

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH  
AND THE MINISTER FOR REPATRIATION

AGAINST

BALDING, TRUSTEE OF THE ASSIGNED ESTATE OF DREW.

ON REMOVAL FROM THE SUPREME COURT OF  
VICTORIA.

*Constitutional Law—Parliament of Commonwealth—Legislative powers—Defence—  
Priority of payment—Debt to fund for discharged soldiers—Insolvency—The  
Constitution (63 & 64 Vict. c. 12), sec. 51 (VI.), (XVII.)—Australian Soldiers’  
Repatriation Act 1917-1918 (No. 37 of 1917—No. 15 of 1918), sec. 19.*

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Sec. 19 of the *Australian Soldiers’ Repatriation Act 1917-1918* provides that  
“Claims in respect of moneys advanced by the trustees of the Australian  
Soldiers’ Repatriation Fund or by the Minister or a State Repatriation Board  
or a Local Committee shall have the same priority with respect to the payment  
of debts as if the money had been advanced by the Crown.”

Knox C.J.,  
Isaacs, Higgins,  
Gavan Duffy,  
Powers and  
Rich JJ.

*Held*, that the section is a valid exercise of the power conferred on the  
Commonwealth Parliament by sec. 51 (VI.) of the Constitution to legislate  
with regard to defence.

SPECIAL case removed from the Supreme Court of Victoria.

In the Court of Insolvency at Melbourne his Honor Judge Moule  
stated a case for the opinion of the Supreme Court, which was  
substantially as follows :—

This was a motion on behalf of the Minister of State for Repatria-  
tion that the proof of debt of the Deputy Comptroller of the Depart-  
ment of Repatriation of the Commonwealth of Australia, for and on  
behalf of the Minister of State for Repatriation, in respect of the sum  
of £150 on the assigned estate of Frank Drew admitted by the  
trustee of the said estate, Edwin Gerald Balding, to rank for dividend



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as an ordinary debt be admitted for payment in priority to all other creditors of the said assigned estate on the grounds set out in the motion.

I found the following facts :—The debtor Frank Drew received the sum of £150 from the trustees of the Australian Soldiers' Repatriation Fund. He assigned his estate under a deed of assignment for the benefit of his creditors. The loan to Drew was approved by the trustees of the Fund. The moneys connected with the fund out of which this sum of £150 came were appropriated as shown in the Parliamentary Estimates 1915-1916, p. 47, item No. 7, "Grant to Australian Soldiers' Repatriation Fund £250,000." That was a grant to the trustees of the fund. Voluntary contributions were made from time to time in the States to the State War Council funds. The State War Council dealt with the voluntary contributions as they thought fit. The trustees from time to time supplied the State War Council with money from the fund of £250,000. Advances were not made by the State War Council out of the voluntary contributions, but the advances to soldiers were made out of the fund of £250,000. Investigations were made by the State War Council as to applications by soldiers for assistance; these applications, with the recommendation of the War Council, were sent on to the trustees of the Fund, and advances were not made until approval was given. The said sum of £250,000 was paid into the Commonwealth Bank to the credit of an account called "Australian Soldiers' Repatriation Fund Trust Account." The voluntary contributions were also paid into the Commonwealth Bank to an account kept separate and apart from the fund of £250,000. The Board of Trustees made advances to the various State War Councils for repatriation purposes, and in the case of the State of Victoria the Board's advances were paid into an account called "State War Council of Victoria Repatriation Account," and this account was kept distinct from any fund contributed by the public of Victoria. The advance of this sum of £150 to Drew was made out of "The Australian Soldiers' Repatriation Fund Trust Account."

The question for the opinion of the Court is : Is the Comptroller's proof of debt entitled to be admitted for payment in priority to all



other creditors of the assigned estate of Frank Drew on the grounds stated in the notice of motion ?

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The notice of motion set out that the grounds of the claim for priority were that the debt was a debt due to the Crown, or that it was a debt due in respect of moneys advanced by the trustees of the Australian Soldiers' Repatriation Fund which, under sec. 19 of the *Australian Soldiers' Repatriation Act* 1917-1918, had the same priority with respect to the payment of debts as if the moneys had been advanced by the Crown.

On the hearing of the special case the Full Court were of opinion that, apart from the provisions of the *Australian Soldiers' Repatriation Act* 1917-1918, the debt in question was not a debt due to the Crown, and that the Comptroller was not entitled to priority of payment in respect thereof, but they decided that, in view of the provisions of sec. 38A of the *Judiciary Act*, they had no power to deal with the question of the validity of sec. 19 of the *Australian Soldiers' Repatriation Act*, which had been challenged on the ground that it was an enactment beyond the constitutional powers of the Commonwealth. The Court therefore pronounced no opinion on the question asked by the special case: *In re Drew* (1).

The question raised by the special case was then, on motion by the Attorney-General for the Commonwealth, removed into the High Court pursuant to sec. 40 of the *Judiciary Act*, and now came on for argument.

A point was taken at the hearing before the High Court by counsel for Balding that, the proof of debt having been made under the deed of assignment, the Minister for Repatriation was bound by the terms of the deed, which provided that the priorities should be those given by the *Insolvency Act* 1915 (Vict.). The point, however, was by leave of the Court withdrawn on certain terms, and the only point dealt with was the validity of sec. 19 of the *Australian Soldiers' Repatriation Act* 1917-1918.

*Braham* (H. I. Cohen with him), for the trustee. The only legislative power given by the Constitution under which sec. 19 of the *Australian Soldiers' Repatriation Act* 1917-1918 could possibly be



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authorized is the power as to bankruptcy and insolvency (sec. 51 (XVII.)), and that as to the naval and military defence of the Commonwealth (sec. 51 (VI.)). The fact that the limitation of the provisions of sec. 19 to bankruptcy in the original Act was struck out by the amendment of the Act in 1918 shows that the Parliament was not intending to legislate as to bankruptcy. Sec. 19 is not within the defence power. The moneys with which that section deals consist partly of moneys contributed by the public, in which the Crown has no interest (sec. 12) and over which the Crown has no control. The defence power does not authorize Parliament to give the Crown any prior claim with regard to loans made out of moneys so contributed. Sec. 19 is not severable in this respect.

*Ham*, for the Attorney-General and the Minister for Repatriation, was not called on.

*Cur. adv. vult.*

March 18.

The following judgments were read :—

KNOX C.J., ISAACS, GAVAN DUFFY, POWERS AND RICH JJ. (read by KNOX C.J.). The only question that remains for our consideration in the present case is whether the provisions of sec. 19 of the *Australian Soldiers' Repatriation Act* 1917, as amended by sec. 14 of the *Australian Soldiers' Repatriation Act* 1918, are within the power of the Commonwealth Parliament. The section as amended is in the following words :—" Claims in respect of moneys advanced by the trustees of the Australian Soldiers' Repatriation Fund or by the Minister or a State Repatriation Board or a Local Committee, shall have the same priority with respect to the payment of debts as if the money had been advanced by the Crown." In our opinion the Commonwealth Parliament had power under sec. 51 (VI.) of the Constitution (the defence power) to enact this provision. It is a provision for the re-establishment in civil life of persons who have served in the defence forces of the Commonwealth when they are discharged from such service. That is a matter so intimately connected with the defence of the Commonwealth as manifestly to be included within the scope of the power.

The chief objection to the validity of the section was founded on the circumstance that the fund constituted for the purposes of



the Act consisted partly of moneys contributed from other than public sources. It was urged that as to those moneys at all events there was no Crown debt, and the attempt to give priority to claims in respect of those moneys was invalid. Then it was said the language of the section not being susceptible of separability the whole was *ultra vires* the Parliament. The answer is that the question depends not on the source whence the moneys originated but on the character and destination of the fund as constituted by the Act. No distinction exists as to any of the constituent elements of that fund. The character impressed upon it by the Act is entirely public, of Commonwealth creation, for Commonwealth purposes, and under Commonwealth direction and control.

We therefore are of opinion that the provisions of the section are well within the powers of the Parliament, and the objection fails.

HIGGINS J. I concur in the opinion that the provisions of sec. 19, as amended, are within the powers of Parliament with respect to naval and military defence. The funds, whether coming from private contributions or from public grant, have one common destination—the repatriation of returned soldiers; and it is for Parliament to say whether the funds for repatriation can be more satisfactorily administered on one systematic basis by Commonwealth authority, and on such terms as effectually secure the loans made to returned soldiers, or give the lender priority over other creditors. Such legislation appears to me to be fairly incidental to the power to legislate with respect to defence.

*The applicant having undertaken to abide by any order the Court might make as to costs, order that the costs of the respondent, including the costs of the motion to this Court, be paid by the Attorney-General.*

Solicitor for the Attorney-General, Gordon H. Castle, Crown Solicitor for the Commonwealth.

Solicitors for Balding, Braham & Pirani.

B. L.

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