

1929-30.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

JOINT COMMITTEE OF PUBLIC ACCOUNTS.

REPORT

ON

CLAIM OF CHARLES DEAN AND OTHERS, TRADING UNDER THE NAME OF HENRY DEAN AND SON, AGAINST THE WAR SERVICE HOMES COMMISSIONER FOR COMPENSATION TO COVER LOSSES ALLEGED TO HAVE BEEN SUSTAINED AS THE RESULT OF EXTENSIONS AND ALTERATIONS MADE TO THEIR WORKS TO PROVIDE BRICKS FOR THE ERECTION OF WAR SERVICE HOMES.

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JOINT COMMITTEE OF PUBLIC ACCOUNTS

REPORT

STATE OF CHARGES AGAINST THE HONOURABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES UNDER THE NAME OF HENRY DEAN AND SON, AGAINST THE WAR SERVICE HOMES COMMISSIONER FOR COMPENSATION TO SEVERAL LOSSES ALLEGED TO HAVE BEEN SUSTAINED AS THE RESULT OF EXTENSIONS AND ALTERATIONS MADE TO THEIR WORKS TO PROVIDE BRICKS FOR THE ERECTION OF WAR SERVICE HOMES.

MEMBERS OF THE COMMONWEALTH PARLIAMENTARY JOINT COMMITTEE OF PUBLIC ACCOUNTS.

(Seventh Committee.)

(Appointed 22nd November, 1929.)

*PERCY EDMUND COLEMAN, Esquire, M.P., Chairman.

Senator JOHN BLYTH HAYES, C.M.G.

Senator ALBERT ALFRED HOARE.

†Senator MICHAEL RAHEAL O'HALLORAN.

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Esquire, M.P.

The Honourable JAMES ALLAN GUY, M.P.

GEORGE EDWIN YATES, Esquire, M.P.

* Appointed Chairman 22nd November, 1929.

† Appointed Vice-Chairman 28th November, 1929.

JOINT COMMITTEE OF PUBLIC ACCOUNTS.

REPORT

ON

CLAIM OF CHARLES DEAN AND OTHERS, TRADING UNDER THE NAME OF HENRY DEAN AND SON, AGAINST THE WAR SERVICE HOMES COMMISSIONER FOR COMPENSATION TO COVER LOSSES ALLEGED TO HAVE BEEN SUSTAINED AS THE RESULT OF EXTENSIONS AND ALTERATIONS MADE TO THEIR WORKS TO PROVIDE BRICKS FOR THE ERECTION OF WAR SERVICE HOMES.

INTRODUCTORY.

1. Under date 12th December, 1929, the Prime Minister (the Right Honorable J. H. Scullin, M.P.), addressed the Chairman of the Parliamentary Joint Committee of Public Accounts in the following terms :—

“ In 1923, Charles Dean and others, trading under the name of Henry Dean and Sons, brought an action against the War Service Homes Commissioner in which damages amounting to £26,500 were claimed in respect of an alleged breach of contract by the Commission in the matter of an arrangement to take certain quantities of bricks from the plaintiffs for use in connexion with the erection of War Service Homes.

“ The case was tried in the first instance before a judge and jury, which returned a general verdict for the plaintiffs. An appeal was then made to the Full Court of the Supreme Court of New South Wales, which reversed the verdict of the jury. Later, on the 23rd April, the High Court (5 judges) heard an appeal by the plaintiffs against the decision of the Supreme Court and dismissed that appeal.

“ The firm subsequently approached the Commonwealth Government with a view to consideration of their case as a moral claim for compensation, and, in support of their contention, put forward the view that the Commonwealth won its appeal on a technicality.

“ I should be glad, therefore, if you would be so good as to place the matter before your Committee and invite it to undertake an investigation of the facts with a view to the submission of a report for the consideration of the Government. The departmental file on the subject is forwarded herewith.”

The Committee decided to undertake the desired investigation and commenced the taking of evidence on the 16th December, 1929.

COMMITTEE'S PROCEEDINGS.

2. To acquaint itself with the subject matter of the inquiry the Committee, in addition to taking evidence, made a careful examination of official files and documents, debates in Parliament, and the reports of the legal proceedings in the New South Wales Courts and the High Court. The Committee also made an inspection of the works of Henry Dean and Son, at Waratah, near Newcastle.

3. Following are the names of the witnesses who appeared before the Committee :—

Cook, Norman Henry, formerly District Officer, Newcastle, War Service Homes Commission.

Dean, Charles, Manager of Deans Limited, Brick Manufacturers, Newcastle, New South Wales.

Hutchings, Donald James, Joinery Manufacturer, Sydney, formerly Deputy Commissioner, War Service Homes, New South Wales.

McCay, Sir James Whiteside, Barrister, Melbourne, formerly Business Adviser to the Minister in charge of the War Service Homes Commission.

Morrell, James Charles, Manager, Advances for Homes Department, Government Savings Bank of New South Wales, Sydney, formerly Deputy Commissioner, War Service Homes Commission, New South Wales.
 Peterson, Charles Wentworth, Secretary, War Service Homes Commission, Melbourne.
 Shoesmith, Jonas, Works Foreman of Deans Limited, Brick Manufacturers, Newcastle, New South Wales.
 Whitlam, Harry Frederick Ernest, Assistant Commonwealth Crown Solicitor, Canberra.

HISTORY OF THE CASE AS DISCLOSED IN EVIDENCE AND OFFICIAL DOCUMENTS.

4. Henry Dean and Son commenced the establishment of their works at Waratah, near Newcastle, New South Wales, in 1912, and engaged in the business of pipe-making until 1917, when they extended their works for the purpose of making bricks. In February, 1921, the manufacture of pipes was discontinued, the firm having decided to concentrate on the manufacture of bricks, for which there was a large and growing demand at the time.

5. On the 21st January, 1920, the District Officer (Mr. N. H. Cook) of the War Service Homes Commission, Newcastle, wrote to Henry Dean and Son intimating that he required supplies of good red common bricks, and requesting Henry Dean and Son to submit a quotation for a large quantity.

6. On the 24th January, 1920, Henry Dean and Son replied stating that before a quotation could be submitted they required further particulars as to rate of delivery, &c., and intimating that their representative would call on the District Officer (Mr. N. H. Cook).

7. On the 24th July, 1920, the District Officer (Mr. N. H. Cook) wrote Henry Dean and Son, complaining about the quantity of bricks supplied and pointed out that the Commission's constructional programme was permanent, and that requirements would only be met by the receipt of 250,000 bricks per week for at least ten years. The District Officer (Mr. N. H. Cook) also indicated that the Commission was in a position to make an agreement with Henry Dean and Son for the delivery of 50,000 to 75,000 bricks per week for three, five or more years, adding that such an agreement would enable Henry Dean and Son to extend their plant, and would guarantee their output. On receiving this offer Henry Dean and Son interviewed the District Officer (Mr. N. H. Cook) and discussed the question of a contract.

8. On the 12th August, 1920, the District Officer (Mr. N. H. Cook) again wrote Henry Dean and Son asking for particulars of quantities available, price, &c. The firm replied on the 14th August, 1920, that the matter was receiving attention.

9. On the 7th September, 1920, the District Officer (Mr. N. H. Cook) wrote to Henry Dean and Son suggesting heads of agreement; but on the 11th September, 1920, Henry Dean and Son replied that they were not in a position to make any contract at present, as they were about to commence the erection of more kilns, which meant that for the next four or five months the bulk of the output would be required for their own work. Henry Dean and Son promised however, to let the Commission have any bricks they could spare.

10. On the 13th September, 1920, the District Officer (Mr. N. H. Cook) replied urging that the question of selling their output to the Commission should be arranged definitely by contract. On the 15th September, 1920, Henry Dean and Son acknowledged this letter and proposed an interview, which took place on the 20th September, 1920.

11. On the 21st September, 1920, the District Officer (Mr. N. H. Cook) wrote to the Deputy War Service Homes Commissioner (Mr. D. J. Hutchings), Sydney, as follows:—

In answer to your verbal request for the result of interview with Mr. Dean, of Henry Dean and Sons, on the 20th inst., I wish to inform you as follows:—

Mr. Dean was very much against making a contract at the present time, his reasons being—

- (a) Uncertainty of output;
- (b) Requires every second kiln to carry on with construction of new kilns;
- (c) Necessity to complete various outside orders in hand;
- (d) His main reason is the necessity of a guarantee on our part to empty a kiln of 80,000 in four (4) days.

I explained personally that the quantity of output did not affect the making of a contract, as I am assured this firm is aiming at an output of 200,000 per week, within twelve (12) months.

It was finally agreed that a contract be made on basis as follows:—

- (1) War Service Homes Commission to take whole output of H. Dean and Sons' brickworks from date of signing contract for a period of five (5) years.
- (2) Henry Dean and Sons agree to erect additional open kilns and one Hoffman pattern with all possible despatch (open kilns are now in course of construction).

- (3) When the output reaches 130,000 weekly, Henry Dean and Sons to have right to disburse all excess outside of contract.
- (4) The Commission guarantees to empty each kiln of 80,000 bricks within five (5) days after twenty-four (24) hours' notice of opening has been given to Newcastle office of Commission.
- (5) If Commission be not in a position to take delivery of any particular quantity of bricks, District Works Officer, Newcastle, to authorize Deans to disburse outside of contract. This clause not to prejudice Commission's liability to take output to 130,000 weekly.
- (6) The price for good-quality common brick, equal to submitted sample, to be 63s. per 1,000.
- (7) The delivery to be taken by the War Service Homes Commission at kiln.
- (8) Henry Dean and Sons agree to load all lorries or drays at kiln with all despatch.
- (9) Price as aforesaid to be varied only by—
 - (a) Increase or decrease in award rates of labour in brickyards.
 - (b) Increase or decrease in cost of coal.
- (10) Delivery to be subject to climatic conditions.

We would be glad if you would have this legally phrased in the form of a contract, inserting any additional matter which may be necessary, but not drastically altering the general conditions, and return to this office to be submitted to Mr. Dean for approval and signature.

12. On the 16th October, 1920, the Deputy War Service Homes Commissioner (Mr. D. J. Hutchings), Sydney, asked the District Officer (Mr. N. H. Cook) to ascertain whether a three years contract, instead of the one for five years proposed, would be acceptable to Henry Dean and Son. The latter agreed to the alteration of term.

13. On the 4th November, 1920, the Deputy Commissioner (Mr. D. J. Hutchings) submitted the matter to the Commissioner (Mr. J. Walker) for authority to enter into the proposed contract. The Commissioner (Mr. J. Walker) replied, under date 13th November, 1920, that the price of 63s. per 1,000 was too high, and that, provided the price was reduced to 60s. per 1,000, negotiations may proceed.

14. On the 26th November, 1920, the Deputy War Service Homes Commissioner (Mr. D. J. Hutchings), Sydney, advised the Commissioner (Mr. J. Walker) that Henry Dean and Son was unable to quote a lower price than 63s. per 1,000. He had arranged, however, with Henry Dean and Son to supply the Commission with bricks in the ordinary way of business, and not subject to contract, at the rate previously agreed upon, viz., 63s. per 1,000. The Deputy Commissioner (Mr. D. J. Hutchings) also indicated that Henry Dean and Son had further stated that when the duplication of their plant was in full working order they may consider a contract for an extended period for a lesser sum than 63s. per 1,000.

15. In February, 1921, the Government's change of policy was announced. Construction by day labour was abandoned, and all future work was to be completed by contract.

16. Nothing further was heard of the matter until the 9th March, 1922, when Henry Dean and Son wrote to the District Officer (Newcastle) in the following terms:—

Following on our conversation of yesterday morning *re* the supply of bricks to the War Service Homes Commission, and the change in your constructional programme.

I pointed out that as your Commission has decided to go out of the building line, and consequently will not be taking bricks from us as originally arranged, we are placed in a very unfortunate position.

Our first intimation from the Commission of its requirements, with the assurance of a ten years' programme of work at least, was contained in a letter of 20th July, 1920,* which was as follows:—

Messrs. H. Dean and Sons,
Pottery, Mayfield.

Dear Sirs,

The quantity of bricks being supplied by you to this Commission is very unsatisfactory. We are of the opinion that this is partly due to your being under the impression that our business is only temporary, and therefore do not consider it good business to yourself to give us absolute preference.

We wish to assure you that our constructional programme is permanent, and our requirements will only be met by the receipt of 250,000 bricks per week for at least ten (10) years, and a continuance after that of a slightly less quantity, for an indefinite period.

It is not the policy of the Commission to acquire brickworks, or commence new works of sufficient capacity to supply the whole of our requirements. This policy will only be adopted as a last resource.

We are in a position to make an agreement with you to accept the maximum quantity of bricks for which you are in a position to guarantee delivery, say, from 50,000 to 75,000 per week for three (3) five (5), or more years.

An agreement to this effect would enable you to extend your plant if necessary, and would guarantee your output.

We would ask you to give this matter your full consideration, the decided advantage of such an arrangement being most obvious.

Yours faithfully,

(Signed) N. H. Cook,
District Officer.

*This letter is apparently the letter of 24th July, 1920, mentioned in paragraph 7 of this report.

After further correspondence and several interviews with the Deputy Commissioner (Mr. D. J. Hutchings) and the District Officer (Mr. N. H. Cook), at their urgent request we agreed not to take any more private orders, but to let the Commission have our output and to give absolute preference.

The District Officer told us that he considered our works were the only ones in the district capable of being extended to meet their requirements, and when we had accepted their offer we decided to at once make the necessary extensions for the speediest production of bricks. We purchased another machine at a cost of £1,000, and started the erection of a continuous kiln capable of burning 120,000 bricks per week.

The Deputy Commissioner and the District Officer visited our works at different times during the building of the kiln to see that progress was being made, and even spoke of the advisability of building a second one.

On 20th October, 1920*, a contract was drafted in which we agreed to supply the Commission with 520,000 bricks per month.

The position now is that after laying out over £6,000 in the purchase of the machinery and erection of the kiln, &c., we have no use for the machine, and are getting no benefit from the kiln. Had it not been for the business offered us by the War Service Homes Commission we would have adhered to our original intention of building down-draught kilns, which would have been sufficient for the ordinary requirements of the district.

We are not now making a formal claim, but we do ask for your consideration of a fitting compensation.

If you like to send an investigation officer here, we will give him all the information he wants on the subject, and we can show him what alterations and additions have been made, how we pulled down three pipe-burning kilns, and altered the buildings to suit the brick-making machinery, for we were determined to do our best to supply the whole of the Commission's brick requirements.

17. The matter was referred to Central Administration, and the Acting Commissioner (Mr. J. M. Semmens), on the 27th April, 1922, noted on the papers that it was evident no contract was entered into, and that the late Commissioner (Mr. J. Walker), under date 13th November, 1920, refused to make a contract at the price offered.

18. At the request of the Acting Deputy Commissioner (Mr. J. C. Morrell), the Crown Solicitor of the Commonwealth (Mr. Gordon H. Castle), under date 17th May, 1922, advised Henry Dean and Son that, owing to their failure to agree as to the price to be charged for bricks, negotiations were discontinued and there was no contract.

19. On the 2nd June, 1922, Henry Dean and Son wrote to the Minister for Repatriation (the late Senator E. D. Millen) admitting that the contract was never completed, and, in later correspondence with the Commission, denied that they relied on the existence of a contract, but on a moral claim for compensation.

20. Consequent on the change of policy of the Government a large number of claims based upon alleged breaches of contract was made to the War Service Homes Commission. These claims, including the claim of Henry Dean and Son, were investigated and reported upon by Sir James McCay, Business Adviser to the Minister controlling the War Service Homes Commission. In some instances substantial compensation was paid, but the claim of Henry Dean and Son was rejected. In his report on this case, dated the 13th June, 1922, Sir James McCay said:—"I am of opinion that there is not a moral claim by Deans against the Commission, and I recommend that no claim be recognized."

21. On the 22nd March, 1923, a writ was issued on behalf of Henry Dean and Son for £26,500 for breach of contract.

22. On the 3rd October, 1924, the hearing of the action was concluded and the jury found for the plaintiff, whereupon the Judge made the following order:—

Verdict to be recorded and to be entered later for such sum as may be ascertained and determined on reference as agreed between the parties or as may be directed by a Judge of this Court. The matter to remain in suspense for the present to enable the parties to agree on the method of ascertaining and determining the amount of damages, if any. Costs of the action to be reserved for the present.

23. The Commonwealth appealed to the Supreme Court and the three judges, on the 18th December, 1924, upheld the appeal.

24. On the 23rd April, 1925, Henry Dean and Son appealed against this decision and the High Court (five judges) dismissed the appeal without calling on counsel for the Commonwealth.

25. Having failed in the Courts, Henry Dean and Son again urged their claim for compensation on moral grounds. In July, 1925, the matter was introduced into the Federal Parliament by the Honorable D. Watkins, Member for Newcastle, who moved that a select committee be appointed to inquire into the claim of Henry Dean and Son. The motion was debated at length, but no finality was reached. In January, 1926, Mr. Watkins re-submitted his motion which, after debate, was defeated.

26. Henry Dean and Son continued to make representations to the Prime Minister and the Minister controlling the War Service Homes Commission, and finally the matter was referred to the Parliamentary Joint Committee of Public Accounts in the manner already indicated.

* This date should be 20th September, 1920, as set out in paragraph 11 of this report.

OBSERVATIONS AND RECOMMENDATION.

27. Having been invited to report on the facts of the case the Committee directed its attention, not only to the moral aspects, but to the factors which may have influenced the minds of the judges and the jury in arriving at their conclusions.

28. On the 2nd October, 1924, in the course of his summing up, Judge Campbell directed the jury that the only question for them to consider was whether a concluded contract was made between the parties on the 20th September, 1920. He also indicated to the jury that, if they found that a definite contract in the terms alleged by Henry Dean and Son was concluded on that day, the memorandum sent by the District Officer (Mr. N. H. Cook) to the Deputy Commissioner (Mr. D. J. Hutchings) on the 21st September, 1920, was a sufficient memorandum of its terms to satisfy the Statute of Frauds. The verdict of the jury was that there was a contract.

29. The Commonwealth appealed to the Supreme Court, and the three judges, on the 18th December, 1924, upheld the appeal. The Supreme Court directed its attention merely to the question as to whether the Statute of Frauds was a good defence in this case; whether the letter of the 21st September, 1920, was in itself evidence of a contract; and whether the memorandum in itself was complete. The opinion of the Chief Justice, in which the other two judges concurred, was that it was not an enforceable contract, for the reason that an essential term of the bargain providing for the right to fulfil existing orders had been omitted from the memorandum; that the whole contract had not been embodied in the memorandum; and that the provisions of the Statute of Frauds had not been complied with. A portion of the judgment reads:—

The jury found a general verdict for the plaintiffs. I should have thought myself that the evidence pointed to the conclusion that there was no definite agreement entered into between the parties on the 20th September, 1920, and that they did not intend to bind themselves until a formal agreement in writing had been prepared.

30. On the 23rd April, 1925, the High Court heard the appeal of Henry Dean and Son against the decision of the Supreme Court, and, without calling on counsel for the Commonwealth, dismissed the appeal. It is stated in evidence that the Chief Justice, during the course of the proceedings, remarked that the jury had found a contract, but it was a puzzle to find any evidence of one.

31. Henry Dean and Son contended that the Commonwealth won its case on a technicality by relying for its defence on the Statute of Frauds.

The Commonwealth's reply to this contention is that it had consistently maintained that there was no contract at all, and that it endeavoured to prove its contention on documents apart from the Statute of Frauds, on which it relied as a second defence. The evidence shows that counsel for Henry Dean and Son allowed certain departmental papers to be admitted, but objected to others, and the Court, on technical rules of evidence, sustained the objection taken and refused to admit them. The Commonwealth claims that this refusal prevented it proving by documentary evidence that there was no contract, and compelled it to rely on the second defence, namely the Statute of Frauds, which, having regard to the circumstances, was claimed to be quite a fair defence.

Included amongst the documents not admitted as evidence were the following letters which, the Commonwealth contended, showed without a shadow of doubt that there was no contract, the parties not being in agreement as to the vital question of price:—

The Deputy Commissioner,
War Service Homes Commission,
Sydney, New South Wales.

13th November, 1920.

Previous Correspondence: Your memo. of 4th inst.
Subject: Brick Supply, Newcastle.

With reference to your memorandum above referred to, having in mind the fact that the price of coal at Newcastle is very much cheaper than it is in Sydney, it appears to me that 63s. is too high a price for a contract of the nature you have in view. After full consideration of all sides of the question, I desire to inform you that, providing the price of bricks is 60s. per thousand loaded into drays or trucks, as the case may be, and that such price will only increase insofar as there is an increase in the wages fixed by the Arbitration Court, and that the price of bricks, adding this increase, will at no time be greater than 10 per cent. less than current market rates, negotiations may proceed. The same provision to apply in the case of a decrease in the current market rates.

Please report further as to the result of your negotiations.

(Sgd.) JAS. WALKER,
Commissioner.

The Secretary,
War Service Homes Commission,
Melbourne.

26th November, 1920.

Subject: Brick Supplies, Newcastle.

Previous correspondence: Your 20/B5943 of 13/11/20.

In further reference to the above memorandum, I have to advise that I placed your views before Messrs. Dean and Sons, but the firm regrets that they are not able to quote any lower price at the present time than 63s. per thousand.

They are at present engaged in the duplication of their works, which duplication will be completed within six weeks or two months from this day.

I have arranged for them to supply, in the ordinary way of business, and not subject to contract, bricks at the previous rate agreed upon, i.e., 63s. per thousand, and they indicated that, when the duplication is in full working order, they may consider a contract for an extended period for a lesser sum than 63s. per thousand.

(Sgd.) D. J. HUTCHINGS,
Deputy Commissioner.

32. It was further claimed by the Commonwealth that, if the letters quoted above had been admitted, the jury would have been quite satisfied that no contract had in fact been entered into.

DEAN'S CLAIM FOR COMPENSATION.

33. The claim for compensation submitted in evidence by Henry Dean and Son is as follows:—

Regarding the compensation for money spent in building the patent kiln and in the purchase of plant, the following are the figures. The value of the three pipe-burning kilns are the figures of Charles Green and P. A. Smith, and that of the buildings of Thomas Southern and Robert Veitch, builders of Newcastle, dated the 8th September, 1920, and the 9th September, 1920, respectively:—

	£	s.	d.
(1) Three Beehive pipe-burning kilns, strapped with five bands of iron plate 6 inches by $\frac{1}{4}$ inch and 90 feet in circumference, with nine fire holes fitted with cast-iron doors, with perforated brick floors, and flues underground leading to the chimney stack, £500 each	1,500	0	0
(2) Cost of building the patent kiln, brick work and castings, £3,206 19s. 6d.	3,207	0	0
(3) One open kiln pulled down and cleared away to make room for patent kiln	450	0	0
(4) One drying shed altered to cover patent kiln originally 140 feet by 40 feet, upper and ground floors	2,750	0	0
(5) One drying shed used for pipes, &c., now out of use, 150 feet by 50 feet, upper and ground floors	3,250	0	0
(6) Loss on sale of pipe-making machines having two mouth-pieces, with dies for making 4-in., 6-in., 9-in., 12-in., 16-in., 18-in., 21-in., and 24-in. pipes, with drums, cradles, bonnets, trucks, &c., valued at £975, sold to F. J. Fieldsend, Maitland, for £300. Loss	675	0	0
(7) Loss on sale of No. 2 Platt brickmaking machine bought in February, 1921, from J. H. Charlesworth, for £1,000; sold December, 1923, to Marrickville Engineering Company for £575. Loss	425	0	0
(8) One pugmill out of use	125	0	0
(9) One conduit die out of use	27	10	0
(10) One ridging out of use	27	10	0
(11) One sink stone out of use	22	0	0
	12,459	0	0

34. It should be mentioned that the amount claimed in Court was £26,500; but in fairness to Mr. Charles Dean, the evidence tendered by him in regard to this amount is quoted. Mr. Dean said:—"I knew nothing about the claim of £26,000. I challenged it as soon as I saw it, and I was told by my solicitor that a mistake had crept in somewhere. The amount should have been £16,000."

35. Reference should also be made to the fact that on the 9th March, 1922, Charles Dean informed the District Officer as follows:—

The position now is that after laying out over £6,000 in the purchase of machinery and the erection of the kiln, &c., we have no use for the machine and are getting no benefit from the kiln.

36. Under date 27th November, 1929, Mr. Charles Dean wrote to the Minister controlling the War Service Homes Commission (The Honorable P. J. Moloney, M.P.) setting out particulars of the amount required to enable the firm to re-start its brickmaking operations, and indicated that "the sum of £6,000 is necessary to set us going again."

37. The claim of £12,459 submitted in evidence is, in the opinion of the Committee, an excessive one, being based, for the most part, on the value of assets written up in 1920. On Mr. Charles Dean's own admission certain items have been included at values considerably in excess of their cost price. With regard to the drying sheds, in respect of which £6,000 is claimed,

Mr. Charles Dean in the course of evidence said :—“ These figures are based on the valuation made in 1920, when there was a great appreciation in the value of building materials Roughly speaking, the value is set down at £2,000 more than the actual cost.”

37. A striking aspect of the claim is that Henry Dean and Son make no allowance for the sale value of the assets in respect of which compensation is sought.

38. In its endeavours to determine whether or not there was a moral claim for compensation the Committee studied all aspects of the case and, after carefully weighing all of the evidence, it is forced to the conclusion that Henry Dean and Son have failed to establish a claim for compensation. In arriving at this decision the Committee has been influenced in a large measure by the following facts :—

That Henry Dean and Son failed to avail themselves of the Commission's offer of a contract to take the whole of their output.

That Henry Dean and Son wrote to the District Officer (Mr. N. H. Cook), Newcastle, on the 11th September, 1920 (nine days before the date of the alleged contract), stating, *inter alia* :—

On Monday next we start the erection of two more temporary kilns, and on completion of these it is our intention to immediately begin the building of a patent kiln.

This will mean that for the next four or five months the bulk of the output will be required for our own work, the quantity depending on the number of men we are able to put on the work—the more the better.

The present position is not satisfactory to our customers or to ourselves, for the conditions under which we are working make it impossible to give delivery with any certainty, and the sooner the position is improved the better from every point of view, and we regard the matter of such importance that we think our best policy is to make the necessary developments here as speedily as possible.

As soon as we have the two kilns in operation we fully expect to be able to supply you with a larger quantity of bricks than in the past, and in the meantime we will be pleased to let you have all the bricks we can spare. More than this we cannot do under the existing conditions.

39. In addition to the definite terms of the letter above quoted, Mr. Charles Dean admitted in Court that, apart from any negotiations for a contract with the War Service Homes Commissioner, there would have been an alteration of plant to increase the output of bricks. The following passages are quoted from page 23 of the proceedings in the Supreme Court of New South Wales on the 30th September, 1924 :—

Counsel for the Commonwealth (Mr. Weston) : So that in any event there would be an alteration of your plant apart altogether from the arrangement which you deposed to in September ?

Mr. Charles Dean : Yes.

Counsel : And that alteration would have been designed to increase your output of bricks ?

Mr. Charles Dean : Yes.

40. These facts are mentioned because in the course of evidence, Charles Dean, of Henry Dean and Son, stated definitely that their works would not have been extended had it not been for the representations of the War Service Homes Commission.

41. From the evidence it would appear that Henry Dean and Son were not very much concerned with the supply of bricks to the Commission until March, 1922, when their ordinary trade began to decline. The following figures throw an interesting light on the position :—

SUMMARY OF SALES OF BRICKS FROM 1st MARCH, 1920, TO 31st AUGUST, 1922, FROM H. DEAN AND SON TO THE WAR SERVICE HOMES COMMISSIONER AND OTHER PERSONS.

EXTRACTION FROM SALES JOURNAL.—DEAN AND SON AND DEANS, LIMITED.

Period.		Quantities of Bricks Sold.			Value of Sales.		
From—	To—	Commission.	Others.	Total.	Commission.	Others.	Total.
1st March, 1920	31st August, 1920	93,116	789,337	882,453	£ 287 3 9	£ 2,682 10 2	£ 2,969 13 11
1st September, 1920	28th February, 1921	234,714	435,271	669,985	742 8 0	1,372 4 0	2,114 12 0
1st March, 1921	31st August, 1921	81,650	1,010,972	1,092,622	275 19 10	4,536 14 10	4,812 14 8
1st September, 1921	28th February, 1922	2,800	1,293,900	1,296,700	11 2 0	5,458 11 3	5,469 13 3
*1st March, 1922	31st August, 1922	..	1,023,002	1,023,002	..	4,459 2 3	4,459 2 3
		412,280	4,552,482	4,964,762	1,316 13 7	18,509 2 6	19,825 16 1

* At about this date the Commission ceased to order bricks from Henry Dean and Son.

42. It will be observed that from March, 1920, to February, 1922, Henry Dean and Son sold only 412,280 bricks (value, £1,317) to the War Service Homes Commission, while their sales to other customers for the same period totalled 3,529,480 bricks (value, £14,050). It should also be noted that if the proposed contract of the 21st September, 1920, had been completed and enforced, Henry Dean and Son would have been obliged to supply the Commission with 6,760,000 bricks a year.

43. The extent of the interest of Henry Dean and Son in the supply of bricks to the Commission may be further gauged from the fact that during the twelve months immediately preceding their claim for compensation they supplied only 84,450 bricks to the Commission, compared with 2,304,872 bricks supplied by them to outside customers. The provision of such small quantities of bricks to the Commission would appear to indicate that the supply of bricks to outside customers was more profitable to Henry Dean and Son. Mr. Charles Dean, in the course of evidence, said that at the time his firm was supplying bricks to the Commission at 68s. per thousand the market price for bricks was 74s. 6d. per thousand.

44. Having regard to all the circumstances the Committee is satisfied that Henry Dean and Son discontinued their pipe-making business and extended their works in the belief that they would have a ready market for their output over a lengthy period. At the time Henry Dean and Son extended their works Newcastle was growing rapidly and suppliers of bricks were receiving far more orders than they could execute. From the evidence it would appear that Henry Dean and Son believed they were justified in extending their works as a business risk, and in not binding themselves to a definite contract with its attendant liabilities and obligations.

45. It is significant that Henry Dean and Son waited until March, 1922, about eighteen months after the alleged contract, before they lodged a claim against the Commonwealth, and that neither the War Service Homes Commission nor Henry Dean and Son made any complaint about non-fulfilment of contract after the Deputy Commissioner of the War Service Homes Commission (Mr. D. J. Hutchings), unsuccessfully negotiated with Henry Dean and Son, on 26th November, 1920, on the vital question of price.

46. Summed up, the Committee is satisfied that:—

- (a) Henry Dean and Son discontinued their pipe-making operations and extended their brickmaking works to meet the growing demand for bricks;
- (b) The claim of Henry Dean and Son that the alterations and extensions were made to meet the brick requirements of the War Service Homes Commission has not been substantiated.

47. Having carefully reviewed the whole position, the Committee is of opinion that the claim has not been sustained.

Senator J. B. Hayes and Senator A. A. Hoare were not present at the Inquiry.

P. E. COLEMAN, Chairman.

Office of the Joint Committee of Public Accounts,

Parliament House, Canberra,

4th April, 1930.

OBSERVATIONS AND RECOMMENDATION OF THE MINORITY.

Having carefully studied all aspects of the case, I find that I cannot subscribe to the view expressed in the report of the majority. In my opinion Henry Dean and Son have established a claim for compensation on moral grounds. My conclusions are based on the following facts:—

ALTERATIONS EFFECTED BY HENRY DEAN AND SON AT THE INSTANCE OF THE OFFICERS OF THE WAR SERVICE HOMES COMMISSION.

Together with other members of the Committee, I visited the works of Henry Dean and Son at Waratah, Newcastle. We were there shown the extent of the alterations which had been made to the establishment, consequent upon representations which had been made by one N. H. Cook, who was at the time the District Officer of the War Service Homes Commission. Mr. Cook's first visit to the works of Henry Dean and Son was made during the absence of Mr. Dean, when he made the purpose of his visit known to Mr. Shoesmith, the foreman of the works. Mr. Cook subsequently called at the works again and interviewed Mr. Dean, to whom he made certain representations of a very alluring character and which, as the evidence reveals, led up to a tentative agreement for a contract as outlined in the letter of the 21st September, 1920, from Mr. Cook to the Deputy Commissioner of War Service Homes. Mr. Dean pointed out to Mr. Cook at the very inception of negotiations that, to meet all the proposed requirements, the necessary alterations involved the removal of three Beehive kilns, which formed part of a Beehive pipe-making plant containing six or more Beehive kilns, together with a huge draught stack in the centre. The removal of these kilns threw the whole system into disuse. Mr. Dean also showed the Committee a drying shed which had been constructed for pipe drying. This also had to be extensively altered to install a Hoffman brick kiln for the purpose of meeting the requirements of the business which Mr. Cook led him to believe would accrue. The plant as altered has remained practically idle since its reconstruction, and has fallen into a state of disrepair. Mr. Dean also showed us other alterations as set out in the statement of his losses. He practically scrapped his pipe-making plant and made arrangements for the delivery of a Platt brickmaking machine, which, owing to the change of policy of the Government, meant his selling it at a sacrifice of £425 without having ever installed it in his premises. All this was actual preparation for the business he was led to expect from the War Service Homes Commission, and which has never been disputed. It was admitted in evidence that the class of bricks supplied by Henry Dean and Son was of the best quality offering in Newcastle, and also that his works were adjacent to large projected works by the War Service Homes Commission. In reply to a question in evidence as to what impelled Messrs. Hutchings and Cook to offer a big contract, Mr. Petersen, secretary of the War Service Homes Commission said (Q. 306): "Only what the file discloses, to the effect that his works were close to the land where mass building was to be undertaken, that the bricks were superior, and that the price was right."

The following facts also disclose the reasons for these alterations and the confidence Henry Dean and Son had in the Government:—

Q. 17 and 18.—You carried on the pipe-making plant until 1920 at a profit? A.—Yes. Then in September, 1920, we were induced to take on the War Service Homes work to make bricks for their building programme in this district, which has proved to be a very disastrous and sorry experience for us. A few days after we had made the agreement with the War Service Homes Commissioner, that is, on the 24th September, 1920, we met, by request, Mr. Berkleman, Stores Supply Department, Mr. King, Engineer of the Public Works Department, and Mr. J. B. Henson, Engineer of the Hunter District Water and Sewerage Board, to talk over the matter of the future supply of pipes and fittings for the sewerage works of Newcastle. We told these gentlemen that we had been urged by the War Service Homes Commissioner to regard their building programme as a national work and to give them absolute preference. We regretted very much having to disappoint these gentlemen and to hold up the sewerage work for the want of pipes, for we had been suppliers for many years to the various departments. In December, 1920, two months after we had made the agreement with the War Service Homes Commission, quotation forms were received by us for the Postmaster-General's Department, for the supply of earthenware conduits and pipes, but we could not take on this work.

Q. 79.—Would you adopt a similar practice if you were dealing with the Broken Hill Proprietary Company or Lysaghts Limited? A.—If the manager of either of those concerns had made a similar proposal to me, I would have acted in the same way.

Q. 80.—Would you have expected a signed contract? A.—If Mr. Bradford asked me to expedite matters I would have acted as I did with Mr. Hutchings.

Q. 125.—With the alterations suggested, and which were ultimately carried out, how would your plant compare with others? A.—We would have been able to produce more than any one yard.

Q. 126.—Were there any other factors in your favour? A.—Yes, we were close to Platt's estate where extensive building was to be undertaken, and 15,000,000 bricks would be required. During Mr. Hutchings's last visit this matter was discussed, and Mr. Shoesmith suggested the erection of an aerial ropeway to enable bricks to be delivered from the yard right on to the spot and thus save handling and carting charges.

NEGOTIATIONS BY OFFICERS OF THE WAR SERVICE HOMES COMMISSION.

As a business firm Henry Dean and Son were attracted by the inducements held out to them by Messrs. Cook and Hutchings, as revealed in the following evidence (Q. 198):—

As a business man I thought it would pay me to increase my plant. I was prepared to go right ahead, but it was solely in anticipation of the activities of the War Service Homes Department that I increased my plant.

Q. 199.—You took a business risk? A.—Yes.

Q. 200.—As a result of a change in policy you were seriously affected? A.—Yes.

Mr. Peterson in evidence made the following statements:—

Q. 286.—It would be a fair inference that Dean was given to understand that substantial orders for bricks would be placed with him by the Department. For instance, it was stated he would be asked to supply 250,000 bricks a week for ten years, to enable the Commission to proceed with a vigorous programme that had been decided on? A.—I do not think there is much doubt about that.

Q. 287.—Would not an indication of that character inspire the hope for big business? A.—I think it did.

Q. 288.—Do you think that the average business man would regard it as a good proposition, and one in connexion with which he would be justified in extending his plant? A.—Yes, that is how he acted. He thought there was a prospect of big business.

Q. 289.—Do you think it is an attempt to mislead the Government? A.—Judging from my impressions during the few occasions on which I have met Dean, I should think not.

Q. 318.—While negotiations were proceeding with Dean did you know that he was extending his plant in order to meet the Commission's requirements? A.—I did not know anything about it.

Q. 319.—I think it can be assumed that Hutchings and Cook knew? A.—The early correspondence sets that out.

Q. 320.—There was nothing to the contrary? A.—No.

Q. 321.—Can it be taken from their conduct that they inspired the belief in Dean that the business would continue? A.—Yes, because they were trying to get all his bricks.

Q. 322.—If there had not been a change in policy in 1921 and the building had proceeded, Dean's position would have been safeguarded? A.—On that assumption it would have been.

Q. 333.—If the alteration in policy was a surprise to the Deputy Commissioner would it not be a greater surprise to Mr. Dean? A.—It was a surprise to everyone.

Q. 334.—It would appear that Dean had been encouraged to undertake the work? A.—Yes, if the statements before the Committee are true. If I were dealing with the question I should like to examine Hutchings as to credibility. His statement was written twelve months after he resigned. His statement in one place is quite definite and on the next page he attempts to get away from it. It is difficult to know what he does mean. I would suggest that the Committee examine Hutchings. The claim was in connexion with a contract and that was the point on which we fought it in the court. We did not worry about any arrangement or understanding, as that was only a side issue. *We successfully contended that there was no contract, but there was not any attempt to disprove that there was no arrangement or understanding.*

Q. 335.—Do you consider that he has a moral claim? A.—That is a question I would prefer not to answer.

This conclusively indicates that Henry Dean and Son were the victims of misplaced confidence in the accredited agents of the War Service Homes Commission and of the Government.

THE DISPUTED CONTRACT.

The whole of these negotiations culminated in the letter of the 21st September, 1920, from Mr. Cook to the Deputy Commissioner of War Service Homes, which clearly shows that up to the point of getting the Department's requirements through Henry Dean and Son, a tentative contract had been arranged. Had the Department acted upon Mr. Cook's advice and completed and returned the contract to him for signature, the claim of Henry Dean and Son would have been valid for the whole of the amount claimed. Therefore the real difference between Henry Dean and Son getting compensation and being left high and dry depended on the non-signing of a contract, for which the Department was wholly responsible, in that it was never completed owing to the question of price, although the secretary of the Department has sworn, "His works were close to the land where mass building was to be undertaken; that the bricks were superior; and that the price was right". It seems anomalous that a firm should follow a track laid by officers of the Department, and because the preparation of a contract had been held up on the pretext of price, and not signed, that the innocent party should be penalized. It would appear from the evidence that Henry Dean and Son were cautious lest they be involved in a contract which they could not carry out, and this caution had been misconstrued into a fault on the part of the firm; but, if such caution had not been exercised, and the firm had pressed for finality in the matter of the contract drawn up by Mr. Cook, there would then have been no shadow of doubt that the Commission would be liable for the whole amount involved. The caution of Henry Dean and Son in effect saved the Commission from a huge liability, and the firm in consequence was left stranded.

COMMITTEE'S FUNCTION.

As the matter has been referred to the Parliamentary Joint Committee of Public Accounts for adjudication on solely moral grounds, I refrain from commenting on the judicial decisions further than to point out that on the facts Henry Dean and Son secured a verdict for general damages.

It is remarkable that in the morass into which the War Service Homes Commission floundered, 31 firms were granted compensation for breach of contract and other reasons, involving the Commonwealth in a bill for compensation of £277,000. A significant comparable case is that of Capper and Nonmus, of which in the evidence of Mr. Peterson the following is recorded (Q. 738): "We denied all liability, and I think if I read a letter of the 13th January, 1922, from the business adviser, General McCay, it will set out all the facts and show there was no liability. The letter reads: 'I am instructed to inform you that the Assistant Minister has considered the matters arising out of the manufacture of fibrous plaster sheets for the War Service Homes Commissioner of your clients Messrs. Capper and Nonmus, of Sydney. Counsel has definitely advised the Commissioner that there is no legal obligation upon him, and that is apart from section 14A of the Act. King's counsel has also advised that section 14A of the Act renders null and void any alleged agreement between your clients and the Commission. The Government and the Assistant Minister are, however, of the opinion that there is a moral obligation to your clients who were induced by officers of the Commission to establish their factory in Sydney, and I am instructed to inform you that approval has been given for the payment of the sum of £5,000 to your clients as full compensation for any damage they may have suffered. If the offer is accepted the necessary relief will be prepared without delay and the matter completed as promptly as possible.'"

Q. 739.—Who was the Minister at the time? A.—Mr. Rodgers.

Q. 740.—Were the circumstances similar to those which prevailed in Dean's case? A.—Yes.

Q. 742.—What was the amount of the original claim? A.—An amount of £23,000 was suggested, but the firm, when advised of the legal position by Sir Edward Mitchell and Mr. Latham, and after discussion with the business adviser, rather than go to litigation accepted £5,000.

Q. 746.—The only two cases where there were contractual obligations were those of Capper and Nonmus and Deans? A.—That is so.

Q. 747.—Is Dean's case the only one in which compensation has been refused by the Government? A.—So far as I know.

Q. 748.—Have you gone through the records to see if there are any other cases outstanding? A.—Yes, and I cannot discover anything.

Q. 749.—Since you appeared before the Committee in Sydney have you given consideration to the merits or otherwise of Dean's case? A.—Naturally I have given the matter my close attention, and as mentioned in Sydney I was in a difficult position inasmuch as Hutchings and Cook said that they induced Dean to extend his plant.

This evidence, out of the mouth of a responsible servant of the Commission, goes to prove that Henry Dean and Son is the only firm with which contractual obligations were urged to which compensation has been refused by the Government, and on the facts it is hard to understand the reason why.

COMPENSATION.

The question of the amount of compensation which should be granted is, in my opinion, nothing less than the amount now sought, £6,000 (*vide* paragraph 36 of the Majority Report). While this amount is small and in no way approximates what would appear to be the loss arising from the disorganization of Henry Dean and Son's plant, the sacrifice of the prospective development of the pipe-making business, and the consequent worry and disappointment, it is the amount finally fixed by attrition and should be granted, and in common justice I urge the Government to accept the minority report on the foregoing facts.

4th April, 1930.

G. E. YATES.