[HIGH COURT OF AUSTRALIA.]

ELLIOTT . . . . . PLAINTIFF;

AND

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

H. C. OF A. 1935-1936.

SYDNEY, 1935, *Dec.* 16.

MELBOURNE, 1936, *Mar.* 6.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law (Cth.)—Regulation of trade and commerce—Preference to State or part thereof over another State or part thereof—Seamen—Licences—Prescribed ports—Prescribed ports in four States, no prescribed ports in two States—Validity of regulations—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 99—*Transport Workers Act* 1928-1929 (*No.* 37 *of* 1928—*No.* 3 *of* 1929)—*Transport Workers (Seamen) Regulations* (*S.R.* 1935, *No.* 125).

The *Transport Workers (Seamen) Regulations* provide a system for licensing seamen which is applicable only at ports in the Commonwealth specified by notice in the *Gazette* by the Minister as ports in respect of which licensing officers shall be appointed. Unlicensed persons may not engage or be engaged as seamen at ports so specified. The Minister specified certain ports in four States, but no ports were specified in two States.

Held, by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ. (*Dixon* and *Evatt* JJ. dissenting), that the regulations and the specification of ports thereunder did not give preference to any State or part thereof over another State or part thereof within the meaning of sec. 99 of the Constitution.

Per Latham C.J.: The *discrimen* which sec. 99 forbids the Commonwealth to select is not merely locality as such, but localities which for the purpose of applying the *discrimen* are taken as States or parts of States.

Per Dixon J.:—What is forbidden by sec. 99 is, in a matter of advantage to trade or commerce, the putting of one State or part of a State before another State or part thereof. But the section does not call upon the Court to estimate the total amount of economic or commercial advantage which does or will actually ensue from the law or regulation of trade or commerce; it is enough that the law or regulation is designed to produce some tangible advantage

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obtainable in the course of trading or commercial operations, or some material or sensible benefit of a commercial or trading character.

Per Evatt J. :—Sec. 99 forbids laws or regulations which accord preferential treatment to persons or things as a consequence of local situation in any part of the six States, regardless of all other circumstances. The section is not infringed if the preferential treatment is a consequence of a number of circumstances, including the circumstance of locality. It operates objectively in the sense that the purpose or motive of the Legislature or Executive in giving preference by a law of commerce or revenue is not a relevant question. It may apply although the legislation or regulations contain no mention of a State *eo nomine*. To prove infringement of the section it is not sufficient to show discrimination based on mere locality it must also be shown that, as a consequence of the discrimination, tangible benefits, advantages, facilities or immunities are given to persons or corporations.

Crowe v. *The Commonwealth*, (1935) 54 C.L.R. 69, referred to.

MOTION for injunction.

The plaintiff, Eliot Valens Elliott, of 86 Wareemba Street, Five Dock, New South Wales, seaman, brought an action against the Commonwealth of Australia and the Attorney-General for the Commonwealth claiming (i.) a declaration that the *Transport Workers Act* 1928-1929 and the regulations made thereunder were invalid so far as they applied to the plaintiff and other persons described therein as seamen, and (ii.) an injunction restraining the defendants, their servants and agents from attempting to enforce and/or from enforcing any of the provisions of the said Act and regulations against the plaintiff and other persons described in those regulations as seamen. In an affidavit Elliott deposed that he followed, and for several years had followed, the calling of a seaman on British ships trading between the port of Sydney and other ports in New South Wales and other ports in other States of the Commonwealth ; that Sydney was his home port ; that his usual classification when employed as a seaman was that of a greaser ; that the defendants had recently passed regulations purporting to be passed under the *Transport Workers Act* 1928-1929, the direct effect of which was to prevent him from following his calling unless he applied for a licence and paid a fee for same under those regulations, and, acting in accordance with those regulations the shipping master of the port of Sydney and the shipping masters of other ports prescribed under

the regulations would refuse to sign him on as a seaman for any ship engaged in inter-State trade unless he obtained a licence and paid the fee therefor; that under the regulations Sydney had been prescribed as a port, but the regulations had not been applied to any other places and/or ports in the Commonwealth except Newcastle in the State of New South Wales, Brisbane in the State of Queensland, Melbourne in the State of Victoria and Port Adelaide in the State of South Australia; and that there were many places and/or ports in New South Wales and in other States of Australia to which the regulations had not been and were not being applied.

The regulations complained of, described as the *Transport Workers (Seamen) Regulations*, were made on 10th December 1935 by the Governor-General in Council, under the *Transport Workers Act* 1928-1929. The regulations are sufficiently set forth in the judgments hereunder.

By notice in the Commonwealth of Australia *Gazette* dated 10th December 1935, the ports of Sydney and Melbourne were, pursuant to reg. 5 of the regulations, specified by the Attorney-General for the Commonwealth as ports in respect of which licensing officers should be appointed for the purposes of the regulations. The ports of Brisbane and Newcastle, by a notice in the *Gazette* dated 11th December 1935, and the port of Port Adelaide, by a notice in the *Gazette* dated 13th December 1935, were similarly specified. No other ports were specified, and thus there was not any prescribed port in Western Australia or in Tasmania.

On 13th December 1935, *Evatt* J. granted leave to the plaintiff to move on short notice in the High Court for an injunction restraining the defendants from attempting to enforce or enforcing any of the provisions of the *Transport Workers Act* 1928-1929, or the regulations made thereunder against the plaintiff and other seamen pending the hearing of the action on the grounds (*a*) that the Act and regulations so far as they applied to seamen were *ultra vires* or invalid, and (*b*) that the regulations as far as they related to seamen were not authorized by any provision of the Act and/or were inconsistent with the Act and/or were invalid.

The motion now came on for determination by the Full Court.

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At the conclusion of the argument it was agreed between the parties that the motion should be treated as the trial of the action.

F. W. Patterson, for the plaintiff. The *Transport Workers (Seamen) Regulations* conflict with sec. 99 of the Constitution and, therefore, are invalid. The regulations give a preference not merely to one State over another State, but also to the ports of one State over the ports of another State. The fact that under reg. 5 of the regulations certain ports are specified definitely constitutes a discrimination. Western Australia and Tasmania are clearly preferred, because there is no port in either of those States to which the regulations apply.

[McTIERNAN J.—Every discrimination does not involve a preference.]

Any seaman in those two States is treated differently from a seaman in, say, a part of the State of New South Wales, namely, Sydney. The application of the law is a disadvantage to the other States because a restriction is imposed on seamen in other ports. Any law dealing with trade and commerce must apply to the whole of the Commonwealth; the same law should be applicable to every port. "Preference" is an advantage given to one person or a group of persons over another or other persons in respect of trade or commerce.

The explanation of sec. 99 given by *Isaacs* J. in *R.* v. *Barger*; *The Commonwealth* v. *McKay* (1) was accepted by *Knox* C.J. and *Powers* J. in *James* v. *The Commonwealth* (2). A discrimination between two persons involves a preference to one as against the other (*James* v. *The Commonwealth* (3)). The regulations operate unequally between the States. The words "States or parts of States" in sec. 99 mean "parts of the Commonwealth," or "different localities within the Commonwealth" (*Barger's Case* (4)).

The position is similar to that in *James* v. *The Commonwealth* (5) except that here the matter concerns parts of a State and not the whole State. The regulations are also invalid because they infringe sec. 92 of the Constitution. Sec. 92 binds the Commonwealth (see *R.* v. *Vizzard*; *Ex parte Hill* (6)). Even upon its narrowest construction

(1) (1908) 6 C.L.R. 41, at pp. 105-111.
(2) (1928) 41 C.L.R. 442, at p. 455.
(3) (1928) 41 C.L.R., at pp. 460, 464.
(4) (1908) 6 C.L.R., at p. 78.
(5) (1928) 41 C.L.R. 442.
(6) (1933) 50 C.L.R. 30.

sec. 92 includes a prohibition against pecuniary imposts. Here a distinction was drawn between the immediate effect of the *Transport Workers Act* as opposed to its consequential effect. In *Huddart Parker Ltd.* v. *The Commonwealth* (1) it was held that the Act was valid as an exercise of the trade and commerce power. Sec. 3 of that Act can only be valid if it is a law of trade and commerce in respect of a particular seaman. Accepting that contention it is impossible to say when applying sec. 92 of the Constitution, that it is not concerned with trade and commerce. Sec. 3 of the *Transport Workers Act* conflicts with sec. 92 of the Constitution because it interferes with the freedom—in its narrow sense—of trade. Trade is not "absolutely free" if it is subject to regulations which tend to hamper free trade and commerce. The Commonwealth is bound to make trade free to any ports without preference against another port.

Weston K.C. (with him *Owen* K.C. and *Kitto*), for the defendants. The Commonwealth is not bound by sec. 92 of the Constitution (*James* v. *The Commonwealth* (2)). Under sec. 99 of the Constitution the fact has to be determined whether preference has been granted. In that regard the onus of proof is on the plaintiff. The majority of the Court in *Barger's Case* (3) took the view that the prohibition expressed in sec. 51 (II.) of the Constitution, and perhaps in sec. 99, against preference was in respect of the Commonwealth. Here there is nothing which appears to show that any difference is made between Sydney and Melbourne or Fremantle or some other port of the Commonwealth. The difference is between ports and ports as parts of the Commonwealth, and not considered as parts of any State at all. The principles applicable are those enunciated by *Isaacs* J. in *Barger's Case* (4). The reasoning of *Isaacs* J. in that case was adopted in *Cameron* v. *Deputy Federal Commissioner of Taxation* (5) and *James* v. *The Commonwealth* (6). Reference to a State or part of a State has no logical relation to that State, but as a locality of the Commonwealth. The validity of the *Transport*

(1) (1931) 44 C.L.R. 492.
(2) (1935) 52 C.L.R. 570.
(3) (1908) 6 C.L.R., particularly at pp. 106 et seq.
(4) (1908) 6 C.L.R., at p. 110.
(5) (1923) 32 C.L.R. 68, at p. 72.
(6) (1928) 41 C.L.R., at pp. 455, 456.

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Workers Act as a whole was upheld in *Huddart Parker Ltd.* v. *The Commonwealth* (1) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). Although there the Court had under consideration the validity of regulations which brought into force a licensing system of a similar nature in respect of transport workers, the question of preference, although available, was not argued, and was not referred to in the judgments other than that the regulations had been brought into force with respect to certain ports only. The differentiation or preference is not made on a commercial basis (*Crowe* v. *The Commonwealth* (3)). In New South Wales a seaman is entitled to a licence as of course, and to renewal thereof as of course, without specific objections; so he becomes a member of a privileged class. On the question, what is the preference, there may be different views as to whether the seaman is in a privileged position in Sydney but not in a free market like Fremantle. Preference, in many cases, is purely a question of fact.

[EVATT J. It is not a question of fact, because no matter what the facts may be preference might be an advantage to one group, and a disadvantage to another.]

Then it may be for the Court to determine whether there is preference within the meaning of the section. Here there has not been any attack upon the validity of the Act, as an Act, omitting sec. 92. The executive action behind the regulation is the only matter that can be attacked. The provision in sec. 99 of the Constitution that the Commonwealth shall not by any law give a preference does not include the executive or the subordinate law-making power. The proclamation would seem to be the only thing which can be void and a nullity: it becomes a question of knowing why these particular ports were chosen. In the absence of evidence the Court should be slow to assume a prohibition under the section. It may be that the ports were chosen with utter indifference to the fact that they were in certain States, or alternatively there may be some reasons for the choice. What is a preference by sec. 99 is not even a preference between one part of the Commonwealth regarded as such and another part of the Commonwealth regarded as such,

(1) (1931) 44 C.L.R. 492. (2) (1931) 46 C.L.R. 73.
(3) (1935) 54 C.L.R. 69, at p. 83.

but only between a part of a State or a whole State regarded as such as against another State or part of another State regarded as such. There is nothing whatever to establish that the distinction which exists in the present case is a distinction within that prohibition. It is not shown that there has been created a preference within the meaning of the section. There is a distinction, but it does not amount to a preference within that prohibition.

F. W. Patterson, in reply. The observations by *Higgins* J. in *James* v. *The Commonwealth* (1) concerning the principles stated by him in *R.* v. *Barger* (2) are important. Sec. 99 is very much wider in its terms than the corresponding section in the Constitution of the United States of America. Here a preference is granted to one whole State, namely, Western Australia, over parts of South Australia, over parts of Victoria, over parts of New South Wales, and over parts of Queensland. For example, particular taxation imposed by the Commonwealth Parliament upon persons in Sydney, Newcastle, Brisbane, Port Adelaide and Melbourne, but not upon any persons in Western Australia automatically grants a preference to persons in Western Australia. The question must be decided by the result. This is the real distinction in *Crowe* v. *The Commonwealth* (3).

Cur. adv. vult.

1936, Mar. 6.

The following written judgments were delivered :—

LATHAM C.J. The question which arises for decision is whether the *Transport Workers Act* 1928-1929 or the regulations made under the Act contained in S.R. No. 125 of 1935, are invalid, by reason of the provisions of secs. 92 and 99 of the Constitution. No argument based upon these sections was submitted in *Huddart Parker Ltd.* v. *The Commonwealth* (4) or in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (5) where the validity of the Act and of certain regulations made under it was upheld. In each of these cases the objection based upon sec. 92 was available. In the latter case all the objections based

(1) (1928) 41 C.L.R., at p. 460.
(2) (1908) 6 C.L.R., at pp. 130-133.
(3) (1935) 54 C.L.R. 69.
(4) (1931) 44 C.L.R. 492.
(5) (1931) 46 C.L.R. 73.

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upon sec. 99 were available and in the former case the objection was available that the Act or the regulations were invalid as authorizing the giving of a preference prohibited by sec. 99—the objection which was raised in *R.* v. *Barger* (1). However, secs. 92 and 99 were not discussed in the cases mentioned.

It was conceded that the objection, in so far as it was based upon sec. 92, depended upon the acceptance of the proposition that the Commonwealth Parliament is bound by that section. It has been decided in *W. & A. McArthur Ltd.* v. *State of Queensland* (2) and *James* v. *The Commonwealth* (3) that sec. 92 does not affect the legislative power of the Commonwealth. (See also *James* v. *The Commonwealth* (4)). It is understood that the Judicial Committee of the Privy Council may, at a not distant date, decide one of the questions raised under sec. 92, namely, whether the Commonwealth is bound by that section. This Court should, however, decide the matter on the law as it stands.

Sec. 99 of the Constitution is in the following terms: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

The *Transport Workers* (*Seamen*) *Regulations*, S.R. No. 125 of 1935, provide in reg. 5 that "the Minister may, by notice in the *Gazette*, specify ports in the Commonwealth (in these regulations referred to as prescribed ports) in respect of which licensing officers shall be appointed for the purposes of these regulations." The regulations provide for the issue of licences to seamen (as defined in the Act) and require that unlicensed persons shall not engage or be engaged as seamen at prescribed ports. The regulations apply indifferently and equally in the case of all seamen and similarly in the case of all employers of seamen at those ports. Licences can be cancelled by the licensing officer in certain specified events, and there is an appeal to a Court from the decision of the licensing officer. The Minister, by notices published in the *Gazette*, has specified the following ports under these regulations—Sydney, Melbourne, Brisbane, Newcastle and Port Adelaide—and they have accordingly become prescribed ports.

(1) (1908) 6 C.L.R. 41.
(2) (1920) 28 C.L.R. 530.
(3) (1928) 41 C.L.R. 442.
(4) (1935) 52 C.L.R. 570.

No other ports have been prescribed, and in particular no ports have been prescribed in Western Australia and Tasmania. It is contended that the effect of the notices in the *Gazette* is to give, by reason of the Act and the regulations mentioned, a preference to States or parts of States over other States or parts thereof contrary to sec. 99 of the Constitution.

The argument submitted to this Court on behalf of the plaintiff was that seamen at the prescribed ports were placed at a disadvantage as compared with seamen at other ports because they were required to obtain licences under the conditions of the regulations, that therefore a preference was given to other ports by the regulations, and that accordingly there was a preference to parts of States over parts of other States.

Two questions arise upon this proceeding. First: Is any and what preference in the sense of sec. 99 given by the Act or the regulations? Secondly: Is that preference a preference to one State or any part thereof over any other State or any part thereof?

The first question cannot be answered in the affirmative without ascertaining and stating, at least with reasonable precision, the particulars of the preference alleged. This proposition remains true whatever general definition of preference may be adopted. It is only when it has been determined that a definable preference is given by challenged legislation that the question can arise whether that preference is given to one State or any part thereof over another State or any part thereof.

I agree that it is immaterial to consider what has been referred to as the motive of Parliament in enacting the statute or the motive of the Governor-General in making the regulations or the motive of the Minister in specifying ports under the regulations. Motive in relation to legislation tends to become a matter of imputation rather than of evidence. In this case there is no evidence as to motive. If there were such evidence, it would be irrelevant. It is equally immaterial to consider political aspects of the legislation, upon which opinion will vary, not only according to the political opinions of individuals, but also quite probably with the circumstances which exist at any given time and the consequences of the

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application of the legislation at that time. But, though considerations of policy as to the wisdom, expediency or propriety of a statute are irrelevant, there is no doubt that the section casts on the Court the duty to determine whether or not what is described as preference is given by legislation. Guidance as to the matters to be considered in answering this difficult question may be obtained from the terms of the Constitution itself.

Several sections of the Constitution deal with the subject of discrimination in Federal legislation or the giving of preference by Federal legislation. For purposes of convenient reference I set out in collocation the terms of four relevant provisions of the Constitution :—

I. Sec. 51. " The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (II.) Taxation ; but so as not to discriminate between States or parts of States. "

II. Sec. 51. " The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (III.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth."

III. Sec. 88. " Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth."

IV. Sec. 99. " The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

Sec. 51 (II.) prohibits in relation to laws with respect to taxation discrimination between States or parts of States. In this case differentiation in legislation between States or parts of States is forbidden. The words used are " discriminate between " and not " discriminate against." In order to apply this provision of the Constitution it is not necessary to arrive at any conclusion as to whether the difference in legislation as between States or parts of States confers an advantage upon any State or any part of a State over another State or over any other part of a State. No question of preference arises. Mere discrimination between States or parts of States, whether resulting in preference or not, is that which is fatal to the statute which infringes sec. 51 (II.).

It may be noted that the discrimination which is forbidden by sec. 51 (II.) includes discrimination between parts of the same State. In sec. 99 the geographical element in the prohibition is expressed by the prohibition of giving preference "to one State or any part thereof over another State or any part thereof." There is nothing in sec. 99 which in terms prevents the giving of preference to one part of a State over another part of the same State, though it may be that in practice it would be difficult if not impossible to devise such a preference which would not also involve a preference to part of a State over another State or over a part of another State.

This difference in language (the reason for which is not obvious) is not important for the purposes of the present case.

In the case of bounties upon the production or export of goods, the requirement of sec. 51 (III.) is that they shall be "uniform throughout the Commonwealth." This section would be infringed by absence of uniformity, whether or not any preference was given to a State or a part of a State over another State or part thereof. A law providing for a bounty upon the export of goods would be a "law of trade or commerce" and accordingly would be subject to the prohibition contained in sec. 99. A law providing for a bounty upon the production of goods would not be a law of "trade or commerce" according to the accepted interpretation of those words.

In the case of customs duties sec. 88 requires that "uniform duties of customs" shall be imposed within two years after the establishment of the Commonwealth. This section does not provide that customs duties shall continue to be uniform, and indeed there is no provision in the Constitution in these precise terms. It is sec. 51 (II.) which, because customs duties are a form of taxation, prohibits any discrimination in customs duties between States or parts of States, and sec. 99 also applies to laws imposing customs duties, because they are laws of trade, commerce, or revenue.

The requirement that uniform duties should be imposed excluded differences in any places in Australia in rates of duties upon the same classes of goods. Such differences were forbidden without reference to any relation to States or parts of States. In the case of sec. 88 (as well as in the case of sec. 51 (II.) and sec. 51 (III.)) it is

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unnecessary to consider any question of preference—differentiation as opposed to uniformity is what is obnoxious to sec. 88.

The sections mentioned operate independently, but they overlap to some extent. Laws of taxation, including laws with respect to customs duties, fall under sec. 51 (II.) and as laws of revenue they fall under sec. 99. Laws with respect to bounties on the export of goods fall under sec. 51 (III.) and also, as laws of trade or commerce, under sec. 99. A preference in relation to any of these subjects which infringed sec. 99 would also be a prohibited discrimination or a prohibited lack of uniformity under one of the other sections. Preference necessarily involves discrimination or lack of uniformity, but discrimination or lack of uniformity does not necessarily involve preference.

There may, however, be laws of trade or commerce which do not fall within secs. 51 (II.), 51 (III.), or 88. The *Transport Workers Act* is an example of such a law. In the case of such laws there is no prohibition of discrimination as such between States or parts of States (as in the case of taxation) and there is no constitutional requirement of uniformity (as in the case of bounties under sec. 51 (III.) and original customs duties under sec. 88). Something more than discrimination or lack of uniformity must be shown before sec. 99 can operate.

What sec. 99 prohibits is giving *preference* "*to* one State or any part thereof *over* another State or any part thereof." In order to apply this section it is necessary to determine that there is preference: it is necessary also to ascertain what the preference is, and to identify the State or part of a State to which the preference is given and the other State or part of another State over which the preference is given. The Constitution appears to be based upon the view that differentiation in some laws or regulations of trade and commerce (namely, those which do not relate to taxation, including customs duties, or bounties) may be proper and desirable or at least permissible, even as between different States, but that such differentiation must not amount to the giving of preference to one State or any part thereof over another State or any part thereof.

In the case now before the Court there is no doubt that the law which applies in, for example, Sydney, does not apply in Fremantle.

The result of the legislation is to make a difference in the law applicable in these two places. It does not, in my opinion, follow from this fact that the law gives preference to one place over the other place. In the case of a law or regulation of trade and commerce the difference between the two places under consideration (whether they be States or parts of States) must be such as to amount to a trading or commercial preference which is definitely given to one State or part thereof over another State or part thereof. This is the view expressed in the case of *Crowe* v. *The Commonwealth* (1). In that case *Rich* J. said that sec. 99 referred to " tangible advantage of a commercial character " (2). *Starke* J. said : " The preferences prohibited by sec. 99 are advantages or impediments in connection with commercial dealings " (3). Similarly *Dixon* J. said : " The preference referred to by sec. 99 is evidently some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character " (4). *Evatt* and *McTiernan* JJ. pointed out that the provision which was then challenged " neither puts any State in possession of trading advantages over another State nor gives it the power to obtain any such advantages " (5) and for that reason it was not obnoxious to sec. 99 of the Constitution.

These various phrases indicate the nature of the preference which is forbidden and I proceed to inquire whether any such preference is to be found in the *Transport Workers Act* or in the regulations in question. The Act itself was not attacked in argument. The argument on behalf of the plaintiff depended entirely upon the view which was taken of the effect of specifying ports under the regulations. When I consider the regulations I at once find a divergence of outlook in the definition of the " advantage " said to be given or conferred by the regulations in, or as the result of, the specification of particular ports, and also a difficulty in determining which State or part of a State is to be regarded by a Court as receiving the advantage. One view is expressed in the argument which was pressed upon the Court, namely, (to use the example given), that Fremantle was preferred to Sydney because the seamen in Fremantle were free from regulations

(1) (1935) 54 C.L.R. 69.
(2) (1935) 54 C.L.R., at p. 83.
(3) (1935) 54 C.L.R., at p. 86.
(4) (1935) 54 C.L.R., at p. 92.
(5) (1935) 54 C.L.R., at pp. 96, 97.

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to which they were subject in Sydney. This proposition adopted the point of view of certain seamen. A second view would be that of other seamen, who are equally entitled to consider that the regulations give them an advantage in Sydney over seamen in Fremantle, where the licensing system is not in operation. According to this view Sydney is preferred over Fremantle. A third view which is put forward is that it is Sydney and not Fremantle that obtains preference—but for the different reason that employers of seamen in Sydney are regarded as receiving an advantage over employers of seamen in Fremantle. At the same time the argument is accepted that, from the point of view of certain seamen, Fremantle is given a preference over Sydney. I can understand that one legislative provision may give preference to State A or a part of State A over State B or a part of State B within the meaning of sec. 99, and that another provision in the same statute or in the same statutory rule may give preference within the meaning of the same section to State B or part of B over State A or part of State A. But I have difficulty in understanding how one and the same legislative provision can, within the meaning of sec. 99, at once give preference to State A over State B and also preference to State B over State A. A similar observation applies to parts of States. Such a view is, I think, inconsistent with the terms of the section unless the words "give preference to A over B" are construed as meaning "make a distinction or differentiation between A and B." I have given reasons for my opinion that this is not the meaning of the section.

Thus there is difficulty in ascertaining satisfactorily what the alleged preference is and what State or part of a State receives it. It is, I think, entirely a question of opinion, which cannot be settled upon legal grounds, whether all or some only of the seamen of Sydney or the seamen of Fremantle or the employers of seamen in Sydney or the employers of seamen in Fremantle receive an advantage by reason of the legislation in question.

Where there is such vagueness as to the nature of the preference and the recipients of the preference I find myself unable to hold that there is here any tangible commercial advantage within the meaning of any of the expressions which I have quoted from *Crowe* v. *The Commonwealth* (1).

(1) (1935) 54 C.L.R. 69.

It may be said that the legislation is intended to confer and may be presumed to confer some trading or commercial advantages, that certain ports enjoy them, while others do not, and that these circumstances are sufficient to show that some preference is given without inquiring into any particular trading or commercial advantage. This view appears to me to rest upon a presumption that all legislation confers advantages upon those to whom it applies in a sense relevant to the application of the word preference in sec. 99. Doubtless this presumption may be taken to represent in a general way the attitude of the Parliament which passed the law in question, but I am unable to accept it as a legal proposition relevant to the interpretation of sec. 99. I think that such an interpretation ignores the express and distinctive reference to preference in sec. 99, with the result that the section is really construed as prohibiting any differentiation or discrimination in legislation to which sec. 99 applies. This view of the section, in my opinion, would make the preferences to which it refers notably intangible and indefinite, and it is not, I think, really consistent with the decision in *Crowe* v. *The Commonwealth* (1).

My opinion is supported to some extent by consideration of the word "give." The preference to which sec. 99 refers is something "given" to a State or a part of a State. The use of such a word appears to me to be inapt to describe mere differences in legislative provisions without definitely ascertainable tangible benefits conferred upon some areas and withheld from other areas. With all respect to those who differ from me, I cannot see that the imposition of a licensing system in employment in one State or a part of a State can fairly be described as something "given" to that State or part of a State. The position is obviously different where licences are necessary in *all* States for certain inter-State or foreign trading operations, but where such licences cannot be obtained at all in the case of goods situated in certain States. Such legislation actually confers a right to trade (in licensed trading) in some States, and prohibits any trading in the goods concerned in other States. This was the position in *James* v. *The Commonwealth* (2).

(1) (1935) 54 C.L.R. 69.

(2) (1928) 41 C.L.R. 442.

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But I would add that the significance of the word "give" should not be over-emphasized. Close attention must be paid to the nature of the subject matter with which the section deals. Thus a legislative prohibition of trade in certain goods between some States only might be so drafted as not to refer to any other States. But such a statute would nevertheless in substance give a tangible trading advantage to the other States, and could be held to be invalid by reason of sec. 99.

For the reasons stated I am of opinion that it has not been shown that the *Transport Workers Act* or the regulations give any preference within the meaning of sec. 99 of the Constitution.

The second question which arises is whether, if a preference is given by the regulations in question, it is a preference given to one State or part thereof over another State or part thereof. In discussing this question, I shall assume, contrary to the opinion which I have expressed, that the legislation does give a preference.

The argument of the plaintiff is that sec. 99 prohibits, in any law or regulation of trade, commerce, or revenue, preference based upon locality. The contention was that any preference given by legislation which was based upon locality necessarily involved a preference as between localities, and that therefore, as every locality in Australia is either a State or a part of a State, it involved preference as between States or parts of States.

If it had been intended to provide by sec. 99 that there should be no preference in laws of trade, commerce or revenue based upon locality it would have been very easy to say so. This has been done very definitely in the case of bounties (sec. 51 (III.)). The words there used are "uniform throughout the Commonwealth." There is no reference to "States or parts of States." The difference between this provision and those contained in sec. 51 (II.) and sec. 99 is a striking and conspicuous distinction, and it is emphasized by the close association of sec. 51 (II.) and sec. 51 (III.). Prima facie, words which relate to a similar subject matter and which are so different should receive a different interpretation.

Sec. 51 (III.) is similar to a provision contained in the Constitution of the United States: "All duties, imposts and excises shall be uniform throughout the United States." The uniformity required

by this clause is what the Supreme Court of the United States has called "geographical uniformity" (*Knowlton* v. *Moore* (1)). So also sec. 51 (III.) of the Commonwealth Constitution requires geographical uniformity in relation to bounties. There must not be, in the case of bounties, any variation based upon locality within the Commonwealth. In considering this provision it is not necessary to inquire whether there is absence of uniformity as "between States or parts of States." *Any* absence of "geographical uniformity" (which includes the presence of any discrimination or preference based upon locality) would constitute a breach of sec. 51 (III.). The marked difference in language between the words of this section and those used in sec. 99 cannot, in my opinion, be ignored. In the case of sec. 51 (III.) it is sufficient, in order to invalidate legislation, to find any differentiation based upon locality in the widest sense. In the case of sec. 99 it is necessary to show that a preference is given to one State or part of a State over another State or part of a State.

Similarly in the case of customs duties it is provided in precise terms that uniform duties of customs shall be imposed. Sec. 99 does not, however, make such a provision. Sec. 99 says that the Commonwealth shall not by any law or regulation of trade, commerce or revenue give preference to any one State or any part thereof over another State or any part thereof. I agree with the explanation of the latter part of this provision given by *Knox* C.J. in *Cameron* v. *Deputy Federal Commissioner of Taxation* (2). *Knox* C.J. referred to *Barger's Case* (3) in relation to sec. 51 (II.) (which with reference to taxation prohibits discrimination between States or parts of States) and approved the following statement of *Isaacs* J. concerning discrimination between localities in a general sense: "Discrimination between localities in the widest sense means that, because one man or his property is in one locality, then regardless of any other circumtance, he or it is to be treated differently from the man or similar property in another locality" (4).

The Constitution in sec. 51 (II.) does not, however, prohibit "discrimination between localities in the widest sense." It prohibits

(1) (1900) 178 U.S. 41; 44 Law. Ed. 969.
(2) (1923) 32 C.L.R., at p. 72.
(3) (1908) 6 C.L.R. 41.
(4) (1908) 6 C.L.R., at p. 110.

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discrimination between localities only in a particular and limited sense—" between States or parts of States." Thus *Knox* C.J., having defined discrimination between localities in the widest sense, proceeded to apply the definition to the particular kind of discrimination which was forbidden by the section under consideration. He continued : " I respectfully agree with this definition, and add that when the localities selected to furnish the *discrimen* are States or parts of States the discrimination is expressly forbidden by sec. 51 (II.) of the Constitution " (1). The point of this observation is to be found, in my opinion, in the rejection of the contention that *any* form of discrimination between Australian localities (which, except in the Territories, are in fact all States or parts of States) is prohibited by the Constitution in sec. 51 (II.). The Chief Justice was expressing his adherence to the view of *Isaacs* J. that the prohibition to the Federal Parliament was against differentiating between States and parts of States " because they were particular States or parts of States " (2). After referring to sec. 99, *Isaacs* J. continues : " The treatment that is forbidden, discrimination or preference, is in relation to the localities considered as parts of States, and not as mere Australian localities, or parts of the Commonwealth considered as a single country " (*Barger's Case* (2)).

In *Barger's Case*, *Griffith* C.J. and *Barton* and *O'Connor* JJ. had taken a different view, saying that " the words ' States or parts of States ' must be read as synonymous with ' parts of the Commonwealth ' or ' different localities within the Commonwealth ' " (3).

In *Cameron's Case* (1), however, *Knox* C.J. made the statement which I have quoted. *Isaacs* J. (4), *Higgins* J. (5) and *Rich* J. (6) also accepted the principle stated by *Isaacs* J. in *Barger's Case* (7). *Starke* J. (6) did not deal expressly with the precise point which arises in this present case.

In *James* v. *The Commonwealth* (8) *Knox* C.J. and *Powers* J., dealing with sec. 99 of the Constitution, expressly adopted what *Isaacs* J. said in *Barger's Case* (7), and *Higgins* J. (9) maintained the propositions which he had stated in that case (10).

(1) (1923) 32 C.L.R., at p. 72.
(2) (1908) 6 C.L.R., at p. 107.
(3) (1908) 6 C.L.R., at p. 78.
(4) (1923) 32 C.L.R., at p. 76.
(5) (1923) 32 C.L.R., at pp. 78, 79.
(6) (1923) 32 C.L.R., at p. 79.
(7) (1908) 6 C.L.R., at p. 110.
(8) (1928) 41 C.L.R., at pp. 455, 456.
(9) (1928) 41 C.L.R., at p. 460.
(10) (1908) 6 C.L.R., at pp. 130-133.

These authorities make it, in my opinion, proper to hold that the *discrimen* which sec. 99 forbids the Commonwealth to select is not merely locality as such, but localities which for the purpose of applying the *discrimen* are taken as States or parts of States. In the regulations in question the application of the regulations depends upon the selection of ports as ports and not of States or parts of States as such. In my opinion, sec. 99 does not prohibit such differentiation.

Sec. 99 expressly distinguishes between preferences to States and preferences to parts of States. It may be that a preference to Sydney and Newcastle in relation to trade and commerce may have a large effect in giving preference to the State of New South Wales as a whole, but I think that a law giving such preference must nevertheless be construed, according to its terms, as giving a preference to Sydney and Newcastle and not to the whole State. As a matter of construction this seems to me to be proper, and, if it is allowable to look at the actual facts, it is a matter of common knowledge that some trade to and from southern New South Wales passes through Melbourne, and that some trade from the north of New South Wales passes through Brisbane. I do not agree that, for the purposes of sec. 99, which so definitely distinguishes between States and parts of States, a State can be regarded as identified with its capital city or its principal port or ports.

On this part of the case, though the reasoning upon which I base my decision is in my opinion soundly based upon the provisions of the Constitution, I am aware that it may be thought that the result is to make the protection of the section largely illusory. The operation of the section can be excluded by avoiding the adoption of reference to States or parts of States as such as a *discrimen*. It is however, some relief to me to find that the opposite view is open, from all practical points of view, to substantially the same objection. The opposite view concedes that sec. 99 is not infringed if the preferential treatment is based not upon locality alone but also upon other circumstances. Thus, upon that view, the operation of the section can be excluded by including among the conditions even of avowedly preferential treatment a condition referring to some circumstance other than locality, possibly to any such circumstance,

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but certainly to any other circumstance which is itself relevant to or an aspect of inter-State or foreign trade or commerce.

It may be mentioned that a view contrary to that which I have accepted would raise difficulties with respect to the *Navigation Act* and the *Customs Act* which have not hitherto been suspected to exist. The power to legislate with respect to navigation and shipping is part of the Federal power to legislate with respect to trade and commerce (*Owners of S.S. Kalibia* v. *Wilson* (1)). Thus sec. 99 of the Constitution applies to the *Navigation Act* 1912-1934. I take one example only from that Act. Sec. 330 of the Act provides that " the Governor-General may proclaim the ports at which the employment of a pilot shall be compulsory " and that " at any such port the pilotage shall be performed by a pilot in the Public Service of the Commonwealth." Here the distinction drawn is a distinction between ports as ports, that is, in substance, the distinction is the same as that which is found in the *Transport Workers Act* and the regulations in question.

Similarly, the *Customs Act*, as a law or regulation of trade, commerce or revenue, is subject to the provisions of sec. 99 of the Constitution, and, as a law with respect to taxation, is subject also to the provisions of sec. 51 (II.). The administration of any *Customs Act* depends upon the establishment of ports of entry. Sec. 15 of the Act authorizes the Governor-General by proclamation to establish " ports " and fix their limits. Sec. 58 provides that the master of a ship shall not suffer his ship to enter any place other than a " port " unless from stress of weather or other reasonable cause. These provisions again present the feature of differentiation between ports—some ports being proclaimed as " ports " under the Act and others being not so proclaimed. The position is similar under the regulations under the *Transport Workers Act* which are now in question.

For the reasons which I have stated, I am of opinion that sec. 99 of the Constitution does not prevent the Commonwealth Parliament, when legislating with respect to maritime trade and commerce (including navigation and shipping) from making provision for adjusting its legislation by the means set forth in the regulations to the varying circumstances of particular ports.

(1) (1910) 11 C.L.R. 689.

The application came before the Court in the form of a summons for an interlocutory injunction referred to the Full Court by *Evatt* J. By consent of the parties the hearing of the summons has been treated as the trial of the action and the plaintiff has claimed a declaration that "the *Transport Workers Act* 1928-1929 and the regulations made thereunder are invalid so far as they apply to the plaintiff and other persons described thereunder as seamen." For the reasons which I have given the declaration should not be made and there should be judgment for the defendants in the action.

RICH J. This is an application for an interlocutory injunction which by consent was treated as the hearing of the suit. As it is the hearing of the suit a declaration of right may be granted if the plaintiff makes out a case for that relief. The plaintiff is a seaman, at the moment without a ship, who complains of the *Transport Workers* (*Seamen*) *Regulations* made on 10th December 1935 under the *Transport Workers Act* 1928-1929. He attacks the validity of these regulations on the ground that they are obnoxious to the provisions of secs. 92 and 99 of the Constitution. The objection based on sec. 92 cannot succeed in this Court so long as the decision which we gave recently in *James* v. *The Commonwealth* (1) stands. In that case the Court decided to adhere to the decisions which construed sec. 92 as applying only to the States and as having no operation upon the Commonwealth. The decision is under appeal to the Privy Council but in the meantime we must follow it. This point therefore fails. It does not follow that if sec. 92 were held to bind the Commonwealth the regulations would be held to involve restraint upon the freedom of trade, commerce and intercourse among the States. But that is a question I need not consider. The second ground for attacking the regulation lies in sec. 99 of the Constitution which provides that the Commonwealth shall not by any law or regulation of trade, commerce or revenue give preference to one State or any part thereof over any other State or any part thereof. The regulations provide a system for licensing seamen, but the system applies only at ports in the Commonwealth specified by notice in the Government *Gazette* by the Minister as ports in

(1) (1935) 52 C.L.R. 570.

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respect of which licensing officers shall be appointed. It appears that so far the Minister has appointed Sydney, Newcastle, Melbourne, Brisbane and Port Adelaide. It is said that the result is that a preference contrary to sec. 99 has been attempted. No one disputes that the *Transport Workers Act* and the regulations thereunder constitute a law or regulation of trade or commerce. But in what lies the preference of a State or part of a State over another State or part thereof? In *Crowe* v. *The Commonwealth* (1) we were called upon to consider sec. 99 in a somewhat different application. I said: "It is neither easy nor safe to attempt a definition of preference. Commercial preference may be accomplished by means which are indirect and ingenious, and it is much easier to say whether a particular thing is or is not a preference than to define the characteristics which a preference must possess" (2). In that case I thought there was no preference because growers of dried fruit, who were the only persons concerned, received no "tangible advantage of a commercial character or any legal means of securing it" (2). I still feel the difficulty of definition. But I think this case does not call upon us to attempt that task. I find it quite easy to say that there is no preference given to a State or a part of a State over another State or part of a State by these regulations or by the action of the Minister under them. There is no discrimination against individuals as denizens of States. The licensing systems may involve a disability in the case of seamen. But the imposition is conditioned upon what is considered the necessity of legislative or executive action in particular localities. No account of State boundaries is taken. No benefit or advantage is given to a State or part of a State to the detriment of another State or part of it. The question appears rather to be one of maintaining order and regularity and of acting only where those conditions do not exist or are imperilled. The notion of preference does not arise in such a connection. In my opinion the regulations are not invalid on this ground. As far as other grounds are concerned upon which they might conceivably be open to attack, the decision of this Court in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3) provides a complete answer.

In my opinion the suit should be dismissed with costs.

(1) (1935) 54 C.L.R. 69. (2) (1935) 54 C.L.R., at p. 83.
(3) (1931) 46 C.L.R. 73.

STARKE J. Action for a declaration that the *Transport Workers Act* 1928-1929 and the *Transport Workers (Seamen) Regulations* are invalid. The case cannot be distinguished from the decision given by this Court in *Huddart Parker Ltd.* v. *The Commonwealth* (1), which upheld the validity of the Act and of provisions similar to the *Transport Workers (Seamen) Regulations*. See also *Dignan* v. *Australian Steamships Pty. Ltd.* (2); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3). Those cases establish that the constitutional power to make laws with respect to trade and commerce among the States authorizes a system of governmental licence. The Parliament may exclude any person, or body, from inter-State commerce, who is not licensed. Its power to do so rests on the proposition, I apprehend, that the power to make laws with respect to trade and commerce involves a power to enact all appropriate legislation for the protection and advancement of trade and commerce, and " therefore about agents and instruments of inter-State commerce and about the conditions under which those agents and instruments perform the work of inter-State commerce." Personally I am unable to adopt this view of the Constitution, but it is, I understand, the doctrine and decision of this Court. It follows, so it is argued, that the institution of a licensing system, coupled with the imposition of licensing fees in respect of persons engaging in inter-State commerce, must then contravene the provisions of sec. 92 of the Constitution, which prescribes that trade, commerce and intercourse among the States shall be absolutely free. The argument is a logical development of the decision in *Huddart Parker Ltd.* v. *The Commonwealth* (1). But this Court has resolved that the provisions of sec. 92 do not affect the legislative power of the Commonwealth (*W. & A. McArthur Ltd.* v. *State of Queensland* (4)). So long as that decision stands the argument submitted to us necessarily fails.

The 99th section of the Constitution was next relied upon : " The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." The preference prohibited by

(1) (1931) 44 C.L.R. 492.
(2) (1931) 45 C.L.R. 188.
(3) (1931) 46 C.L.R. 73.
(4) (1920) 28 C.L.R. 530.

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this section is any advantage or impediment in connection with commercial dealings (*Crowe* v. *The Commonwealth* (1)). And the preference prohibited is preference to localities, though the practical result may be a preference to persons or goods in a locality. But there is nothing in all this which requires that laws should be general in their application: the Legislature must determine whether its Acts shall extend to the whole Commonwealth, or to part of the Commonwealth, or some of its inhabitants. Special legislation may be required for some localities and special rules for various occupations. Such discriminations are often desirable, but they are by no means preferences prohibited by sec. 99. A licensing system applied to some ports in Australia and not to others is but an illustration of this kind of discrimination. In some ports the conditions may be such as to require some local regulation of labour whilst in others regulation may be wholly unnecessary. But this is not a preference of one locality over another, or of one State or part of a State over another: it is a regulation required for the circumstances of particular ports and the labour conditions of those ports. The *Transport Workers* (*Seamen*) *Regulations* do not, therefore, contravene sec. 99 of the Constitution.

The action should be dismissed.

DIXON J. In the consideration of this case my opinion has fluctuated, but I have reached the conclusion that, in specifying ports in four States only for the purpose of the *Transport Workers* (*Seamen*) *Regulations*, (S.R. 1935, No. 125), the Commonwealth by a regulation of commerce gave preference to those States or parts thereof over the other States contrary to sec. 99 of the Constitution, and that a declaration to that effect ought to be made.

The *Transport Workers* (*Seamen*) *Regulations* were made by the Governor-General in Council under the power conferred by sec. 3 of the *Transport Workers Act* 1928-1929. The validity of that provision, so far as material, was established by the decision of this Court in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). It was there decided that, because it authorized the control of the selection of men for the doing of work

(1) (1935) 54 C.L.R. 69.

(2) (1931) 46 C.L.R. 73.

essentially part of trade and commerce with other countries and among the States, it was a law with respect to such trade and commerce.

The present regulations empower the Minister to specify ports in the Commonwealth, called "prescribed ports," in which licensing officers shall be appointed. The Minister may then publish in the *Gazette* a notice fixing a date after which at a prescribed port no person, unless he first obtain a licence, shall engage as a seaman on any British ship trading inter-State or on any British ship trading overseas from a port in the Commonwealth as the headquarters from which the engagement and discharge of its crew are managed and controlled. The regulations contain no statement or indication of the grounds upon which the Minister should proceed in specifying prescribed ports. His discretion is quite unfettered. He is not called upon to ascertain any state of facts or to form any opinion as to the existence of special conditions or circumstances at the ports he selects.

The regulations were made on 10th December 1935 and this cause was heard on 16th December. In the meantime the Minister had by *Gazette* notices, dated 10th, 11th and 13th December, specified Sydney, Melbourne, Brisbane, Newcastle and Port Adelaide.

The explanation of the purpose of the regulations must be sought in what they provide. But from their provisions it may be gathered that they seek to secure, in places where they are applied, that those who may be engaged as seamen shall be registered and identified, that they shall have some qualification for their work, and that control shall be maintained over them by cancelling the licences of those who are guilty of misconduct in refusing duty or in other respects.

The regulations are themselves general and uniform. But, apart from such prohibitions as those contained in clauses 21 and 22, the regulations operate only in reference to the ports which the Minister specifies. It is the exercise of the power of prescribing ports which causes the differentiation. Sec. 99 provides that the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or part thereof. In my opinion, the result of the differentiation is

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to give preference to a State over another State contrary to sec. 99.

It cannot matter that the differentiation is brought about by the act of the Minister. If the differentiation causes preference, the infringement upon sec. 99 is as complete as if it were made directly by the regulations themselves. The expression "Commonwealth" covers the Executive as well as the Legislature and the expression "regulation of commerce" extends to administrative acts which would produce a regulative effect upon commerce. For this reason an administrative act, such as that of specifying ports, if it results in giving preference to one State or any part thereof over another State, is rendered ineffective by the section.

Again, I do not think it can be denied that the regulation is a regulation of commerce. The ground upon which the validity of the regulating power itself was sustained is enough to establish that regulative measures taken under it are regulations of commerce.

The case does not, in my view, depend upon the expression "part of a State." For even if, in prescribing a port in one State, the Minister cannot be considered to have adopted "part of a State" within the sense of sec. 99 as the basis of his differentiation, I think that in specifying the chief ports in each of four States a course was taken which must be considered as affecting each of those States as a whole. We are concerned only with sea-borne trade of each State with other States and countries. For the most part that trade is done from the ports prescribed, namely, from the ports of the capital cities of each of these four States, and, in the case of New South Wales, the port second in importance, Newcastle. Whatever relates to carriage by sea from those ports relates to the international and inter-State sea commerce of the States themselves.

It is in the words "give preference over" that the crux of the case appears to me to lie. They express a conception necessarily indefinite. Their meaning cannot be considered apart from the words "law or regulation of trade, commerce, or revenue." By limiting the class of law or regulation which may not be used as a means of giving preference, those words necessarily determine the kind of preference prohibited.

In *Crowe* v. *The Commonwealth* (1) I said that in relation to trade and commerce, as distinguished from revenue, the preference referred to by sec. 99 is evidently some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character. I intended the expression " trading or commercial operations " to bear a very wide and general meaning. It includes the activities which attend carriage by sea or land. Further consideration has confirmed me in the view which I then expressed. I repeat that the preference may consist in a greater tendency to promote trade, in furnishing some incentive or facility, or in relieving from some burden or impediment. But it is, perhaps, desirable to notice that the phrase is not " give a preference " but " give preference." The difference may be slight, but the latter expression seems to bring out the element of priority of treatment, while the former has more suggestion of definite and actual advantage in the treatment. What is forbidden by sec. 99 is, in a matter of advantage to trade or commerce, the putting of one State or part of a State before another State or part thereof. But the section does not call upon the Court to estimate the total amount of economic or commercial advantage which does or will actually ensue from the law or regulation of trade or commerce. It is enough that the law or regulation is designed to produce some tangible advantage obtainable in the course of trading or commercial operations, or some material or sensible benefit of a commercial or trading character. To give preference to one State over another State discrimination or differentiation is necessary. Without discrimination between States or parts of respective States, it is difficult to see how one could be given preference over the other. But I agree that it does not follow that every discrimination between States is a preference of one over the other. The expressions are not identical in meaning. More nearly, if not exactly, the same in meaning, is the expression " discrimination against." If sec. 99 had been expressed to forbid the Commonwealth by a law or regulation of trade, commerce, or revenue to discriminate against a State or part of a State, I do not think its effect would have been substantially varied.

(1) (1935) 54 C.L.R., at p. 92.

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The present regulations are restrictive and regulative. But the restrictions and regulations are directed at the disciplined and orderly conduct of a vocation or pursuit the work of which is essential to the carriage of goods or persons by sea. Ports in reference to which the system is applied enjoy its advantages whatever they may be. It is a system designed to promote the ease, convenience and orderliness of operations forming part of trade and commerce. The degree to which in practice it may do so, the manner in which it may be actually regarded by seamen, on the one hand, and shipmasters, on the other, and generally the merits or demerits of the system are, I think, beside the true question, which, in my opinion, is whether in a matter directed at commercial advantage one or more States have been put before another or others. That, in my opinion, has been done by giving to the sea commerce of four States a means devised for the enlistment and control of seamen and for maintaining order and discipline among them and by withholding it from the remaining two States.

If the regulation had shown upon its face an intention that the system should be applied as a remedy for a particular inconvenience or evil which might be found at one place and not at another, if the Minister were authorized to prescribe ports only when he found a given state of facts to prevail there, it might, perhaps, have been open to us to decide that the facts and not the " law or regulation of commerce " made the discrimination. I had some doubt whether, even without such limitation of the discretion conferred upon the Minister, the Court might not, for the purpose of ascertaining whether preference was given, examine the actual grounds upon which the specification of ports proceeded. But I think that sec. 99 does not allow such a course. No doubt it does not require the Court to consider a law or regulation of commerce *in abstracto*. Preference and trade and commerce are conceptions which relate entirely to practical affairs. But sec. 99 does establish a standard of validity which is concerned with the character of the law or regulation of commerce and not with the particular trading or economic consequences which may or may not in fact ensue from it at a particular place and time. This appears to me to be decided in *James* v. *The Commonwealth* (1). There *Higgins* J. said :—" It is not an answer

(1) (1928) 41 C.L.R. 442.

to say, even if it is the fact, that Queensland or Tasmania does not produce dried fruits, and that this regulation makes no real difference to these States. We cannot take judicial notice of such a fact; nor can we assume a limit to the possibilities of a State's trade or commerce under the changing conditions of science and invention" (1).

For these reasons I think the plaintiff is entitled to succeed. I think a declaration should be made that the specification of ports made by the Commonwealth is void.

EVATT J. The main question to which argument was devoted upon the hearing of this action before the Full Court, is whether the *Transport Workers (Seamen) Regulations*, made by the Governor-General of the Commonwealth on December 10th, 1935, are invalidated by reason of inconsistency with sec. 99 of the Commonwealth Constitution, which provides that "the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

The regulations were carried into effect by the specification under reg. 5 of six licensing ports (two each in New South Wales and Queensland, and one each in Victoria and South Australia), and the subsequent specification under regulations 12 and 13 of December 31st, 1935, as the date after which those two regulations should operate.

The first decision on sec. 99 is *R.* v. *Barger* (2), where *Griffith* C.J., *Barton* and *O'Connor* JJ., comprising the majority of the Court, expressly determined that the *Excise Tariff Act*, No. 16 of 1906, even if otherwise valid, was invalid upon the broad ground that it authorized the giving, and therefore gave, preference to one State or a part thereof over another State or a part thereof.

The Act thus deemed invalid had imposed a duty of excise upon agricultural implements manufactured in Australia; but had also provided that it should not apply if the goods were manufactured in any part of the Commonwealth under conditions intended to secure adequate remuneration of the labour engaged in manufacture.

(1) (1928) 41 C.L.R., at p. 461.

(2) (1908) 6 C.L.R. 41.

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The conditions were four in number, including (i.) conditions of labour at the standard of the relevant Commonwealth arbitration award or industrial agreement, and (ii.) conditions declared fair and reasonable by the President of the Commonwealth Arbitration Court or by certain other State authorities or Judges to whom he might refer the matter.

The majority of the Court held that, as a result of the application of the conditions, exemption from taxation " might vary according to the area within which the manufacture was carried on " (1), so that " discrimination according to locality might be made " (2).

A fundamental proposition of law established by *Barger's Case* (3) was that the preference forbidden by sec. 99 of the Constitution includes any preference given to persons associated with any locality within the Commonwealth so far as it comprises the aggregation of the geographical areas of the six States, such preference necessarily resulting in a preference either to a State or to some part thereof (4).

The dissenting opinion of *Isaacs* J. was that sec. 99 forbade preferences " in relation to the localities considered as parts of States, and not as mere Australian localities, or parts of the Commonwealth considered as a single country " (5).

It may be observed that in such opinion the phrase " considered as " is ambiguous. In one sense it may refer to the motive of the Commonwealth legislation or regulation. In another sense it may refer to some stated relation between the favoured localities and the States to which they belong. But sec. 99 says nothing about the motive animating the Commonwealth law ; and it forbids preferences not merely to a State but to a part of it. Further, it would seem impossible to assert that a law preferring Sydney to Melbourne does not give preference to part of one State over part of another. However " considered," Sydney and Melbourne *are* parts of States and sec. 99 prohibits a commercial law which gives preference to a part of one State over any part of another State. The " considered as " theory, which I analyse later, is extremely difficult to understand or apply.

(1) (1908) 6 C.L.R., at p. 79.
(2) (1908) 6 C.L.R., at p. 80.
(3) (1908) 6 C.L.R. 41.
(4) (1908) 6 C.L.R., at p. 78.
(5) (1908) 6 C.L.R., at p. 107.

Isaacs J. also drew certain inferences from the judgment of *Nelson* J. in *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (1) (*Barger's Case* (2)), which do not appear to be justified, having regard to the noticeable difference of language in the United States and Australian Constitutions. This Court is not directly concerned with the validity of the judgment of *Isaacs* J. as to the main principle of interpreting sec. 99, because his opinion that sec. 99, if otherwise applicable, does not extend to preferences given by Commonwealth commercial or revenue legislation by reason solely of local situation in any one of the six States, was rejected.

A minor proposition of the majority of the Court in *Barger's Case* (3) was that sec. 99 was infringed by reason of the conditions of exemption prescribed in the particular statute then under consideration. The majority was of opinion that proof of such infringement was sufficiently shown if manufacturers in different parts of the Commonwealth *might* receive differential treatment as a result of the application of the conditions already described. On this point both *Isaacs* and *Higgins* JJ. dissented, *Higgins* J. pointing out that, under the conditions of exemption, the case of each manufacturer had to be considered in the light of *all* the conditions of life and of business, not excluding locality, so that, even if any differential treatment resulted, it was " not based on locality " (4).

Barger's Case (3) still remains the leading authority on sec. 99. It was referred to in *Cameron* v. *Deputy Federal Commissioner of Taxation* (5). That case concerned a Commonwealth regulation as to taxation, and it was sec. 51 (II.), which forbids discrimination between States or parts of States, which was most concerned. The regulation directed that, for the purpose of determining the income of graziers, the values of live stock at the beginning and end of the year had to be brought into account at stated figures which varied according to the State in which the stock was situated. The Court held unanimously that sec. 51 (II.) was infringed, *Knox* C.J. stating that, according to the table of values, the only discrimen adopted was the State in which the stock were found. He referred (6) with

(1) (1855) 59 U.S. 421 ; 15 Law. Ed. 435.
(2) (1908) 6 C.L.R., at pp. 107-109.
(3) (1908) 6 C.L.R. 41.
(4) (1908) 6 C.L.R., at p. 133.
(5) (1923) 32 C.L.R. 68.
(6) (1923) 32 C.L.R., at p. 72.

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approval to *Isaacs* J.'s opinion as to the minor proposition in *Barger's Case* (1) that "discrimination between localities in the widest sense means that, because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated differently from the man or similar property in another locality."

A reference to the judgment of *Isaacs* J. in *Barger's Case* (1) makes it apparent that he was then considering what was required to prove a locality preference in breach of sec. 99. For he was addressing himself to the terms of the particular statute, and stated :—

> "The area is merely a convenient label to indicate similar industrial circumstances, irrespective of State boundaries, or State districts. The Act applies the one rule to goods made 'in any part of the Commonwealth,' the one standard, reasonableness, or if variation of rule is possible, it is variation of the Court's idea of justice, and in no way determined by the mere fact of locality. So far from finding in the Act partiality for any special localities, I discern the most absolute impartiality, and absence of discrimination of or against any particular locality."

This opinion was, of course, similar to that expressed by *Higgins* J. (2), to which reference is made above. When, therefore, *Knox* C.J. (3) agreed with *Isaacs* J.'s definition (1) of "discrimination between localities," he was certainly not accepting the main argument of *Isaacs* J. in *Barger's Case* (4). Indeed, I find it impossible to believe that *Knox* C.J. was prepared to reject the main principle of interpreting sec. 99 as laid down by the majority in *Barger's Case* (5), particularly as sec. 99 was not directly involved in *Cameron's Case* (6).

In *James* v. *The Commonwealth* (7), sec. 99 was directly involved because a regulation under the *Dried Fruits Act* 1928, the effect of which was to prevent the transport of dried fruits, if held in Queensland or Tasmania, was held to constitute a preference forbidden by the section. *Knox* C.J. and *Powers* J. said that

> "the mere fact that the dried fruits are held in the State of Queensland or the State of Tasmania prevents the owner from obtaining a licence which he might have obtained had his fruit been held in one of the other four States. In our opinion this affords a clear instance of discrimination between States or of a preference to one State over another State" (8).

(1) (1908) 6 C.L.R., at p. 110.
(2) (1908) 6 C.L.R., at pp. 130-133.
(3) (1923) 32 C.L.R., at p. 72.
(4) (1908) 6 C.L.R. 41.
(5) (1908) 6 C.L.R., at pp. 63-81.
(6) (1923) 32 C.L.R. 68.
(7) (1928) 41 C.L.R. 442.
(8) (1928) 41 C.L.R., at p. 457.

In *James' Case* (1) it must have been held that, by the offending regulations, a preference was given to the four remaining States and each part thereof over the two States where the licensing system could not be taken advantage of by the owners of dried fruits.

In *Crowe's Case* (2) an entirely different aspect of sec. 99 had to be considered, for the trade regulations there in question openly discriminated between the growers solely by reason of their association with States, certain States having a great number of representatives upon the administrative Board. The sole point in issue was whether the difference in State representation of the growers constituted a forbidden preference. The decision was that it was not possible to infer that advantages, in the sense required by sec. 99, were being given to the States which had the larger representation. The case did not require an exhaustive analysis of the kind of preference forbidden by sec. 99, but the general tenor of the observations of all the Judges accorded with that of *Dixon* J. who expressed the view that a preference implied

> "some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character. It may consist in a greater tendency to promote trade, in furnishing some incentive or facility, or in relieving from some burden or impediment" (3).

This definition can be applied to the facts of the present case. An analysis of sec. 99 shows that it forbids four distinct types of preference laws, that is to say :—

(1) Laws giving preference to a State over another State ;

(2) Laws giving preference to a State over any part of another State ;

(3) Laws giving preference to any part of a State over another State ;

(4) Laws giving preference to any part of a State over any part of another State.

It is evident that commercial or revenue regulations which are not geographically uniform and which confer advantages based solely upon the discrimen of locality in any State will usually find ready inclusion in one or more of the four categories set out above. Of

(1) (1928) 41 C.L.R. 442. (2) (1935) 54 C.L.R. 69.
(3) (1935) 54 C.L.R., at p. 92.

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course an enactment which merely preferred one part of a State (e.g. Sydney) over another part of the *same* State (e.g. Bathurst) would be unaffected by sec. 99. But, in practice, it would be almost impossible to pass such an enactment, because the States other than New South Wales would either be treated in the same way as Sydney or not; in the first case, the enactment would give preference to the other States over part of New South Wales (Bathurst); and in the latter case the enactment would give preference to part of New South Wales (Sydney) over the other States.

Accordingly, there was a very solid foundation for the conclusion reached in *Barger's Case* (1) by the majority of the Court—that sec. 99 forbids all preferences which arise solely as a legal consequence of association with or reference to any locality in "Australia," i.e., "one or more of the States of Australia." The opposing view of *Isaacs* J. (2)—that the only preference forbidden by sec. 99 is preference to a State or a part of a State "considered as" such—involves the proposition that sec. 99 is not infringed if (say) a Commonwealth enactment exempts from taxation "all persons carrying on business or resident at Brisbane." On *Isaacs* J.'s view, presumably, such an enactment would not give a preference to a part of Queensland "considered as" a part of Queensland. But it is indisputable that such an enactment would give a preference to Brisbane, and, as Brisbane is part of the State of Queensland, the enactment would give a preference to a part of a State over the five remaining States of the Commonwealth. Similar examples may be multiplied indefinitely—e.g., preferences might be given to persons associated with an electoral division, a municipal or shire area, and so forth; in all such cases a careful analysis of the enactment would reveal an infringement of sec. 99. In truth, the extension of the prohibition in sec. 99 to "part of" a State, whether it is a large part or only a small part, makes it impossible to apply the view, advanced by *Isaacs* J. in *Barger's Case* (2), but rejected by the majority.

In his able argument, Mr. *Paterson* gave a further illustration of a law of revenue which offends against sec. 99. He supposed that a Commonwealth law provided that persons resident in, and carrying on business at, Sydney, Newcastle, Melbourne, Brisbane, Port

(1) (1908) 6 C.L.R. 41.

(2) (1908) 6 C.L.R., at pp. 105-111.

Adelaide and Townsville (the six places specified in the present regulations) should be exempt from taxation if their incomes exceeded £500. In such a case, he said, first, that there would be an infringement of sec. 51 (II.), because the law of taxation would "discriminate between States or parts of States." This view is obviously sound, because it is preposterous to suggest that, before the prohibitions of sec. 51 (II.) or sec. 99 of the Constitution can apply, the name of one or more States must be branded upon the face of the offending legislation. If this view is correct, it also shows that the word "because" as used by *Isaacs* J. in *Barger's Case* (1) in the phrase "*because* one man or his property is in one locality," (which phrase occurs in the sentence adopted by *Knox* C.J. in *Cameron's Case* (2)), cannot be taken as a reference to the Legislature's or Executive's *reason* for giving a preference arising from mere locality. For, in the example mentioned, the reason for the preference would not be apparent from the Act or regulation, and it is not easy to imagine how otherwise that reason could ever be ascertained. The word "because" in the phrase defining locality preferences must mean that the particular legislation operates solely *as a consequence* of geographical situation within a State of the Commonwealth. The one thing which the framework and phraseology of sec. 99 should place beyond dispute is the fact that the constitutional prohibition is objective in character. The Commonwealth is forbidden to pass a law "by" which a certain type of preference is "given."

The illustration given by counsel should be followed a little further. Does such an Act as he envisaged confer a preference contrary to sec. 99 as well as to sec. 51 (II.) ? He contended, and his contention has not, and I think cannot, be answered, that such a law would give preference to those residing or carrying on business in any of the six localities specified over all persons residing or carrying on business in any locality within Western Australia and Tasmania, as well as over all such persons in all localities in the four States except the localities preferred.

There is nothing in the American case of *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (3) which is inconsistent with the view

(1) (1908) 6 C.L.R., at p. 110.
(2) (1923) 32 C.L.R., at p. 72.
(3) (1855) 59 U.S. 421 ; 15 Law. Ed. 435.

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that a law of the character illustrated would offend against sec. 99. In the United States Constitution, art. 1, sec. 9, forbids preference "to the ports of one State over those of another." Such a prohibition is not nearly so sweeping as that contained in sec. 99, and it is this very difference which must be remembered in evaluating the statement of the majority of the United States Supreme Court that what is forbidden is "not discrimination between individual ports within the same or different States, but discrimination between States" (1). For *Nelson* J. illustrated the position by asserting that it was necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and the ports of Pennsylvania (1). In the United States, no ground was open for holding that (say) a preference to an individual port in one State over an individual port in another State was forbidden by the Constitution. *All* the ports of one State had to be discriminated against in favour of *all* the ports of another before the Constitution applied.

Under the Commonwealth Constitution the position is quite different, and the obvious and dangerous gap pointed out by *Nelson* J. seems to have been closed. The distinction between the two Constitutions on the particular point is proved by the fact that one type only of preference is forbidden in the United States, whereas, in Australia, four types of preference are forbidden. There is a useful discussion on sec. 99 by *Harrison Moore*, particularly in reference to the absence of the requirement of uniformity. That was due to the belief that insistence upon uniformity would prohibit discrimination not only as between localities, but also as between individuals (*Constitution of the Commonwealth of Australia*, 2nd ed. (1910), pp. 516, 517).

The logical result of the above discussion of principle and authority is that, in relation to sec. 99, the following propositions should be accepted :—

(1.) Sec. 99 forbids four types of preferential legislation, viz., (*a*) giving preference to a State over another State ; (*b*) giving preference to a State over any part of another State ; (*c*) giving preference to

(1) (1855) 59 U.S., at p. 435 ; 15 Law. Ed., at p. 439.

any part of a State over another State; (*d*) giving preference to any part of a State over any part of another State.

(II.) Sec. 99 forbids laws or regulations which accord preferential treatment to persons or things as a consequence of local situation in any part of the six States, regardless of all other circumstances (*R.* v. *Barger* (1), per *Griffith* C.J., *Barton* and *O'Connor* JJ.).

(III.) The section is not infringed if the preferential treatment is a consequence of a number of circumstances, including the circumstance of locality (*R.* v. *Barger* (2), per *Isaacs* and *Higgins* JJ.; *Cameron's Case* (3); *James* v. *The Commonwealth* (4)).

(IV.) The section operates objectively in the sense that the purpose or motive of the Legislature or Executive in giving preference by a law of commerce or revenue is not a relevant question, e.g., it is irrelevant that the Legislature or Executive desires to facilitate or encourage inter-State or overseas trade, or to increase revenue (*Cameron's Case* (5)).

(V.) Sec. 99 may apply although the legislation or regulations contain no mention of a State *eo nomine*, e.g., the section may be infringed if preference is given to part of a State (e.g., that part of New South Wales which is represented by the port of Sydney) over another State (e.g., Western Australia) or any part of another State (e.g., Fremantle or Brisbane).

(VI.) To prove infringement of sec. 99 it is not sufficient to show discrimination based on mere locality; it must also be shown that, as a consequence of the discrimination, tangible benefits, advantages, facilities or immunities are given to persons or corporations (per *Dixon* J., *Crowe* v. *The Commonwealth* (6)).

It is necessary to examine the *Transport Workers (Seamen) Regulations* in relation to seamen for the purpose of determining two distinct questions: first, whether, solely as a result of their operation, tangible benefits, advantages, facilities or immunities accrue to any persons or class of persons; second, whether such accrual is a consequence of geographical situation in any part of the six States, regardless of all other circumstances. As will appear from a later

(1) (1908) 6 C.L.R., at pp. 78-81.
(2) (1908) 6 C.L.R., at pp. 107-111, 130-133.
(3) (1923) 32 C.L.R. 68.
(4) (1928) 41 C.L.R. 442.
(5) (1923) 32 C.L.R., at p. 74.
(6) (1935) 54 C.L.R., at p. 92.

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part of this judgment, the second question answers itself, because any advantages or benefits conferred by the regulations proceed as a legal consequence of the operation of the licensing system at certain ports where alone the engagement of seamen may be effected, and those places are restricted to six ports within four of the States of the Commonwealth.

Returning to the first question, we must first note the suggestion that it is not for this Court to determine whether by the present regulations any tangible facilities, benefits or immunities are being accorded to the shipowners or seamen. Such a suggestion entirely ignores the fact that such function and duty are committed to the Court by the Constitution, for one of the questions which must necessarily be determined in the enforcement of sec. 99 is whether any facilities, benefits or immunities have been created by the particular law or regulation of commerce which is challenged. Here the regulations are admittedly regulations of commerce within the meaning of sec. 99. So much is decided by *Huddart Parker Ltd.* v. *The Commonwealth* (1), and *Crowe* v. *The Commonwealth* (2); for the latter case negatives the theory that such regulations as those before us can be passed in the exercise of the constitutional power contained in sec. 51 (xxxix.) of the Constitution.

It is therefore necessary to analyse the legal operation of the regulations in order to determine whether advantages have been conferred.

By sec. 3 of the *Transport Workers Act* 1928-1929, the Governor-General is empowered to make regulations with respect to the employment of "transport workers." In particular, power is given (1) to regulate the engagement, service and discharge of transport workers; (2) to regulate the licensing of transport workers; (3) to regulate or prohibit the employment of non-licensed persons as transport workers, and (4) to regulate the protection of transport workers.

The Commonwealth has no legal power to deal with employment generally, but it may pass laws in relation to trade and commerce with other countries or among the States. A transport worker is defined by reference to his employment in the work of sea transport

(1) (1931) 44 C.L.R. 492. (2) (1935) 54 C.L.R. 69.

in connection with those two species of trade and commerce which the Commonwealth Parliament may lawfully regulate. *A priori* it might have been supposed that the provisions of the *Navigation Act* dealing with seamen would have precluded the passing of regulations under a separate Commonwealth Act to deal with such matters as the engagement of seamen. But sec. 3 of the *Transport Workers Act* provides that the regulations are to operate "notwithstanding anything in any other Act," so that, by this umbrella phrase, the regulations may operate *pro tanto* as a repeal of the elaborate provisions for protecting seamen and shipowners contained in the *Navigation Act*. The question of consistency of part of the regulations with the *Merchant Shipping Act* has not been debated.

Part II. of the *Transport Workers* (*Seamen*) *Regulations* is headed "Licensing, Engagement and Employment of Seamen." Regs. 12 and 13 provide that, on and after a date fixed by the Minister by *Gazette* notice (the date fixed being December 31st, 1935 (*Gazette* No. 78, 24th December 1935)), only those seamen who hold licences issued under regs. 7, 8, and 9, may engage or be engaged at any "prescribed port." If seamen without licences engage or are engaged, offences are committed. At the "prescribed ports" licensing officers are to be appointed (reg. 5), and any person desiring to obtain at a "prescribed port" a seamen's licence must apply and pay the fee required (reg. 7). The licensing officer must be satisfied that the applicant is qualified for employment (reg. 8). Licences are to endure for twelve months but may be renewed (reg. 9).

The general scheme as to the grant of licences is almost identical with that applied to waterside workers some years ago, and now contained in Part III. of the Act itself. In the case of *R.* v. *Mahony*; *Ex parte Johnson* (1), there had been a refusal by a licensing officer to renew a licence to a person who had held a licence and was not under any disqualification. The Court held that a renewal could not lawfully be refused, and ordered a mandamus to issue. *McTiernan* J, and I decided that the licensing officer had no discretion to refuse either the grant or the renewal of a licence. To the present regulations the same reasoning applies. Of course by reg. 8 the

(1) (1931) 46 C.L.R. 131.

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licensing officer must be satisfied that an applicant is "qualified for employment." If he is so satisfied, he must issue a licence on payment of the prescribed fee.

As every qualified seamen is entitled to obtain a licence upon payment of a fee of one shilling, the present regulations, if they contained no other provisions than those already described, would merely result in the setting up of a new Government bureau for the registration of employees in the industry. Such a bureau might duplicate other bureaux, but could not fairly be said to advantage or disadvantage any one. The real operation and significance of the present regulations has to be sought for, and is easily ascertained in, the other regulations, and to these it is necessary to turn. The outstanding provision is reg. 11, which gives power to a licensing officer to cancel a seaman's licence in five specified cases, viz.:

(*a*) a refusal or failure on the part of the seaman to comply with the lawful order or direction of his employer (reg. 11 (1) (*a*));

(*b*) the refusal by a seaman engaged to work on a ship to work in accordance with his agreement and any award of the Commonwealth Arbitration Court which is binding on him (reg. 11 (1) (*b*));

(*c*) intimidating conduct on the part of the seaman including "abusive" language to any licensed seaman or any official (reg. 11 (1) (*c*));

(*d*) conviction of any offence against the regulations (reg. 11 (1) (*d*));

(*e*) conviction of any other offence against any other Commonwealth or State law committed upon a pier, wharf, jetty, or ship (reg. 11 (1) (*e*)).

Reg. 11 (1) (*c*) and 11 (1) (*e*) need not be dealt with in detail. So far as intimidation is concerned, State laws deal adequately with such offences; here the additional sanction of loss of livelihood may be visited upon an offender.

By reg. 22 (1) it is an offence for any organization *by any means whatsoever*, or for any person, *by persuasion or any means whatsoever* to attempt to induce any seaman to refrain from offering or engaging

himself for employment on a ship to which Part III. of the Regulations applies. This regulation has no compeer in that part of the Act dealing with waterside workers. It operates, and is obviously aimed against, what would otherwise be the civil rights and activities of labour, particularly organized labour.

Reg. 22 (2) makes it an offence for an organization or a person " with the object of holding up the ship or of enforcing any demand " to persuade a seaman to abandon or terminate his employment on the ship. The penalty imposed under reg. 22 (2) is £100 or three months' imprisonment in the case of a person, and £500 in the case of an organization. The latter penalty—£500—is the maximum penalty contained in any of the regulations. Further, reg. 23 provides that in any proceeding for an offence against reg. 22 (2), the averment of a prosecutor as to " the object " of the organization or person is deemed to be proved in the absence of proof to the contrary. This last regulation, which is clearly of doubtful validity, having regard to the limited terms of the grant of power contained in sec. 3 of the statute, serves to illustrate the general character and operation of the regulations. If valid, reg. 23 would compel an organization of labour or a person, himself accused of an offence, to submit their officials or themselves to cross-examination, thus subverting the generally recognized method of proving criminal offences, at least under most British legal systems.

Full reference has been made to reg. 22, because a conviction for an offence against it leads to the cancellation of the seamen's licence under reg. 11 (1) (*d*).

The licensing officer may, under reg. 11 (3), fix a period of between one and twelve months during which the holder of a licence who disobeys an order or refuses to work under an award, or commits a breach of reg. 22 (1) or 22 (2), shall remain ineligible to receive a licence. An appeal against cancellation of a licence may be brought to a Court of summary jurisdiction. By reg. 11 (8), it is provided that, on the hearing of an appeal against cancellation, the Court shall order the restoration of a licence if, *inter alia*, it is satisfied that the abusive language used by the seaman had no relation to the employment of the seaman, or to the fact that the eaman " had

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offered for, accepted, or continued in, employment in the work in respect of which he was licensed."

Another vitally important regulation is reg. 14, which, subject to regs. 12 and 13, gives to every employer "freedom of selection" from among licensed seamen offering for employment. This regulation precludes the possibility of preference to unionists being awarded by the Arbitration Court (see *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1)), because the regulations validly made under the *Transport Workers Act* override inconsistent terms in awards made by the Federal arbitrators.

The operation of the regulations is now apparent. Licensing is set up as a means to an end. Licences cannot be refused to qualified persons, and the fee which is imposed is nominal in character. But the regulations operate to lower the status of licensed seamen. The lowering of status necessarily results from the fact that loss of the means of livelihood (involved in a withdrawal of the licence or permit to be employed as a seaman), as well as drastic penalties in certain cases, may be suffered by any seaman who, in the course of combining with his fellow unionists and his trade union for the purpose of improving his standard of wages, agrees to strike or not to accept employment.

In this case the challenge to the regulations is not made, as in *Huddart Parker's Case* (2), by the shipowners. Again the reason is clear. The sole obligation cast upon employers by the regulations is that contained in reg. 13, which compels the employer to see to it that his seamen are licensed. As it is obvious that the general effect and operation of the regulations will be to give the employer an almost unexampled right to discipline and control his unionist employees through the medium and assistance of the Government supervisor, armed with power to cancel the licence on a large number of grounds, the employer will naturally be pleased to insist that his employees become licensed. Consequently, the licensing system operates as "class" legislation, in the sense that it necessarily benefits shipowners and necessarily disadvantages organized trade unionism. The most radical provision is that which attempts to suppress, under penalty of loss of livelihood, attempts by employees, through their

(1) (1931) 46 C.L.R. 73.

(2) (1931) 44 C.L.R. 492.

organization or otherwise, to withdraw or retain their labour power for the purpose of improving their industrial conditions. The provision as to loss of licences in the case of failure of an employee to obey a lawful order is also important, as providing a sharp weapon for the maintenance of the strictest discipline.

It is idle to deny that, by the operation of these regulations, a definite material and economic advantage, the value of which is capable of estimation in terms of money, will accrue to any shipowner who is fortunate enough to engage employees who become subject to the regulations. The disadvantages imposed upon employees necessarily confer direct and distinct advantages upon the employers. The principle of " compulsory labour " typical of the " servile State " and vigorously condemned by Mr. Justice *Higgins* (*Industrial Arbitration*, p. 12), but embodied in the present regulations, gives the employers a specially valuable control over the human agencies necessary to the profitable carrying on of their enterprise. As a result of the present regulations, seamen are compelled, in direct relation to their employers and their employment, to abstain from conduct calculated to interrupt the continuous performance of work for the benefit of their employers. The regulations impose drastic penalties if the seamen fail to carry out certain obligations, but, although the penalty operates *after* the proof of such failure, the sanctions imposed necessarily operate as a *prior* restraint upon the seamen's freedom of action—to the direct benefit of the employer. Accordingly, the disadvantages suffered by the employees, and the advantages conferred upon the employers are correlative. And both arise as a legal consequence of these regulations.

It is emphasized that the question arising under sec. 99 has nothing to do with the motive of the Minister or the Executive, whether it be to advantage shipowners or to injure organized labour, or whether it is merely to prevent any hindrance to the orderly transport of passengers and goods in trade and commerce. This Court is concerned solely with the effect and operation of the regulations properly construed. They operate in the way which has been described. The elaborate bureau set up may fairly be described as a bureau for the disciplining and punishment of unionist

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seamen. It is to be noted that inefficient performance of duties, however gross, and however often repeated, is not a ground for the cancellation of a licence. It is also to be noted that employers on their part are not prevented from locking out or combining to lock out employees by tying up their vessels in order to compel compliance with any demand. The regulations are entirely advantageous to the employers, and are entirely disadvantageous to seamen.

The second question is whether the advantages given to certain employers by the regulations are given in such a way that a locality preference has been given in breach of sec. 99. As has been indicated already, the answer to the question is not in doubt. All the regulations centre around regs. 12 and 13, which prohibit the giving or acceptance of employment as a seaman only "at any prescribed port." The result is that, elsewhere than at prescribed ports, seamen may be engaged, and employers have no duty, and can insist upon no right, to require that seamen engaged shall be licensed. The prescribed ports, where the licensing officers are set up, are limited to certain ports in the States of New South Wales, Victoria, Queensland and South Australia. At six specified ports in those States licences are mandatory. This results in the conferring upon the employers engaging seamen at such ports the material and economic advantages resulting from a docile, if not servile, body of employees. At other ports within the same four States, and at all ports within the two States of Western Australia and Tasmania, no such licensing system being in operation, the advantages to the employers have not been created. The fact that the ships trade outside the ports of engagement is immaterial, for sec. 99 may be infringed by regulations which give preference to persons resident at a particular locality in a State although their business is carried on elsewhere. Here there is a direct inducement to shipowners to make use of the facilities provided, and provided only at the specified ports.

Whatever the motive may have been for operating the licensing system in this manner, the differential treatment is a clear preference contrary to sec. 99 of the Constitution, because it gives a tangible advantage and furnishes an incentive or facility limited solely by reference to the locality of the place of engagement. It cannot be

denied that one result of such regulations may be to facilitate trade and commerce, inter-State and overseas. But sec. 99 does not address itself either to the object, or even to the results flowing from, the forbidden regulations of trade, commerce and revenue. It is quite probable that an effective method of promoting inter-State and overseas trade would be to give preference to the States or parts thereof which are most suited to the development of such trade. But sec. 99 intervenes to forbid such method and to declare that four different means of regulating trade, commerce and revenue shall be absolutely prohibited to the Commonwealth Parliament and Executive, whether they promote or hinder trade and commerce, and whether they promote or hinder the revenue of the Commonwealth. Here the regulations are invalid, not because of their effect on inter-State or overseas trade, but solely because they confer facilities, advantages and benefits upon certain shipowners, and do so merely as a result of the deliberate selection in four States only of six places where licensing is required, and where only licensed seamen may lawfully be engaged.

In this view, it is unnecessary to consider the question whether the regulations infringe sec. 92 of the Constitution, which provides that trade, commerce and intercourse among the States shall be absolutely free. The question whether sec. 92 binds the Commonwealth is shortly to be decided by the Privy Council, which has granted special leave to appeal in *James* v. *The Commonwealth* (1). It would seem reasonable to await the opinion of that tribunal before again acting upon the view that the Commonwealth is immune from the operation of sec. 92, especially as in *James'* *Case* (1) the majority of the members of this Court considered that the Commonwealth was bound by sec. 92. The plaintiff here also maintains that the Commonwealth, like everybody else, is bound by the general rule of inter-State free trade or "inter-Colonial free trade" (as it was always called before Federation), evidenced by sec. 92 of the Constitution. Even if he is right upon that point it by no means follows that all or any of these regulations should be declared void, and there is a close analogy between the present case and *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2),

(1) (1935) 52 C.L.R. 570.

(2) (1935) 52 C.L.R. 189.

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where this Court held that the New South Wales system of licensing the instruments of land transport, including those used in inter-State transport, was not necessarily inconsistent with sec. 92, and where the Privy Council subsequently refused to grant special leave to appeal. (See also *James* v. *The Commonwealth* (1)). But at least the plaintiff should have an opportunity of advancing an argument based on sec. 92 *after* the decision of the Privy Council, and his case should not be dismissed out of hand.

In my opinion, the plaintiff is entitled to a declaration that the *Transport Workers (Seamen) Regulations* are void as inconsistent with sec. 99 of the Constitution.

McTIERNAN J. The *Transport Workers (Seamen) Regulations*, which were made by the Governor-General on the 10th December 1935 under sec. 3 of the *Transport Workers Act* 1928-1929, by reg. 5 (1) in Part II. provide as follows: " The Minister may, by notice in the *Gazette*, specify ports in the Commonwealth (in these regulations referred to as prescribed ports) in respect of which licensing officers shall be appointed for the purposes of these regulations." Any person desiring to obtain at a prescribed port a licence as a seaman, the meaning of which is defined, may make application to a licensing officer and a fee of one shilling is payable on the application (reg. 7). The regulations provide for the grant of a licence to the applicant to engage as a seaman, specify the period of its duration and enable a licensing officer to cancel a licence for various grounds which include the misconduct or disobedience of the holder of a licence in his employment (regs. 8, 9, 11). The regulations also provide that on and after a date fixed by the Minister no person shall engage or be engaged as a seaman at any prescribed port for service on any ship to which the regulations apply unless he is the holder of a licence (regs. 12, 13). On 10th December the Minister by a notice in the *Gazette* specified " the following ports, namely Sydney and Melbourne, as ports in respect of which licensing officers shall be appointed for the purposes of the *Transport Workers (Seamen) Regulations*." On 11th December " the following ports, namely Brisbane and Newcastle " were specified as ports for the

(1) (1935) 52 C.L.R., at pp. 599, 600.

like purposes, and on 13th December " the following port, namely Port Adelaide " was also specified. The Minister has not specified any port in Western Australia or Tasmania for the purposes of the regulations. The ships to which the part of the regulations relating to the licensing, engagement and employment of seamen applies are as follows : (*a*) British ships registered in Australia or employed in trading between ports in the Commonwealth, or (*b*) other British ships regularly employed in trading from a port in the Commonwealth as headquarters and managed or controlled at that port in respect of the engagement, employment and discharge of their crews. It is the trade and commerce carried on by these ships which is within the scope of these regulations relating to the licensing, engagement and employment of seamen. Assuming that the regulations beneficially affect trade, the benefit would extend uniformly to the whole of that trade and commerce.

Now there is no reference in the regulations express or implied to a State or part of a State. In the absence of such assistance for the determination of the question of invalidity under sec. 99, this part of the case turns on the question whether, in the result, the exercise of the power in the regulations to specify ports in the Commonwealth has *given preference to a State or part of a State over another State or part thereof.* It is apparent on the face of the regulations that it was not deemed expedient at once to apply the licensing regulations to seamen engaged at every port in the Commonwealth. The obvious plan is that these regulations should be applied only to seamen who would be engaged for service on any of the ships above-mentioned, at the ports which it would be deemed expedient to specify from time to time. The seamen to whom the regulations are thus applied are always seamen engaged in the trade and commerce of the Commonwealth. It is the trade and commerce of the Commonwealth *qua* the Commonwealth which is regulated. On the assumption that the regulations are beneficial to trade, the whole of the trade carried on by the licensed seamen is equally and uniformly affected, irrespective of the connection of the trade with any State or part thereof, or of the relation of the ships, the seamen or their employers to any State or part thereof. The Minister has specified ports in the

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Commonwealth under the designation of Sydney, Melbourne etc., but this designation does no more than identify certain focal points of the trade and commerce of the Commonwealth. As the regulations apply to the seamen and ships in their character respectively as agents and instrumentalities of Commonwealth trade and commerce and not as persons and property, so too " the following ports, namely Sydney and Melbourne " are specified, not as cities or parts of New South Wales or Victoria, but as ports of the Commonwealth. The true view in my opinion is that these ports have been specified without any regard to the fact whether any such port is in State " A " or in State " B." (See *Cameron's Case* (1), *Barger's Case* (2) and *James' Case* (3)). In my opinion it is a misconception of the result produced by the exercise of the power reposed in the Minister to say that the notices gazetted on 10th, 11th and 12th December whether taken severally or in combination give preference to a State or any part thereof over another State or part thereof.

The regulations it is true impose on any person engaged as a seaman at any of the specified ports restrictions which are not applicable within the limits of Western Australia or Tasmania. This may show that in a particular respect there is discrimination against the States within which the restrictions apply. But it does not follow that " preference " has been " given " to any State or part of a State wherein the restrictions do not apply. It is enough to say that whatever the advantages or benefits or tendencies inherent in the non-regulation of seamen, it is impossible to reach the conclusion that they answer the general character of a preference as explained in *Crowe's Case* (4).

In the result therefore, so far as the plaintiff's case depends on an infringement of sec. 99, there must be judgment for the defendants.

The plaintiff also relied on sec. 92. This court has already held that sec. 92 does not bind the Commonwealth, and even in the event of a contrary view being expressed by the Privy Council in the pending appeal *James* v. *The Commonwealth*, it would still have to be shown that these regulations as to the licensing of seamen do in fact interfere with freedom of trade, commerce and intercourse

(1) (1923) 32 C.L.R. 68.
(2) (1908) 6 C.L.R. 41
(3) (1928) 41 C.L.R. 442.
(4) (1935) 54 C.L.R. 69.

among the States. (Compare *R.* v. *Vizzard*; *Ex parte Hill* (1), and *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2)).

In my opinion there should be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors for the plaintiff, *C. Jollie Smith & Co.*

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

J. B.

(1) (1933) 50 C.L.R. 30.

(2) (1935) 52 C.L.R. 189.