding the continuation at the level on the determined date, will be debited to the appropriate Stabilization Account subject to the provisions of 7.

The term "subsidy" is not strange to British Legislatures or to law. From the earliest times Parliaments have granted subsidies to the Sovereign out of parliamentary moneys for the Armed Services and other needs. In later days to manufactured products (English Sugar Subsidy Act of 1925). Generally, they have been granted by way of direct money payments—in Canada by grants of land. But always the grant has been free, never in pursuance of an obligation or in satisfaction of a claim. And always by Parliament out of parliamentary-controlled funds to which the recipient has no shadow of title or claim. Judicially such grant has been described as a "bounty": *Calgary and Edmonton Railway Company, Limited v. The King*, [1904] A.C. 765. Unless it complies with these tests a payment or grant, despite the motive that prompts it, is not a subsidy.

Assuming the Government is under no obligation to make the necessary reparation, a grant out of its own funds to do so would unquestionably be by way of subsidy. To make the payment out of some one else's funds, equally unquestionably, would not be a subsidy. How, then, does this particular fund stand?

Both sides claim ownership. Neither claim is, in my opinion, fully justified, and the need of an agreement authorizing withdrawals is of itself at least a presumptive refutation of uncontrolled ownership in either party. The moneys in the fund come from the sale overseas of the dairy-farmers' butter, and, although the Government has assured ownership of that butter from the date of shipment, the true relationship of the parties to funds accumulated from this source can only be ascertained from the provisions of the Primary Products Marketing Act, 1936, which set up the plan of

control under which the dairy industry operates. As the statute has to be more than once referred to and its purpose kept constantly in mind, I venture as a preface to more detailed examination to set out the title and preamble:—

#### Title

An Act to make Better Provision for the Marketing of Dairy-produce and other Primary Products so as to ensure for Producers an Adequate Remuneration for the Services rendered by them to the Community :

#### Preamble

WHEREAS it is considered essential in the public interest that producers of primary products should, as far as possible, be protected from the effect of fluctuations in the market-prices thereof: And whereas it is thought that the most effective and appropriate way of affording such protection, so far as relates to primary products intended for export, is to provide that the Government, on behalf of the Crown, shall acquire the ownership of such products at prices to be fixed and promulgated from time to time, and, so far as relates to primary products intended for consumption in New Zealand, is to empower the Government in its discretion either to acquire the ownership thereof at fixed prices or to control the sale and distribution thereof: And whereas it is not feasible to put into operation forthwith any plan or plans to deal effectively with all classes of primary products, and it is considered desirable that in the meantime a plan should be inaugurated in respect of dairy-produce (including certain other products usually associated with dairy-farming) :

It appears, then, from the preamble that the ownership taken by the Crown is assumed as an operative step in a plan designed for the public interests and the protection of the farmer. It is therefore a special ownership, and, inasmuch as it is acquired to protect the farmer and maintain and stimulate production, the necessary corollary is the insertion of provisions for the retention of surpluses arising from good years to meet the deficits that can be expected from lean years. Consequently we find stringent provisions in the statute that moneys derived from the sale of dairy-produce shall be paid into, not the Consolidated Fund, but into an account to be established at the Reserve Bank of New Zealand, and to be known as “the Dairy Industry Account.” Over this account Parliament has expressly retained strict control and specified what shall be paid into it and what shall be paid out of it (sections 10 and 12). The principal payments out are to meet the price paid by the Crown, the costs of freight, insurance, storage and marketing, and salaries and other expenditure incurred in the administration of the Act.

It is quite clear that under the statute no free grant moneys can be made from this account. The moneys in the account are held for the purposes set out in the preamble just as the ownership acquired is for those purposes. Any claim to an ownership in the moneys in that account that implies an absolute right of disposal is therefore, in my opinion, unjustified, and no interpretation of any subsequent agreement can be based on an assumption of a prior unfettered right to dispose of surpluses arising from the sale of butter overseas. On this ground alone, without the clearest authority from an agreement made with parliamentary approval, neither party to this controversy can make a free grant or subsidy to the other out of these surpluses.

Turning again to the preamble to consider whether a payment to meet costs incurred in production is a free grant, or is made in pursuance of an obligation, it is plain the plan contemplates an obligation on the Government to pay to the dairy-producer prices computed by taking into account his costs of production and other specified factors. As those factors are in their nature not constant prices cannot be constant and are to be promulgated from time to time. A glance at the factors the statute then directs shall be taken into account in fixing the prices shows the necessity for constant revision if the plan set up is to operate efficiently. They are set out in section 20 of the statute, and are as follows:—

- (1) The necessity in the public interest of maintaining the stability and efficiency of the dairy industry :
- (2) The costs involved in the efficient production of dairy-produce :
- (3) The general standard of living of persons engaged in the dairy industry in comparison with the general standard of living throughout New Zealand :

- (4) The estimated cost to the Department of marketing the dairy-produce concerned, and also the cost of the general administration of this Act :
- (5) Any other matters deemed to be relevant :
- (6) Due regard having been paid to the several matters, the prices fixed in respect of any dairy-produce exported after the thirty-first day of July, nineteen hundred and thirty-seven, shall be such that any efficient producer engaged in the dairy industry under usual conditions and in normal circumstances should be assured of a sufficient net return from his business to enable him to maintain himself and his family in a reasonable state of comfort.

It is obvious that it would be a matter of extreme difficulty to say that any payment to the dairy-farmers, since price is the only payment contemplated, even one in excess of a previously promulgated price, was not in respect of one of these factors, and a payment made because of a fluctuation in any single one, is in pursuance of an obligation and not a free grant or subsidy. The preamble recognizes that export butter and locally consumed butter need separate treatment owing to different processing required for overseas and local markets. Acquisition of ownership is essential in the one case ; in the other apparently not. The distinction is carried into the operative sections of the statute, and provision is made that the price for butter sold locally shall be fixed at a price which will allow the producer a net return equal to that he obtains for export butter. If, then, the price fixed by the Government for local sale does not ensure that return, a subsequent payment to the industry by the Government to equalize returns is in pursuance of an obligation and not a free grant or subsidy.

Unless, then, it can be shown that by authorized agreement the Government has acquired absolute control of the funds in the Stabilization Account and been relieved of its obligation to equate the price of locally sold butter to its production cost, the answer to the question put to the Commission must, in my opinion, be in the negative.

I turn then to the agreement of 1943 to see whether these fundamental planks in the structure of the parliamentary plan are removed and ascertain whether a payment, in my view, presumptively not a subsidy, is to be considered a subsidy. The agreement, since we are told it is to receive parliamentary sanction, should be read as if it were a section added to the Primary Products Marketing Act. In that case its provisions must be read so as to conform to the general scheme of the Act.

Apart from the language in which the agreement is expressed, the only aids properly available to assist in the interpretation of the agreement, despite the wealth of material displayed before us, are the status, rights, and obligations of the parties created by statute to which I have already paid attention and the character of the many subsidies affecting the dairy industry granted prior to the agreement. With those aids the ordinary rules of construction applicable to a document must be applied—that is, the intention should be gathered from the document as a whole, and the language employed must be given its plain and literal meaning. A special meaning will not be attributed to any particular term unless it be shown use of its ordinary meaning will render the agreement insensible or untractable.

Such subsidies as were in existence at the time the agreement was entered into were made by the Government from non-controlled funds—namely, the War Expenses Fund—funds not related to a primary industry account in any way, and were paid not to the primary producer, but to the supplier whose goods the primary producer purchased.

The agreement has two objects—(1) to remove from the scope of the Dairy Industry Accounts overseas increases which, though related to dairy-produce and in form an increase in price of that produce, have in fact been made for some general national purpose (paragraphs 3 and 5) ; (2) to relieve the War Expenses Account of the burden of liability for further subsidies to manufacturers or suppliers of goods essential to a primary industry and certain increases in existing subsidies with reference to a determined date. Unless this is the effect of paragraph 6, I think it is insensible. Insensible because I venture to say no statistician preparing a comparative table of the costs of production of butter in New Zealand and any other country would insert the cost of keeping the price of local butter down as a cost in New Zealand. In a comparison of the producers' returns it would find an appropriate place.

The paragraph in terms gives power to debit the Stabilization Account with "subsidies." The subsidies existing are subsidies to suppliers. Counsel for the Government take the words "Where a subsidy is required to keep costs of any product down to the level" to mean when the costs of production of the primary producer require a subsidy. But the costs of the primary producer do not require a subsidy. The obligation of the Government is to ensure that the price of the primary producer's product is equated to his costs of production. The words cannot be taken to refer to a non-existent condition. Such subsidies as were before the mind of the parties related to the costs of suppliers' products. And the words are not "the costs of production," but "the costs of production of any product," and the product referred to must have reference to the product purchased by the primary producer, not created by him.

In the grant of a subsidy there must be a grantor and a grantee. The grantee contemplated is the manufacturer or supplier of a product which the primary producer has to purchase. A debit to a fund in the stability of which the primary producer is vitally interested is not a subsidy to that producer, since it comes, in part at least, from his own moneys. Therefore, why interpret the paragraph as if it were intended to meet the case of a payment clearly not a subsidy at all?

A construction that throws on the primary producer the cost of meeting his own cost of production out of purchase-money accumulated against a rainy day undermines the whole plan of control set up by the statute, and it should not be adopted unless the intention to make the change is apparent from the whole agreement and expressed in clear and unambiguous language. Quite apart from the statute, the normal way in which to meet increased costs of production is to increase price. A construction that prevents this course being adopted, especially where it would relieve the other party to the agreement from his obligation to see that the price received does cover the producers' costs of production, is one to be avoided. No canon of construction I am aware of can be cited which supports a claim to force into the agreement a payment not in character a subsidy by expanding the ordinary use of a term used in the same connection in its ordinary sense.

In my opinion, for the foregoing reasons, the question as to whether the costs above the price realized incurred in holding the retail price of butter and cheese in New Zealand can, under the provisions of the said agreement, be debited to the Dairy Industry Stabilization Account, being an account raised in the Marketing Department pursuant to the said agreement, should be answered in the negative.

(Sgd.) H. JOHNSTON, J.

Dated at Wellington, this 29th day of July, 1946.