[HIGH COURT OF AUSTRALIA.]

HUDDART PARKER LIMITED AND OTHERS APPELLANTS;
PLAINTIFFS,

AND

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1931.

MELBOURNE, *Jan.* 6, 7; *Feb.* 17.

Gavan Duffy C.J., Rich, Starke, Dixon and Evatt JJ.

Constitutional Law—Validity of Commonwealth legislation—Trade and commerce—Transport workers—Regulations—Restriction of employment to members of specified trades union—Validity—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 92—*Transport Workers Act* 1928-1929 (*No.* 37 *of* 1928—*No.* 3 *of* 1929), *sec.* 3*—*Transport Workers* (*Waterside*) *Regulations* (*S.R.* 1930, *No.* 158)*—*Acts Interpretation Act* 1901-1930 (*No.* 2 *of* 1901—*No.* 23 *of* 1930), *sec.* 15A.

Sec. 3 of the *Transport Workers Act* 1928-1929 is expressed to empower the Governor-General to make regulations not inconsistent with that Act with respect to the employment of transport workers, and in particular for regulating the engagement, service, and the discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers and for the protection of transport workers.

* The *Transport Workers Act* 1928-1929 (No. 37 of 1928—No. 3 of 1929) provides:—"3. The Governor-General may make regulations not inconsistent with this Act, which, notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* 1901-1918 and the *Acts Interpretation Act* 1904-1916, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers."

The *Transport Workers* (*Waterside*) *Regulations* (Statutory Rules 1930, No. 158) provide:—"1. These Regulations may be cited as the *Transport Workers* (*Waterside*) *Regulations*. 2. (1) In the employment, engagement or picking-up of transport workers (being waterside workers) for oversea or inter-State vessels at the ports in the Commonwealth to which Part III. of the *Transport Workers Act* 1928-1929 applies, priority shall be given to those

Held, by *Rich*, *Dixon* and *Evatt* JJ., that such provision operates to authorize a regulation made by the Governor-General requiring that in the employment, engagement or picking up of transport workers (being waterside workers) for oversea and inter-State vessels at the ports to which Part III. of the Act applies, priority shall be given to those workers available for employment, engagement or picking up at those ports who are members of the Waterside Workers' Federation, and, to that extent at least, is a valid exercise of the powers of the Commonwealth Parliament.

Per Gavan Duffy C.J., that the regulation was inconsistent with Part III. of the Act.

Per Starke J., that sec. 3 of the Act and the regulation were invalid.

MOTION for injunction referred to Full Court.

The plaintiffs, Huddart Parker Ltd. and the Melbourne Steamship Co. Ltd. (who carried on business as, *inter alia*, shipowners engaged in inter-State trade and commerce in the Commonwealth of Australia and the loading and unloading of ships, and who engaged waterside workers in various ports of the Commonwealth), and United Stevedoring Pty. Ltd. and Victorian Stevedoring and General Contracting Co. Pty. Ltd. (who carried on the business of master stevedores in Melbourne in connection with the loading and unloading of oversea vessels), brought an action against the Commonwealth of Australia and the Minister of State for Transport claiming (1) a declaration that the *Transport Workers* (*Waterside*) *Regulations* dated 19th December 1930 were not authorized by any provision of the *Transport Workers Act* 1928-1929 and/or are inconsistent with the said Act and/or are invalid; (2) a declaration that in so far as the said Regulations are authorized by the said Act, the said Act is *ultra vires* the Parliament of the Commonwealth of Australia; (3) an injunction to restrain the defendants, their servants and agents from giving any notice under sec. 4 of Part III. of the said Act, or from taking any step to bring the provisions of the said Regulations

of such workers available for employment, engagement or picking-up at those ports, who are members of the Waterside Workers' Federation of Australia, an organization which is bound by an existing award of the Commonwealth Court of Conciliation and Arbitration applicable to such employment: Provided that nothing in this regulation shall operate to prevent the employment, engagement or picking-up of returned soldiers or returned sailors, as defined in section eighty-one A of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. (2) Any person who employs, engages or picks-up a transport worker (being a waterside worker) in contravention of the last preceding sub-regulation shall be guilty of an offence. Penalty: Ten pounds or imprisonment for one month."

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into operation; (4) an injunction to restrain the defendants, their servants and agents, from enforcing or putting into operation the said Regulations.

On 19th December 1930 the Regulations complained of were made by the Governor-General in Council, under the *Transport Workers Act* 1928-1929, described as the *Transport Workers (Waterside) Regulations*, which would come into operation when ports were specified to which they were to apply by notice in the *Gazette* pursuant to Part III., sec. 4, of the *Transport Workers Act* 1928-1929.

On a motion for an injunction on the part of the plaintiffs *Starke* J. ordered that the defendant the Minister of State for Transport should not before 7th January 1931 specify the ports of the Commonwealth to which Part III. of the *Transport Workers Act* 1928-1929 should apply or publish in the *Gazette* notice of any such specification, and otherwise adjourned the matter until 6th January 1931, when it came on for determination by the Full Court.

The motion was ultimately agreed to be treated as the trial of the action.

Robert Menzies K.C. (with him *Stanley Lewis*), for the plaintiffs, in support of the application. The regulation in question (reg. 2 of Statutory Rules 1930, No. 158), is inconsistent with the scheme of the provisions in the Act. Further, the Act does not authorize this regulation, and, if it does, then the Act is not within the constitutional powers of the Commonwealth Parliament. The Regulations, though proclaimed on 19th December 1930, did not in fact come into operation then because the ports were not proclaimed under sec. 4. In consequence of a strike in 1928 a number of people were engaged as waterside workers and were licensed under the *Transport Workers Act* 1928, and subsequently formed the Permanent and Casual Wharf Labourers' Union of Australia, which was registered under the *Conciliation and Arbitration Act*, and obtained an award. Preference to the Waterside Workers' Federation was abolished by the Court and the result of these Regulations is to restore that preference. Under these Regulations a person who has obtained a licence cannot be employed unless he is a member of the Waterside Workers' Federation. The

scheme of the regulation is thus inconsistent with the scheme of the Act, which only requires a person to be licensed. There is an inconsistency because the new scheme requiring membership of the Waterside Workers' Federation is different from the scheme under the Act which required only a licence (*Clyde Engineering Co.* v. *Cowburn* (1); *Hume* v. *Palmer* (2)).

[EVATT J. Inconsistency under sec. 109 of the Constitution between Commonwealth and State laws is distinct from inconsistency between an Act and a regulation proceeding from the same Government.]

If the second scheme is different and distinct from the former though both could be obeyed, they are inconsistent. Some men are put out who would have been in before the regulation was passed. This regulation makes the engagement of non-members of the Waterside Workers' Federation unlawful when it would by the Act have been lawful but for the regulation. The test of inconsistency is whether this regulation makes unlawful something made lawful or treated as lawful by the Act itself. No qualification was required of a person who desired to be selected as a waterside worker, preference to unionists having gone. Then the *Transport Workers Act* required a waterside worker to have a licence, and that is the one qualification imposed by the Act. The regulation makes unlawful what is recognized as lawful under the Act. The schemes of the Act and the regulation are fundamentally different. The Act qualifies a waterside worker for work by reference to his individual holding of a licence; and the regulation qualifies him by reference to his membership of a political or social group. The regulation is inconsistent with the Act, which provides that the only condition shall be the obtaining of a personal licence. The regulation-making power given by sec. 24 is confined to Part III. to implement the provisions of that Part, and it is difficult to justify the regulation under that section. The regulation was apparently, therefore, made under sec. 3.

[GAVAN DUFFY C.J. On this basis what use is sec. 24 if sec. 3 is there to cover the matter? Does sec. 24 limit the power in sec. 3?]

(1) (1926) 37 C.L.R. 466, at p. 490. (2) (1926) 38 C.L.R. 441, at p. 462.

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The special regulation-making power in sec. 24 limits the powers in sec. 3. Part II. of the Act relates to transport workers, and Part III. is an enacting provision in relation to waterside workers, and contains its own regulation-making power. Sec. 3 has no relation to waterside workers at all (*Rossi* v. *Edinburgh Corporation* (1); *Toronto Municipal Corporation* v. *Virgo* (2)). A by-law cannot without express authority make unlawful what was lawful before (*Bentham* v. *Hoyle* (3)). An act left lawful by the statute cannot be made unlawful by a regulation (*Cook* v. *Buckle* (4)).

[EVATT J. referred to *Gibson* v. *Mitchell* (5) as to the meaning of the expression "necessary or convenient."

[DIXON J. referred to *Cullis* v. *Ahern* (6). How do you say the Legislature has covered the whole ground in Part III. ?]

The steps are (1) the insertion of Part III.; (2) the institution of a licensing system, i.e., steps by which a person obtains a right to work as a waterside worker; and (3) provisions excluding persons not holders of licences.

[DIXON J. The same materials may be used to support the view that sec. 3 does not apply. The *Acts Interpretation Act* 1904-1930, sec. 10, may affect the date on which the regulation is to come into operation.]

As to the validity of the legislation, under the trade and commerce power it cannot be said that a particular person shall be appointed (*Adair* v. *United States* (7)). *Adair's Case* was the converse case, and the Supreme Court held the act in question was not within the trade and commerce power.

[EVATT J. Is not *Adair's Case* (8) inconsistent with the *Second Employers' Liability Cases* (9) and also inconsistent with *Australian Steamships Ltd.* v. *Malcolm* (10) ? The licensing power, that is, the licensing of individuals, seems to be within the trade and commerce power (*Willoughby* on the *Constitution of the United States*, 2nd ed. (1929), vol. II., pp. 782, 783; vol. III., pp. 1815, 1866).]

(1) (1905) A.C. 21, at pp. 25, 26.
(2) (1896) A.C. 88, at pp. 93, 94.
(3) (1878) 3 Q.B.D. 289, at p. 294.
(4) (1917) 23 C.L.R. 311, at pp. 318, 319.
(5) (1928) 41 C.L.R. 275.
(6) (1914) 18 C.L.R. 540.
(7) (1908) 208 U.S. 161, at pp. 171, 167 *et seqq.*, 190.
(8) (1908) 208 U.S. 161.
(9) (1912) 223 U.S. 1.
(10) (1914) 19 C.L.R. 298.

The fitness of a workman, his hours and wages are one thing, but his membership of an organization is another (*Coppage* v. *State of Kansas* (1); *Australian Steamships Ltd.* v. *Malcolm* (2)). It would not be competent to say that because an individual was engaged in trade and commerce Parliament could legislate as to such things as his religion and clothing. It is only as a unit in that commerce that the Commonwealth can legislate with regard to him or his acts (*Second Employers' Liability Cases* (3)). The later cases have not affected the weight of *Adair's Case* (4) as an authority (see *R.* v. *Barger* (5)). The test is whether the subject matter dealt with is the carrying on of inter-State trade which involves actors.

[EVATT J. referred to *Di Santo* v. *Pennsylvania* (6).]

The regulation in question was gazetted on 24th December 1930, but there was no notification under sec. 4 of the *Transport Workers Act* 1928-1929.

Ham K.C. (with him *Herring*), for the defendant the Commonwealth, to oppose. The regulation is valid. Transport worker and waterside worker are not mutually exclusive. Part II. of the Act deals with transport workers as a whole. Part III. deals with such transport workers as are waterside workers. Therefore, sec. 3 still applies to enable the Governor-General to make regulations relating to waterside workers.

[GAVAN DUFFY C.J. What is the effect of the new Act? The definition of "transport worker" is the same in both Acts.]

A man cannot be a waterside worker unless he is a transport worker. The new Act merely incorporates regulations previously made as Part III. The words "not inconsistent with this Act" add nothing. There is always such an implied limitation. The general power in sec. 3 has not been cut down by the later Act.

[GAVAN DUFFY C.J. Is not the only question whether the regulation is inconsistent with Part III.?]

(1) (1915) 236 U.S. 1.
(2) (1914) 19 C.L.R., at pp. 316 *et seq.*, 319.
(3) (1912) 223 U.S., at p. 46.
(4) (1908) 208 U.S. 161.
(5) (1908) 6 C.L.R. 41.
(6) (1927) 273 U.S. 34.

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Sec. 3 gives power to make regulations on four subjects: (1) employment, (2) engagement, service and discharge, (3) licensing, &c., and (4) protection, &c. Part III. only deals with the third, and does not concern itself with the first, second or fourth, except in so far as it prescribes that persons must be licensed. Moreover, the first is a general power, but the second, third and fourth are particular. In any event the regulation is valid under the general power. There is no inconsistency between the regulation and the Act (*Cullis* v. *Ahern* (1)). The regulation does not restrict the right to get a licence. The Act does not disclose an intention that Part III. shall be an exclusive code; in fact this is express, for in sec. 3 power is given to make regulations with regard to matters not dealt with in Part III. (*Craies* on *Statute Law*, 3rd ed., p. 270; *Edmonds* v. *The Master and Senior Warden of the Company of Watermen and Lightermen* (2)). *Cowburn's Case* (3) and *Hume* v. *Palmer* (4) are cases in which the Court was considering matters where two legislatures were operating in the same field, and have no application to the present case. *Rossi's Case* (5) does not assist the applicants: At pp. 28 and 29 the distinction between that case and the present is clearly defined. Upon the language of sec. 3 power is conferred on the Governor-General to make regulations giving one set of persons preference. Alternatively, if Part III. has the effect of ousting sec. 3, then the regulation is supportable under sec. 24 as being necessary and convenient (*Gibson* v. *Mitchell* (6)).

[EVATT J. Part III. only deals with licences, and sec. 24 cannot help if you fail on sec. 3.

[GAVAN DUFFY C.J. Is there any power to limit the persons who may get a licence ?]

Every person has not the right to get a licence. The Act contemplates the necessity for peace on the waterfront and knowledge of the award, and the Governor-General may well think there should be only one union at work.

[DIXON J. referred to *Carbines* v. *Powell* (7).]

(1) (1914) 18 C.L.R. 540.
(2) (1855) 24 L.J. M.C. 124, at p. 128.
(3) (1926) 37 C.L.R. 466.
(4) (1926) 38 C.L.R. 441.
(5) (1905) A.C. 21.
(6) (1928) 41 C.L.R., at p. 279.
(7) (1925) 36 C.L.R. 88, at p. 91.

Regulations of this kind are considered in *Craies* on *Statute Law*, 3rd ed., pp. 261, 262, and *Institute of Patent Agents* v. *Lockwood* (1), and *The King* v. *Minister of Health*; *Ex parte Yaffe* (2).

[STARKE J. Is sec. 3 within the trade and commerce power ?]

Yes. That is decided in *Roche* v. *Kronheimer* (3) and *Australian Steamships Ltd.* v. *Malcolm* (4).

[DIXON J. Are we to adopt the very extended view adopted in America ? It may be that this falls within the trade and commerce power; but I am not entirely satisfied with the American method of arriving at their conclusion.]

The proper method of approach is, is the law one that deals with trade and commerce ? If it is, it is within the power. If the licensing provisions are within the power, then the regulation in question must be.

Stanley Lewis, in reply. The words "with respect to employment" in sec. 3 should be read down. There is a special power conferred on the Arbitration Court to grant preference. [He referred to *Craies* on *Statute Law*, 3rd ed., pp. 169-170; *Nolan* v. *Clifford* (5).] As to the trade and commerce power, sec. 98 is inserted to fill in a blank in sec. 51 (I.) of the Constitution. It would not have been necessary if sec. 51 (I.) had the wide meaning contended for by the Crown in this case. It is not open to the Legislature to set up bodies to legislate at large.

Cur. adv. vult.

The following written judgments were delivered :— Feb. 17.

GAVAN DUFFY C.J. I need not deal with the constitutional question raised in this case. It is enough for me to say that the Regulations which are attacked are, in my opinion, inconsistent with Part III. of the *Transport Workers Act* 1928-1929.

RICH J. I have read the judgment of my brother *Dixon*, and agree with its reasons and conclusion. So far as concerns the questions which arise upon the assumption that the *Transport*

(1) (1894) A.C. 347.
(2) (1930) 2 K.B. 98.
(3) (1921) 29 C.L.R. 329, at p. 337.
(4) (1914) 19 C.L.R. 298.
(5) (1904) 1 C.L.R. 429, at p. 444.

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Workers Act 1928-1929 and, in particular, sec. 3, form a valid law of the Commonwealth, there is nothing which I desire to add. But the question whether sec. 3 is valid when construed by the aid of sec. 15A of the *Acts Interpretation Act* 1901-1930 raises a difficult question of far-reaching importance, and I wish to express in my own words exactly why I think that, when sec. 3 is read down in the manner required by sec. 15 of the *Acts Interpretation Act*, it constitutes a valid law sufficient to authorize the regulation. When construed in this manner, its provision appears to me to authorize the making of regulations with respect to the performance of work and the conduct of operations by means of employees which truly form part of or an incident in trade and commerce with other countries and among the States. It is unnecessary to express any opinion whether the provisions of the section, when construed so as to fall within the limits of the constitutional power, can or do extend to the general relationship of master and servant subsisting between persons doing work or conducting operations in connection with trade and commerce. The regulation does not appear to me to deal with that relationship, or at any rate directly to do so. It requires that persons who seek to perform by their employees the operation of loading goods on a ship for oversea or inter-State carriage or unloading goods from a ship after oversea or inter-State carriage shall, in a competition for employment, avail themselves of the services of the members of a trade union bound by an industrial award in priority to the services of the non-unionists. It is evident that the reason or policy which inspired this regulation is industrial but it does not follow that the object, scope or operation of the statutory regulation does not fall within the commerce power. Unless its purport and operation properly understood are not within that power it appears to me to be authorized by sec. 3. Further, although the motive may be industrial the actual regulation of the intending employer's conduct goes no further than a requirement that he shall prefer one man to another in engaging a servant to do particular work. That work is an operation in trade and commerce. I think it follows that, if the provision contained in the regulation can truly be described as a law with respect to that

operation, its efficacy is established. In *W. & A. McArthur Ltd*, v. *State of Queensland* (1) I was called upon to consider whether in a previous decision I had correctly discriminated between the motive and the purpose or operation of a legislative enactment. I said: "'The object' of an Act is to be gathered from its necessary effect, and not from some purpose or motive which the Legislature may be supposed to have had." To this view I adhere; but it remains to apply it to this case. In applying it, it is necessary to distinguish the immediate operation the regulation will have and its remoter consequences. Its remoter consequences include the fact that the Arbitration Court may or may not vary the terms and conditions of the award and that the employer, if he be a party to that award, is bound when he has in obedience to the regulation engaged a member of the union although a non-unionist was available and must observe its terms and conditions. It may be assumed that these remoter consequences supplied the motive which actuated the law-givers, but the question is what immediate object or operation has the regulation ascertained from its terms and from its necessary effect. Its necessary effect is to determine what person shall be preferred for performing actual work in an operation of trade and commerce with other countries and among the States. Its terms express an intention to control the selection of the persons who are to be put to that work. The grounds given for their selection—membership of the union—appear to me to relate not to the immediate operation or object of the law but to the policy by which that operation or object is inspired.

For these reasons, I am unable to adopt the view that sec. 3 of the Act or the regulation fall outside the power conferred upon Parliament by sec. 51 (I.) of the Constitution.

STARKE J. The plaintiffs in these proceedings have challenged the validity of the *Transport Workers Act* 1928-1929, and also of some regulations made under that Act giving priority of employment, among transport workers, to members of the Waterside Workers' Federation. The constitutional basis for the *Transport Workers'*

(1) (1920) 28 C.L.R. 530, at p. 570.

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Act is the power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States; and the Constitution, sec. 98, extends the power to navigation and shipping and to railways the property of any State. In *Citizens Insurance Co. of Canada* v. *Parsons* (1) the Judicial Committee pointed out that the power contained in sec. 91 of the *British North America Act* to make laws for the regulation of trade and commerce, in its unlimited sense, is sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with other governments requiring the sanction of Parliament, down to minute rules for regulating particular trades. But they held that a consideration of the Act showed that the words were not used in this unlimited sense, and laws made pursuant to it must not trench on the subjects assigned exclusively to the Legislatures of the Provinces. And for this reason the *Industrial Disputes Investigation Act* 1907 of Canada was held invalid and not within the competence of the Parliament of Canada (*Toronto Electric Commissioners* v. *Snider* (2)). On the other hand, the Supreme Court of the United States has held that the power in the American Constitution to regulate commerce with foreign nations and among the several States and with Indian tribes, extends incidentally to every instrument and agent by which such commerce is carried on. Therefore Congress may legislate concerning the agents or instruments of commerce and concerning the conditions under which those agents and instruments perform the work of inter-State commerce, whenever such legislation bears or can be deemed to bear upon the reliability or promptness or economy or security or utility of the inter-State Commerce Act. For these reasons the *Employers' Liability Act* of 1918 and the *Railway Labour Act* of 1926 were supported (*Second Employers' Liability Cases* (3); *Texas & N. O. Railway Co.* v. *Railway Clerks* (4)). Still, the same Court denied, in *Adair* v. *United States* (5), that the power to regulate trade and commerce warranted a law making it a crime for an agent or officer of an inter-State carrier to discharge an

(1) (1881) 7 App. Cas. 96, at p. 112.
(2) (1925) A.C. 396.
(3) (1912) 223 U.S. 1.
(4) (1930) 281 U.S. 548.
(5) (1908) 208 U.S. 161.

employee from the service of such carrier because of his membership in a labour organization. Mr. Justice *Harlan*, delivering the judgment of the majority of the Court, said (1):—"Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between inter-State commerce and membership in a labour organization as to authorize Congress to make it a crime against the United States for an agent of an inter-State carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require inter-State carriers, under penalties, to employ in the conduct of its inter-State business *only* members of labour organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability . . . can be regarded as, in any just sense, a regulation of inter-State commerce."

Under our own Constitution Act this Court upheld the validity of the *Seamen's Compensation Act* 1911, No. 13 (*Australian Steamships Ltd.* v. *Malcolm* (2)). But the majority of the Court relied upon the extension of the commerce power to shipping as the foundation of the judgment. Thus *Gavan Duffy* and *Rich* JJ. say (3):—"It was urged . . . that sec. 51 (I.) of the Constitution authorizes only such legislation as prescribes, prohibits or regulates acts which are themselves part of the transactions constituting commerce, or, in the alternative, acts which promote, impede or otherwise directly affect commerce. . . . Let us assume that sec. 51 (I.) has the limited meaning already suggested, what is then the meaning of the provision as to navigation and shipping contained in sec. 98? . . . It says in effect that the power to make laws with respect to trade and commerce shall include a power to make laws with respect to navigation and shipping as ancillary to such trade and commerce. It authorizes Parliament to make laws with respect to shipping and the conduct and management of ships as instrumentalities of trade and commerce, and to regulate the

(1) (1908) 200 U.S., at pp. 179, 180. (2) (1914) 19 C.L.R. 298.
(3) (1914) 19 C.L.R., at pp. 334-335.

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relations and reciprocal rights and obligations of those conducting the navigation of ships in the course of such commerce both among themselves and in relation to their employers on whose behalf the navigation is conducted." Again, in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees Association* (1) *Griffith* C.J., *Barton* and *O'Connor* JJ., referring to the commerce power, say:—"We think that the power of the Commonwealth Parliament to regulate inter-State trade and commerce, although unlimited within its ambit, cannot, as a mere matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial and proximate. *And, in our opinion, the general conditions of employment are not of this character.*"

These judgments show how widely opinions may differ as to the scope and meaning of the trade and commerce power in the various Constitutions. We must therefore go back to the context of our own Constitution and see in what sense the phrase conferring the power is there used. It must be remembered that the powers of legislation given to the Commonwealth are limited and specifically enumerated, and, except in so far as existing powers of the States were transferred to the Commonwealth, they remain exclusively vested in the States. And in the main the legislative powers of the States are concurrent with those of the Commonwealth, subject to the provisions of sec. 109 of the Constitution. Under the *British North America Act*, on the other hand, certain classes of subjects are assigned exclusively to the legislative powers of the Provinces, whilst to the Dominion Parliament is assigned the residuary power of legislation. The power of the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States is plenary within its ambit, but it is clear that the power does not transfer to the Commonwealth general control over the civil rights of the subject, any more than it transfers general control over his liberty (*Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (2)). Again, the collocation of the power with subjects of national and general concern, such as currency,

(1) (1906) 4 C.L.R. 488, at p. 545. (2) (1914) A.C. 237, at p. 255; 17 C.L.R. 644, at p. 654.

coinage and legal tender, banking other than State banking, insurance other than State insurance, weights and measures, bills of exchange and promissory notes, trade marks, &c., conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, affords an indication that the power is not unlimited (cf. *Citizens Insurance Co. of Canada* v. *Parsons* (1)). Further, the power is to make laws with respect to trade and commerce generally, and not with respect to particular trades or avocations. All this satisfies me that the power cannot be given a meaning which would swallow up the powers of the States and enable the Parliament to regulate the conduct and employment of all persons, however remotely connected with foreign or inter-State trade, such as carriers, freight, customs, and baggage agents, and even persons or bodies conducting financial arrangements in connection with such trade. The power would, no doubt, include political arrangements in regard to such trade and commerce, and the conduct and acts of those engaged in it, and the general regulation of such trade. Acts such as the *Sea-Carriage of Goods Act* 1904, the *Secret Commissions Act* 1905, the *Commerce (Trade Descriptions) Act* 1905, the *Australian Industries Preservation Act* 1906 (Anti-Trust Act of 1906) and the *Spirits Act* 1906 (Spirits Description Act of 1906), are all illustrations of a general regulation of trade and commerce with foreign countries and among the States, which may be supported under the power. The decision in *Malcolm's Case* (2), which supported the *Seamen's Compensation Act* 1911, is not to the contrary, because it was expressly based upon the power conferred with respect to shipping. But when we come to legislation excluding persons, whether employers or employees, from engaging in trade and commerce, prohibiting the employment of persons in the transport or movement of persons or goods in such trade, or regulating the reciprocal rights and duties of employers and employees in that trade, then, in my opinion, the Parliament has passed the limit of its powers and transcended the Constitution. It matters little, to my mind, whether the regulation is by way of prohibition or by way of a licensing system : both are equally beyond the powers of Parliament

(1) (1881) 7 App. Cas. 96. (2) (1914) 19 C.L.R. 298.

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(cf. *Citizens Insurance Co.* v. *Parsons* (1); *Attorney-General for Canada* v. *Attorney-General for Alberta* (2)).

It remains to consider the *Transport Workers' Act* 1928-1929, and certain regulations made thereunder, in the light of this construction of the Constitution. The title of the Act of 1928 is: "An Act relating to Employment in relation to Trade and Commerce with other Countries and among the States." But it prescribes no rule in relation to such employment: it remits the whole matter to the regulation of the Governor in Council. Extraordinary though this form of legislation undoubtedly is, still, it is not beyond the power of Parliament (*Roche* v. *Kronheimer* (3)). And the safeguard against hasty and ill-considered regulations is found, no doubt, in the right of either House of Parliament to disallow any regulations so made (*Acts Interpretation Act* 1904, No. 1, sec. 10; 1930, No. 23, sec. 2). The *Transport Workers' Act* 1928-1929, sec. 3, provides that the Governor-General may make regulations, not inconsistent with the Act, which, notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* 1901-1918 and the *Acts Interpretation Act* 1904-1916, shall have the force of law with respect to the employment of transport workers, and in particular for regulating the engagement, service and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers. A transport worker means a person offering for or engaged in or in connection with the provision of services in the transport of persons or goods in relation to trade or commerce by sea with other countries or among the States (*Transport Workers Act* 1929, No. 3, sec. 5—inserting new sec. 2 in the Principal Act). The *Transport Workers Act* No. 3 of 1929 provided for the licensing of waterside workers. Formerly, regulations had dealt with the matter, but the 1929 Act substituted statutory provisions:— A waterside worker means (sec. 5) a transport worker who offers or is engaged for work in the loading or unloading of ships as to cargo, coal, or oil fuel (whether for bunkers or not), and includes

(1) (1881) 7 App. Cas. 96. (2) (1916) 1 A.C. 588.
(3) (1921) 29 C.L.R. 329.

(except as otherwise declared by the Minister by notice in the *Gazette*) persons working in or alongside the ship in connection with the direction or checking of the work of other waterside workers, but does not include (except as otherwise declared by the Minister by notice in the *Gazette*), (*a*) the members of the crew of a ship on the ship's articles, (*b*) the members of the crew of a lighter who do not handle cargo or bunker fuel. Any person desiring to obtain a licence as a waterside worker at a port to which the Act applies (secs. 4 and 6) may apply therefor; *but no person can engage as a waterside worker for work unless that person is the holder of a licence* (sec. 13), and no person can engage another person as a waterside worker unless that other person was the holder of a licence (sec. 14). All these provisions for the licensing of waterside workers are, in my opinion, beyond the competence of the Parliament under the trade and commerce power in the Constitution. They place restrictions upon the right of persons to employ others and upon the right of such other persons to be employed in the loading or unloading of particular cargoes on ships. The power of Parliament is not to make laws with respect to employment, in foreign or inter-State trade, or the rights and duties of employers and employees in such trade, whether as to engagement, service, discharge, wages or otherwise, but to make laws with respect to foreign and inter-State trade and commerce as such: its general regulation as opposed to the regulation of particular trades and avocations. Nothing in the incidental power (Constitution, sec. 51 (xxxix.)) affects this conclusion (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1); *In re Judiciary and Navigation Acts* (2)). And the *Acts Interpretation Act* 1930, No. 23, sec. 3, has no bearing upon this question, for the whole of the provisions of Part III. of the *Transport Workers Act* are, in my opinion, in excess of the power of Parliament. This brings me to the Regulations which have been directly attacked in this case, Statutory Rules 1930, Nos. 158 and 159.

The main provision of these Regulations is that in the employment, engagement or picking up of transport workers (being waterside

(1) (1914) A.C., at p. 256; 17 C.L.R., at p. 655.
(2) (1921) 29 C.L.R. 257, at p. 265.

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workers) for oversea or inter-State vessels *at the ports of the Commonwealth to which Part III. of the Transport Workers Act* 1928-1929 applies, priority shall be given to those of such workers available for employment, engagement or picking up at those ports who are members of the Waterside Workers' Federation of Australia, an organization which is bound by an existing award of the Commonwealth Court of Conciliation and Arbitration applicable to such employment. Now these Regulations are connected up with the licensing system of the *Transport Workers Act.* They only operate at ports where the licensing system is in force. They prescribe an order of selection in respect of licensed workers. But if the licensing system (Part III. of the *Transport Workers Act* 1928-1929) is invalid and of no force, then this priority of employment, &c., cannot take effect, for the conditions upon which it is to operate do not exist. The regulation is so mutually connected with and dependent upon the licensing system that it fails to operate if that system does not exist in point of law. Moreover, the provisions of sec. 3 of the *Transport Workers Act* 1928-1929 under which the Regulations purport to have been made, are also, in my opinion, beyond the competence of Parliament under the trade and commerce power. That section extends to the act of employing, and enables the Parliament to restrict the right to employ or be employed in foreign or inter-State trade. It therefore, for reasons already given, appears to me to be beyond the ambit of the trade and commerce power. And the regulations giving priority to a certain class of workman necessarily restrict the right to employ and be employed in such trade, and are similarly in my opinion beyond the power of Parliament and void. If, however, the *Transport Workers Act* 1928-1929 were within the competence of the Parliament, then I think that the regulations attacked in this case would not be beyond the power to make regulations conferred by that Act, or inconsistent with or repugnant to the provisions of Part III. of the Act (Waterside Workers).

DIXON J. Sec. 3 of the *Transport Workers Act* 1928-1929 is expressed to empower the Governor-General to make regulations not inconsistent with that Act with respect to the employment of transport workers, and, in particular, for regulating the engagement,

service, and the discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers. The question is whether this provision operates to authorize a regulation which the Governor-General has in fact made requiring that in the employment, engagement or picking up of transport workers (being waterside workers) for oversea and inter-State vessels at the ports to which Part III. of the Act applies, priority shall be given to those workers available for employment, engagement or picking up at such ports who are members of the Waterside Workers Federation. I am of opinion that the section does operate to authorize this regulation.

The expression "with respect to the employment of transport workers" appears to me to describe a subject for regulation which necessarily extends to the determination of the persons who shall or may be employed. The words "in particular" which follow introduce a statement of particular matters which are intended to be included in the general expression "employment of transport workers." The enumeration of these matters is not exhaustive. The words "in particular" cannot be treated as equivalent to "namely," "that is to say" or "to wit," but must be understood as having a meaning which is the contrary of that conveyed by these expressions. No doubt the matters enumerated may not be disregarded in determining how much the word "employment" covers, and, if some special characteristics were found to be common to these particular matters, it might be a reason for confining the application of the general language of the provision to things of a like nature. But I can find no such common characteristic which suggests any relevant restriction upon the natural meaning of the general words "with respect to the employment of transport workers." On the contrary, because, under the heading "in particular," the subject of licensing persons as transport workers and regulating or prohibiting the employment of unlicensed persons is included, it appears clearly that one method at least is contemplated of controlling and impairing the free choice of persons to be employed, and that method is treated as an instance of what the general words comprise. I think it follows that the words "with respect to the employment of

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transport workers" must include the determination of the persons to be employed and so enable the Governor-General to regulate the selection of employees in spite of the invasion of individual liberty which is thus involved.

It is said, however, that the powers given by sec. 3 in respect of transport workers in general do not now apply to waterside workers. This view is founded upon the provisions of the *Transport Workers Act* 1929. By this Act amendments are made in the Act of 1928 which result in the composite *Transport Workers Act* 1928-1929 wearing an appearance very different from that of the Act of 1928. Sec. 3 is headed "Part II.—Transport Workers," and is the only provision of that Part. Part III. is headed "Waterside Workers," and is devoted to the parliamentary enactment of the substance of the law which was contained in regulations made under the Act of 1928. It includes, however, a section, i.e., sec. 24, which empowers the Governor-General to make regulations not inconsistent with that Part prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to that Part. Part I. of the Act is headed "Preliminary," and contains a definition section, i.e., sec. 2, which, after defining "transport worker," defines "waterside worker" to mean a transport worker who, in effect, works as a wharf or stevedore's labourer in connection with oversea or inter-State ships. It thus appears that all waterside workers are transport workers. In terms sec. 3 covers all transport workers and, if its operation is not to extend to transport workers who are waterside workers, it must be because it is so limited by some necessary implication. I am unable to find any such implication. The fact that Part III. contains a complete scheme for licensing waterside workers and for making penal the employment of unlicensed persons, considered with the manner in which the Act is divided into Parts and with the inclusion of another power to make regulations, may afford ground for inferring that the Legislature supposed sec. 3 would have no further application to waterside workers. But whatever plausibility may be found in this inference, it cannot, in my opinion, amount to the necessary intendment which is required in order to control the natural meaning of the language of

sec. 3 itself. It appears to me no more than a conjecture as to the assumptions upon which the draftsman proceeded in making the amendment of 1929. Indeed, as a matter of speculation, I do not think the inference is very probable. It is more likely that the draftsman did intend that the general power to regulate the employment of transport workers should remain applicable to waterside workers, save in so far as a licensing system was established, and that sec. 24 was enacted in relation to the licensing system because it appeared doubtful whether sec. 3 would continue to operate in relation to the licensing of waterside workers.

But regulations made under sec. 3 must be consistent with the Act, and it is denied that the regulation now in question is consistent with Part III. This contention rests upon the view that Part III. is meant as a complete statement of the manner in, or the grounds upon, which free competition by waterside workers in connection with oversea or inter-State ships may be limited, so that consistently with the scheme no new condition can be imposed upon any man's right to seek or compete for such work. I do not think such an intention is disclosed by the provisions of the enactment. Part III. appears to me to do no more than prescribe a method of determining who shall be eligible for employment, and forbid the employment of those who are not approved as eligible. It does not seem to me to be inconsistent with this scheme to invest some of those licensed as eligible with a right to be preferred to others of them in a competition for work, and this is all the regulation in question purports to do, whatever may be its practical operation. Once it appears that the power extends to conferring upon some a right to be preferred to others, it is open to those exercising the power to select any criterion which they may think fit. For these reasons, I think the regulation is within the power which sec. 3 of the *Transport Workers Act* 1928-1929 purports to confer.

The question remains whether that section is valid in so far as it would authorize such a regulation. The provision purports to confer upon the Executive a power to make regulations having the force of law, that is, to legislate, with respect to the subject of employment of persons offering for or engaged in work of a particular class in relation to trade or commerce by sea with other

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countries and among the States. It thus assumes to bestow upon the Executive a fragment of the power to make laws with respect to trade and commerce with other countries and among the States. I think *Roche* v. *Kronheimer* (1) decided that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. Upon this decision, the regulation cannot be invalid merely because it proceeds from the Governor-General in Council and not from the Parliament.

But it cannot be valid unless so much of the intended grant of power, as would authorize the regulation, does relate to trade and commerce with other countries and among the States. Sec. 3 of the *Transport Workers Act* 1928-1929 expresses the power in the wide terms to "make regulations . . . with respect to the employment of transport workers," and sec. 2 defines "transport worker" to mean "a person offering for or engaged in work in or in connection with the provision of services in the transport of persons or goods in relation to trade or commerce by sea with other countries or among the States." It may be objected that even if a power sufficient to warrant the regulation might be conferred, yet sec. 3 attempts to authorize the Executive to do much more and goes beyond the limits of the commerce power. It may be that the verbiage "in or in connection with the provision of services in the transport of persons or goods in relation to trade or commerce" has such a vague and general meaning that persons are included who are not concerned in oversea or inter-State commerce or its incidents, and further that the subject of "employment" extends beyond the limits of the power given by sec. 51 (I.) over inter-State and external trade. In my opinion, however, the objection is met by sec. 15A of the *Acts Interpretation Act* 1901-1930. This section provides that "Every Act, whether passed before or after the commencement of this section, shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth,

(1) (1921) 29 C.L.R. 329.

to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." The provisions of sec. 3 of the *Transport Workers Act* 1928-1929 read with the definition of "transport worker" express a legislative intention to authorize the Governor-General in Council to deal with a general subject made up of many different acts and matters, and in respect of those acts and matters to regulate persons answering a wide description which is directed to their participation in inter-State and external commerce and its incidents. Plainly it was intended that the power to regulate both persons and subject matter should be exercisable as to each and every part of the subject matter and each and every class of persons comprised within the general description. Some acts or matters and some class of persons might be regulated while other acts and matters and other persons within the power might be left unregulated. There is nothing to suggest that the legislation can have none of the operation which the Parliament intended, unless the definition of persons and description of subject matter are completely effective. On the contrary, the enumeration of matters after the words "in particular" evidences an intention that these matters should be dealt with. The question is very different from that which arose in the *Australian Railways Union* v. *Victorian Railways Commissioners* (1), where a majority of us thought the whole policy and operation of the law would be altered if we divided the steps by which a power was intended to be transferred from one authority to another so that it was validly withdrawn from one body although the attempt to invest it in the other body failed, with the result that the power would not be transferred but destroyed. Here the question is whether the law shall have the same operation over all or some only of classes of persons and things which are comprised in distributive descriptions. In my judgment sec. 15A aptly and properly applies to such a case and requires that the descriptions should be confined in their application within the limits allowed by the Constitution.

(1) *Ante*, 319.

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It therefore appears to me that sec. 3 may be a valid law of the Parliament, although apart from sec. 15A of the *Acts Interpretation Act* 1901-1930 the definition of "transport workers" might be understood to include persons whose work was not directly concerned with inter-State or external trade or commerce and the term "employment" to extend to incidents in the relation of master and servant which do not form part of that subject. In this view it is unnecessary to decide whether any part of the intended grant of power is void which is not required to support the regulation, and the validity of the regulation may fairly be determined by considering whether its provisions could be validly enacted by the Parliament itself. Thus, in effect, the question is whether an enactment which gives preference to unionists among persons offering for work in loading or discharging cargo or fuel for the purpose of oversea or inter-State transport, is a law with respect to trade and commerce with other countries and among the States.

The difficulties which have been experienced in the United States in obtaining a satisfactory criterion by which may be determined the operation and application in such matters of the trade and commerce power, so indefinitely expressed, affords an additional reason for pursuing the course recommended in *John Deere Plow Co.* v. *Wharton* (1) by Viscount *Haldane* L.C., of confining decisions upon questions of constitutional interpretation to concrete questions and avoiding general definitions of expressions occurring in the Constitution. In dealing with the trade and commerce power, it is peculiarly desirable to consider each case which arises without entering more largely upon the interpretations of the Constitution than is necessary for the decision of the particular case (*Citizens Insurance Co.* v. *Parsons* (2)). In this instance, the work with which the law in question deals is that of putting goods on a ship which is to carry them to another country or another State, and of fuelling a ship for a voyage to another country or to another State, and of taking goods from a ship which has carried them from another State or from another country. Because the power relates exclusively to trade and commerce with another country or among the States, the movement of commodities between States or between this

(1) (1915) A.C. 330, at p. 338.

(2) (1881) 7 App. Cas., at p. 112.

country and another country must be an operation which comes directly within the power and is under its immediate and full control. This operation is incomplete until the goods carried are unloaded, and it begins as goods are loaded for carriage. The question who shall take part in such an operation is to be determined by the legislative power which governs the operation. The question who shall be preferred amongst those ready to take part in it, is one of the same order. Once the power over the matter is established, it becomes irrelevant how, or upon what grounds, or for what motives it is exercised. When the question is whether legislation conduces to some main object, it may be proper to consider its tendency and probable result, and this course has often been found necessary in the United States when the validity has been considered of legislation upon the relation of employer and employee in connection with inter-State trade. (Cf. *The Employers' Liability Cases* (1); *Adair* v. *United States* (2); *Second Employers' Liability Cases* (3); *Wilson* v. *New* (4); *Texas & N. O. Railway Co.* v. *Railway Clerks* (5).) But in the present case it is enough to say that the work of loading and unloading is an essential part of sea commerce, and who may do that work, and who shall be preferred for the purpose of doing it, are questions which may be determined by an exercise of the legislative power over that commerce.

In my opinion the provision contained in the regulation is an exercise of legislative power directed to the determination of the question who shall be preferred for the purpose of doing such work. It is true that the provision adopts a description of the persons who are to be so preferred which has no apparent relation to any characteristic of inter-State or oversea commerce. No doubt it is also true that such a description was adopted because of the industrial consequences of requiring preference to members of an organization bound by an award. But these features of the law do not appear to me to deprive it of its character of a law with respect to trade and commerce with other countries and among the States. It obtains that character from the circumstance that it directly regulates the choice of persons to perform the work which forms

(1) (1908) 207 U.S. 463, at p. 497.
(2) (1908) 208 U.S., at p. 178.
(3) (1912) 223 U.S., at pp. 47-49.
(4) (1917) 243 U.S. 332, at pp. 348-351.
(5) (1930) 281 U.S., at pp. 570-571.

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part of or is an incident in inter-State and external commerce. It does so in spite of the fact that it affects employers in the selection of their servants and in spite of the industrial aspect which the provision undeniably presents. Although these are considerations to which weight must undoubtedly be given in determining whether the regulation is a law with respect to oversea and inter-State commerce, they do not, in my opinion, warrant the conclusion that a provision is not such a law which directly controls the selection of agents for the doing of work forming part of such commerce.

For these reasons I think the regulation is valid.

In my opinion the action should be dismissed.

EVATT J. The substantial question in this action is whether the *Transport Workers (Waterside) Regulations*, made by the Executive Government of the Commonwealth on 19th December 1930, were validly enacted. By force of the *Acts Interpretation Act* 1904-1930, sec. 10, these Regulations, if valid, took effect at the latest on 24th December 1930, when the making of the Regulations was notified in the *Gazette* pursuant to sec. 5 (3) of the *Rules Publication Act* 1903.

The Regulations attacked by the plaintiffs in the action provide, in substance, that, without prejudice to the right to engage returned soldiers and sailors as defined, preference or priority shall be given in the employment of waterside workers on oversea or inter-State vessels to those workers who are members of the Waterside Workers Federation of Australia. The latter organization is registered under the *Commonwealth Conciliation and Arbitration Act* and is bound by an existing award of the Commonwealth Court of Conciliation and Arbitration, the award applying to the employment of members of the organization on the waterfront.

By their own terms, the Regulations are to operate at those ports of the Commonwealth to which Part III. of the *Transport Workers Act* 1928-1929 applies; and it is not disputed that the Commonwealth Executive Government intends to cause a notice to be given under Part III., sec. 4, of the said Act specifying a number of ports in the Commonwealth, including the ports of Melbourne and Adelaide, as ports where Part III. of the Act will apply. When

this specification is made the Regulations, if validly made, will be fully operative at the ports to be specified.

The plaintiffs are companies who engage waterside workers in various ports of the Commonwealth for the purpose of loading and unloading ships engaged in trade and commerce with other countries or among the States, and, up to the present time, this work has been performed very largely by persons who are not members of the Waterside Workers Federation. The plaintiffs claim, by writ issued on 2nd January 1931 against the defendants, the Commonwealth of Australia and the Minister of State for Transport, declarations that the *Transport Workers* (*Waterside*) *Regulations* dated 19th December 1930 are invalid, and consequential injunctions.

On Friday, 2nd January 1931, *Starke* J. made an interim order restraining the defendant Minister of State for Transport from specifying ports of the Commonwealth under Part III. of the *Transport Workers Act* and from publishing any *Gazette* notification thereof; and the present application to continue the injunction until the hearing has, by consent, been treated as the trial of the action, all parties being apparently desirous of obtaining a decision of the Court upon the question whether the new regulations are valid. The course taken has relieved the Court from considering the question whether, assuming that the Regulations are not authorized, the plaintiffs are entitled to the relief sought.

The attack on the Regulations is made upon two main grounds, the first giving rise to three questions of construction, and the second to an important question of constitutional law.

I shall deal first with the questions of construction. Mr. *Menzies*, on behalf of the plaintiffs, contended that the Regulations are not authorized by the *Transport Workers Act* 1928-1929. His arguments involve three propositions, namely—

(1) Sec. 3 of that Act does not apply at all to waterside workers;

(2) The Regulations made are not within the power conferred upon the Governor-General by sec. 3;

(3) The Regulations are inconsistent with the Act itself and are therefore void.

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Until the amending Act of 1929, the *Transport Workers Act* 1928, after defining "transport workers" by reference to their performance of duties related to trade or commerce by sea with other countries or among the States, proceeded to give, in sec. 3, to the Governor-General a very wide regulation-making power in the following terms:

> "3. The Governor-General may make regulations, which, notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* 1901-1918 and the *Acts Interpretation Act* 1904-1916, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers."

It will be noticed that the Act conferred authority on the Governor-General to make regulations, Parliament not having itself exercised any legislative power other than that represented by sec. 3 itself. In *Roche* v. *Kronheimer* (1) this Court was invited to hold that such a thorough-going and absolute delegation by Parliament to the Executive Government of the power to make rules having the force of law was inconsistent with the Constitution. It is sufficient to say that the contention was rejected, and the decision is binding upon us and covers this part of the case.

Passing to a consideration of sec. 3, it appears that the authority given to the Governor-General includes a general authority to "make regulations . . . with respect to the employment of transport workers." Three distinct powers relating to employment are then particularized, namely, (a) the power to regulate the engagement, service and discharge of transport workers; (b) the power to regulate the licensing of persons as transport workers; and (c) the power to regulate or prohibit the employment of unlicensed persons as transport workers.

The Governor-General, acting under sec. 3, made Regulations for the purpose of setting up a licensing system in respect to the group of transport workers known as waterside workers. On 16th March 1929 an amending Act became law and it commenced to operate as from 1st July 1929, the date fixed by proclamation.

(1) (1921) 29 C.L.R. 329.

By virtue of the new Act the existing licensing regulations applicable to waterside workers were elevated to a position as a separate part of the *Transport Workers Act* itself; and they became and are Part III. of that Act. The original definition of "transport worker" was retained so as to preserve the relationship of the employee to inter-State and foreign trade, and "waterside worker" was defined, with certain qualifications which are not material, to mean a transport worker engaged for work in the loading or unloading of ships.

Sec. 3 of the 1928 Act, which has already been set out in full, was amended by inserting after the word "regulations" where it first occurs, the words "not inconsistent with this Act." And sec. 3 as amended became Part II. of the *Transport Workers Act* 1928-1929.

I now proceed to deal in order with the three questions of construction.

1. The first question raised is whether Part II. of the Act as now amended, which is headed "Transport Workers," applies in any respect to "waterside workers." In my opinion it does so apply. "Transport workers" are defined so as to include "waterside workers." The latter are, therefore, clearly a group contained in the larger group constituted by transport workers. Had it been so desired, nothing could have been easier than to exclude waterside workers altogether from the wide sweep of sec. 3. It is very difficult to gather any such intention.

In order to illustrate the position, it might be pointed out that, until 16th March 1929, there existed a power in the Governor-General to make regulations under sec. 3 "for the protection" of waterside workers as a portion of the larger group described as transport workers. If the argument for the plaintiffs is sound and waterside workers are no longer covered by sec. 3 of the Act, the power of protection was taken away from the Executive Government by Parliament, and no provision whatever was inserted in the Act with the same object in view.

Further, the very addition to sec. 3 by the amendment of 1929 of the words "not inconsistent with this Act" at a time when the only provisions of the Act as amended, with which there could be any inconsistency, were the waterside workers licensing provisions contained in Part III., seems to me to be conclusive evidence of an intention

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to retain waterside workers in sec. 3. Parliament was endeavouring to guard against such a use by the Executive Government of the regulation-making power under sec. 3, as would defeat the operation of the licensing system made applicable to waterside workers in Part III. It therefore became necessary to add the words "not inconsistent with this Act," because waterside workers were still comprised within the group of "transport workers" referred to in sec. 3.

2. The next question is whether the Regulations passed are authorized by the terms of sec. 3. In my opinion they are so authorized. No doubt the preference scheme enacted in the Regulations constitutes an interference with the contractual freedom both of employers and employees engaged in this wharf-labouring and stevedoring work, and the common law right of liberty of contract is taken away. But this always occurs in any statutory scheme which regulates the employment of persons, and, in particular, which regulates their engagement, service, or discharge. No such scheme could ever operate without affecting, to a greater or a less degree, the civil rights of employers, applicants for employment, and employees.

If a State of the Commonwealth gave authority to an administrative tribunal to "make regulations with respect to the employment of workers" in a particular trade, and included a special authority to the tribunal to regulate "the engagement service and discharge" of such workers, I think it clear that the tribunal could fix the times, places, and circumstances under which employment was to be offered and given, the order in which employment should be given, and the general conditions of work to be observed by employer and employee, including the conditions on which the service might be terminated. And such a power would include authority to give preference to applicants for employment upon what appeared to the administrative tribunal to be good grounds for such preference. It follows that the second suggestion of the plaintiffs cannot be upheld, and it is unnecessary to examine the further contention of Mr. *Ham* based on *Lockwood's Case* (1).

(1) (1894) A.C. 347.

3. The last question of construction is whether the Regulations made are consistent with the Act. This involves a consideration of Part III. which has set up a scheme of licensing waterside workers at various ports in the Commonwealth.

Part III. consists of twenty-one sections. Provision is made in them for applications to licensing officers by persons desirous of obtaining a licence to work on the waterfront. The officers are empowered to issue licences, which expire on 30th June of each year, but which may be renewed. Power is given to cancel licences on grounds personal to the holder. A person aggrieved by the cancellation of a licence may appeal to a Court of summary jurisdiction, upon which certain powers are conferred. Various machinery provisions, all relating to licences, are included.

Secs. 13 and 14 prohibit unlicensed persons from working, and employers from employing unlicensed persons; and sec. 24 empowers the Governor-General to make regulations prescribing "all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed" for carrying out Part III.

I do not agree with the suggestion that sec. 24 constitutes any authority to issue the present preference regulations. The latter do not deal with licensing at all but with a different subject matter; and the authority to make them must be sought and can only be obtained in sec. 3.

It is my opinion that, having regard to the nature and purpose of the whole Act, the licensing provisions of Part III. cannot be construed "as prescribing completely and exclusively the limits within which the liberty" of employers and employees on the waterfront is to be confined (*Cullis* v. *Ahern* (1)). The preference regulations merely determine the order of engagement of waterside workers, leaving every provision in Part III. of the Act fully operative.

The licensing system does in a sense recognize the freedom both of employer and employee to employ or be employed respectively, subject to the requirement of official licences. And the Regulations are no doubt further restrictions upon such liberty and create new duties, accompanied by new sanctions. But that does not, in my view, amount to "inconsistency" with the Act of the preference

(1) (1914) 18 C.L.R., at p. 543, per *Griffith* C.J.

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regulations. Cases like *Cowburn's Case* (1) and *Hume* v. *Palmer* (2) afford little or no assistance on the present question for there law-making was proceeding from separate legislatures not from the legislative and executive branches of the one Government. The licensing system is not trenched upon by the preference scheme. Part III. does not deal at all with employment in respect of the order of engagement of persons who are the holders of licences. No doubt regulations could not bevalidly made under sec. 3 with respect to the licensing of waterside workers because of the fact that Part III. does deal exhaustively with that subject matter. In my opinion the subject matter dealt with by the preference regulations is different and distinct from the licensing system itself.

The third submission as to construction must also be rejected.

The remaining question to consider is that which involves the interpretation of the Constitution. The plaintiffs contend that the *Transport Workers Act*, so far as it authorizes the preference regulations for waterside workers, is invalid on the ground that the trade and commerce power of the Commonwealth Parliament does not confer authority to regulate the order of engagement of persons, who are seeking work in connection with the loading or unloading of vessels engaged in inter-State and oversea trade and commerce.

Sec. 51 (I.) of the Constitution gives power to the Parliament of the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to "trade and commerce with other countries, and among the States." This power is given "subject to this Constitution," but it is now an accepted thesis that the Commonwealth Parliament is not affected in the exercise of this legislative power by the provisions of sec. 92 of the Constitution, which declares that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free" (*W. & A. McArthur Ltd.* v. *Queensland* (3); *James* v. *The Commonwealth of Australia* (4)).

The method of construing the legislative power is now also well settled by what is known as the *Engineers' Case* (5), a decision in 1920 which has been reaffirmed by this Court recently in the

(1) (1926) 37 C.L.R. 466.
(2) (1926) 38 C.L.R. 441.
(3) (1920) 28 C.L.R. 530.
(4) (1928) 41 C.L.R. 442.
(5) (1920) 28 C.L.R. 129.

Australian Railways Union v. *Victorian Railways Commissioners* (1). "It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution" (*Engineers Case* (2), per *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ.).

It is therefore necessary to see what is comprised in the concept of "trade and commerce with other countries and among the States." Once the field is ascertained, the power of the Commonwealth Parliament to make laws upon matters within the field is plenary. Again, it seems to me that the question for determination is largely covered by authority. In *McArthur's Case* (3), *Knox* C.J., *Isaacs* and *Starke* JJ. said:—"'Trade and commerce' between different countries . . . has never been confined to the mere act of transportation of merchandise over the frontier. That the words include that act is, of course, a truism. But that they go far beyond it is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of 'trade and commerce.' The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls trade and commerce."

In *Malcolm's Case* (4), moreover, the *Seamen's Compensation Act* 1911, which regulated to some extent the reciprocal rights and duties of persons engaged in foreign and inter-State traffic by means of ships, was held to be a valid exercise of the legislative power of the Commonwealth Parliament. "It is evident to me," said *Isaacs* J. (as he then was) in that case (5), "that to leave outside the sphere of control, with respect to inter-State and foreign trade and commerce, all but the mere act of supply of commodity or service would practically nullify the power. Limiting my observations to present purposes, the class of vehicle to be employed, the appliances necessary

(1) *Ante*, 319.
(2) (1920) 28 C.L.R., at p. 154.
(3) (1920) 28 C.L.R., at pp. 546-547.
(4) (1914) 19 C.L.R. 298.
(5) (1914) 19 C.L.R., at pp. 331-332.

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for safety, the classes of individuals to be employed either in relation to race, language, age or sex, and perhaps to some extent the contractual rights and obligations of the carrier and the public, would all be outside the power. But if not, then it is not easy to see why any modification of common law or statute law affecting the relations of employer and employee, while engaged in co-operating in the trade and commerce, so as to conduce really or substantially to affect the service rendered to passengers or to shippers, is not part of the necessary control of the subject."

Trade and commerce among the States, it has often been said, consists of acts and transactions and not of things. Laws with respect to trade and commerce must operate upon persons and things, and, in particular, upon persons co-operating in the transportation of goods from State to State in the course of trade. It is difficult to understand why the class of person to be employed should not be an appropriate subject of regulation by Parliament in the exercise of the power. I did not understand it to be contended that, after the relationship of employer and employee had come into existence with respect to wharf-labouring work in inter-State transport, the Commonwealth Parliament could not regulate the mutual rights and duties of employer and employee while the relationship continued. If such power existed, hours and conditions of labour could be fixed by the direct authority of the Federal Parliament.

But whether or not the Commonwealth power extends so far as to regulate "the reciprocal rights of employer and employee" in inter-State trade, it was admitted that a licensing system could be set up, as has been done in Part III. of the *Transport Workers Act* itself. Yet if persons may lawfully be prohibited by legislation from becoming employees or employers in respect of the transport of goods from State to State, or overseas, regulations may also be passed laying down rules as to the class of persons who may lawfully be employed. It is impossible to see any logical distinction between the two positions.

Reliance was placed by Mr. *Menzies* for the plaintiffs upon the decision of the Supreme Court of the United States in the case of

Adair v. *United States* (1), where the majority of the Court held that there was no such connection between inter-State commerce and membership in a labour organization, as to authorize Congress to prohibit inter-State carriers from dismissing their employees because of membership in such organization. *Adair's Case* must be looked at in the light of subsequent decisions of the United States Supreme Court. It was decided in the year 1908, but in 1912 in the *Second Employers' Liability Cases* (2) Mr. Justice *Van Devanter*, in giving the decision of the Court, said (3):—"This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter . . . which does not have a real or substantial relation to . . . such commerce."

In *Adair's Case* itself, the reasoning of the dissenting judgment of Mr. Justice *O. W. Holmes* is difficult to resist, if the matter is considered upon strictly logical grounds. He said (4):—"As we all know, there are special labour unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labour in that business, upon the terms of such employment and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is at least as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant—matters which, it is admitted, Congress might regulate, so far as they concern commerce among the States. I suppose that it hardly would be denied that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near."

Most recently of all, in the year 1927, in the case of *Di Santo* v. *Pennsylvania* (5), the majority of the United States Court regarded a licensing system applying to agents selling steamship tickets

(1) (1908) 208 U.S. 161.
(2) (1912) 223 U.S. 1.
(3) (1912) 223 U.S., at p. 47.
(4) (1908) 208 U.S., at p. 190.
(5) (1927) 273 U.S. 34.

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between the United States and Europe as a part of foreign commerce which could be regulated by Congress, and could not be regulated by the Legislatures of the States, and the dissenting Judges in the same case also recognized the right of Congress to deal with the subject because of its connection with foreign commerce.

But I do not think any useful purpose is served by further discussion of the American cases. Many of them depend upon the doctrine that it is within the power of Congress to create facilities for inter-State and foreign trade, and therefore, unless the legislation constitutes some assistance to the trade, it is outside the constitutional power. Whether a given regulation of the Australian Parliament facilitates or impedes trade and commerce between States or with countries overseas is a question of a political rather than a legal character. Given the appropriate subject matter, the Commonwealth Parliament may prohibit as well as it may restrict; it may remove restrictions, alter restrictions or add restrictions; it may encourage or discourage; it may facilitate or obstruct. The phraseology is political, and question-begging terms necessarily abound.

Once it is admitted, as it must be in the light of decided cases, that sec. 92 of the Constitution does not affect the Commonwealth legislative power, any given Australian controversy must be settled by determining whether the regulation enacted is a law upon the described subject. If it is, it is unnecessary to consider, so far as the trade and commerce power is concerned, what will be the effect upon the commerce itself: that is a matter entirely for the consideration of Parliament.

If the decisions of the United States Supreme Court as to the commerce power often depend upon a distinction which is inapplicable in the interpretation of the Commonwealth Constitution, I am of opinion that, for a similar reason, little assistance is to be derived from the decisions of the Judicial Committee as to the trade and commerce power of the Parliament of the Dominion of Canada.

Sec. 91 of the *British North America Act* vests exclusive power in the Dominion Parliament to make laws for "the regulation of trade and commerce." But sec. 92 of the same Constitution vests exclusively in the Legislatures of the Provinces exclusive power to make laws in relation to "property and civil rights in the Province."

It was, therefore, not possible to ascertain and define the extent of the Dominion power over trade and commerce without maintaining the exclusive provincial power over local civil rights. Central and local claims to power had to be balanced. Neither power was greater or less than the other. It was necessary to visualize and recognize both powers at the same moment. Consequently the "aspect" of any questioned legislation often became of supreme importance. In such cases, the double enumeration of exclusive powers of Dominion and Province respectively in secs. 91 and 92 made the problem one of classifying disputed legislation under two already given heads of power. If the challenged Dominion law appeared to regulate civil rights in the Province rather than to regulate the trade and commerce of Canada as a whole, the Dominion power was denied.

The task is essentially different under the Australian Constitution. The question is still one of construction; but it is construction of the express powers conferred upon the central Parliament. No doubt the powers of the States are very important, but their existence does not control or predetermine those duly granted to the Commonwealth. The legislative powers of the States are only exclusive in respect of matters not covered by the specific enumeration of Commonwealth powers. It is the grant to the Commonwealth which must first be ascertained. Whatever self-governing powers remain belong exclusively to the States.

It follows at once that, when the Commonwealth Parliament passes legislation in pursuance of secs. 51 and 52 of the Constitution, "civil rights in" a State are affected by the exercise of the power. It is true, as Viscount *Haldane* pointed out in the *Colonial Sugar Refining Co.'s Case* (1), that "general control" of individual liberty is not a power conferred upon the Commonwealth Parliament. But restrictions of individual liberty, and interference with civil rights, necessarily result from all valid Commonwealth enactments. Positive law conditions, regulates, and thereby affects the free exercise of civil rights.

Nor do I think that the express grant to the Commonwealth legislative power in other parts of sec. 51 of matters such as

(1) (1914) A.C., at p. 255; 17 C.L.R. at p. 654.

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banking, insurance, currency, and the like, really affects or limits the extent of the trade and commerce power of the Commonwealth: these other subjects within Commonwealth jurisdiction apply to all commercial transactions whether inter-State, foreign or confined to one State alone.

In Canada the phraseology of sec. 91 is perfectly general—"trade and commerce." In Australia, following in the main the American precedent, the power to make laws is in respect to trade and commerce of a much more limited character—"with other countries and among the States." As each disputed Commonwealth enactment must answer this description, the field of power is thus greatly narrowed. Within the smaller field, however, the Commonwealth power is, in my opinion, essentially different in quality from the trade and commerce power of the Canadian Parliament, and portions of inter-State and oversea trade and particular transactions of inter-State and foreign trade may well be selected by the Commonwealth Parliament for regulation. Each matter regulated, however, must always be part of trade and commerce with other countries, or among the States.

It does not follow, in the least, that a mere reference to trade and commerce with other countries or among the States in a Commonwealth enactment is sufficient to satisfy the condition. See the judgment of *Starke* J. in *Ex parte Walsh and Johnson*; *In re Yates* (1). What the statute in question in any case is called is of little moment. The label may not correctly describe the goods. Several extreme examples were referred to in argument which might well be held to be outside the Commonwealth legislative power on the subject of trade and commerce. It is necessary to speak guardedly upon the matter, for a great variety of cases may arise in the future. No one can test in advance the true nature and character of suggested legislation.

In this case, however, the handling on the wharves of cargo destined for or in course of inter-State or foreign shipment, is an essential and typical operation in trade and commerce with other countries or among the States. The Commonwealth Parliament may therefore regulate the performance of the work as a part of

(1) (1925) 37 C.L.R. 36, at pp. 136, 138.

trade and commerce, it may require a licence from persons who are engaged in the work, and may, if it chooses, set up its own set of qualifications to be fulfilled by persons seeking to perform the work. The individual worker is none the less engaged in an operation of inter-State trade though he does not know, and does not care, whether the goods handled by him are destined for or come from another State or the same State.

Such work of wharf-labouring is part of transport in inter-State trade, and is thus a part of the Commonwealth field of power. The prohibition of employment, the regulation of the order of employment, and the method of selection of persons seeking employment in such occupation, are all, in my opinion, within the legislative jurisdiction of the Commonwealth. And these matters are none the less within the power because, from one angle, they certainly present an aspect or appearance of legislation with respect to employment. For the States have not exclusive jurisdiction over the subject matter of " employment " as such.

I desire to add that in my opinion sec. 15A of the *Acts Interpretation Act* 1901-1930 answers any suggestion of invalidity of the *Transport Workers Act* based upon the generality of the language used in defining " transport worker." This point was not raised in argument at the Bar, and all I desire to say is that the enactment can and should be construed so as to cover the class of employees and the operations already described.

In my opinion, therefore, the case for the plaintiff fails and the action should be dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiffs, *Blake & Riggall.*

Solicitor for the defendants, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.