

Cons Rose & Repatriation Commission, Re 11 ALD 505	Foll Mason v Nominal Defendant (Qld) [1987] 2 QdR 190	Foll Cth v Christoffelsz 18 FCR 415	Foll Clunies-Ross v Common- wealth (1984) 56 LGRA 184	Foll McMillan & Repatriation Commission, Re (1993) 31 ALD 359	Appl AAT Case 12,660; Lewin & Federal C'ner of Taxation, Re (1998) 39 ATR 1128
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[HIGH COURT OF AUSTRALIA.]

BIRCH APPELLANT ;

INFORMANT,

AND

ALLEN RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE COURT OF GENERAL SESSIONS OF
VICTORIA.

National Security—Endeavouring to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war—“The war”—Meaning—Emendation of statute—Effect—National Security Act 1939-1940 (No. 15 of 1939—No. 44 of 1940), secs. 3, 19—Acts Interpretation Act 1901-1937 (No. 2 of 1901—No. 10 of 1937), secs. 10A, 46 (a)—National Security (General) Regulations, regs. 3, 42.

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Aug. 25.

The *National Security (General) Regulations* must now be regarded, for the purpose of their construction, as made under the *National Security Act 1939* as amended by the *National Security Act 1940*, and not as made under the first-mentioned Act alone. Accordingly the phrase “the war” in reg. 42 of the Regulations refers to “any war in which His Majesty is or may be engaged” and not merely to “the present war” as formerly defined by the *National Security Act 1939*.

Latham C.J.,
Rich, Starke,
McTiernan and
Williams JJ.

APPEAL from the Court of General Sessions.

Upon an information laid by James Richard Birch, a detective sub-inspector of police and officer-in-charge of the Special Investigation Branch, Melbourne, William Francis Allen was, with the consent of the Acting Attorney-General, summarily charged in the Court of Petty Sessions, Melbourne, that between 17th February 1942 and 17th March 1942 at Melbourne he did, contrary to the *National Security Act 1939-1940*, contravene a provision of the *National Security (General) Regulations*—reg. 42—made under the said Act, in which he did endeavour to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war by

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asking divers persons to sign a petition addressed to the Prime Minister, Mr. John Curtin, and the Federal members of the Parliamentary Labour Party for the purpose of negotiating for peace with Japan.

The defendant was convicted and sentenced to imprisonment for one month.

An appeal against that conviction and sentence was upheld by the Chairman of General Sessions and the conviction set aside. The Chairman held that the words "the war" in reg. 42 of the *National Security (General) Regulations* (defined in reg. 3 as meaning "the present war") should be construed as meaning "the present war" as defined by the *National Security Act* 1939, that is, the war between His Majesty the King and Germany existing during the present state of war. Reg. 42 was made under the *National Security Act* 1939, and before the passing of the *National Security Act* 1940; it must be construed as a regulation made under the 1939 Act and the words "the war" in the regulation could not have the meaning in effect given to them by the 1940 Act. Those words in the information must be construed as referring to "the present war" as defined by the 1939 Act, and, in his Honour's opinion, it was impossible on the evidence to find that Allen endeavoured to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of that war.

From that decision the informant, by special leave, granted upon the condition that he pay in any event the costs of the defendant of and incidental to the appeal, appealed to the High Court.

Upon the appeal coming on to be heard counsel for the appellant informed the Court that the appellant desired only a determination by the Court on the point of law involved and did not press for a determination on the facts nor for a conviction of the respondent.

Further facts are set forth, and the relevant statutory provisions are sufficiently set forth, in the judgment of *Latham C.J.* hereunder.

Dwyer K.C. (with him *N. Pilcher*), for the appellant. By virtue of sec. 46 (a) of the *Acts Interpretation Act* 1901-1937 expressions used in the regulations made under the *National Security Act* 1939-1940 shall have the same meanings as in that Act. The definitions of "the present state of war" and "the present war" as appearing in the *National Security Act* 1939 were omitted by the *National Security Act* 1940. The last-mentioned Act puts upon the Court the duty of judicially informing itself of the international state of affairs which at any particular time answers to the expressions so used. The Court is entitled to look at the title of an Act in order

to ascertain its scope and to remove ambiguities (*East and West India Dock Co. v. Shaw, Savill and Albion Co.* (1); *Coomber v. Justices of Berks* (2))—See also the *Acts Interpretation Act* 1901-1937, secs. 10, 10A. It is important that by sec. 3 of the *National Security Act* 1940 the title of the *National Security Act* 1939-1940 was amended by omitting the words “the present state of war” and inserting in their stead the words “any war in which His Majesty is or may be engaged.” By reason of the combined operation of secs. 10A and 46 of the *Acts Interpretation Act* 1901-1937, regard must be had to the regulations as if they were an Act of Parliament, and as if each separate regulation were a section of such an Act. Reference in the *National Security (General) Regulations* to “the Act” means the *National Security Act* 1939 as amended from time to time—see also sec. 10A of the *Acts Interpretation Act* 1901-1937. The meaning of that expression in the regulations changes in accordance with relevant amendments made in the Act from time to time (*Stevens v. General Steam Navigation Co.* (3); *Acts Interpretation Act* 1901-1937, sec. 46 (a)). The Act, as amended from time to time, and the regulations must be read together as a whole (*Colquhoun v. Brooks* (4)). Amendments made to the regulations consequent upon and since the enacting of the *National Security Act* 1940 shows a “contrary intention” within the meaning of the definition clause in the regulations. Upon the assent having been given to the *National Security Act* 1940, “the war” ceased to be limited to the war between His Majesty the King and Germany, and by virtue of the regulations became referable to “the present war,” that is, any war in which His Majesty the King is at the time engaged. The existence of any such war is a matter of judicial knowledge (*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (5)).

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Barry K.C. (with him *Sugerman*), for the respondent. There is not any inconsistency between the regulations and the *National Security Act*; they may stand side by side. The Act and the regulations should be construed as penal provisions according to the words and not according to any presumed intention (*Ledwell v. Ledwell* (6); *Liversidge v. Anderson* (7); *In re Wainewright* (8); *Maxwell on the Interpretation of Statutes*, 8th ed. (1937), p. 240). The word “present” is a descriptive temporal adjective. The

(1) (1888) 39 Ch. D. 524, at p. 531.

(2) (1882) 9 Q.B.D. 17, at p. 33.

(3) (1903) 1 K.B. 890.

(4) (1889) 14 App. Cas. 493, at p. 506.

(5) (1923) A.C. 191, at p. 197.

(6) (1900) 26 V.L.R. 595.

(7) (1941) 3 All E.R. 338, at p. 361.

(8) (1843) 1 Ph. 258, at pp. 260, 261

[41 E.R. 630, at p. 631].

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regulations as originally promulgated referred to the war between His Majesty the King and Germany. The expression "the present war" may have taken on a new meaning, although this is not conceded, when the Act was amended in 1940. The only wars then in existence were between His Majesty the King and Germany and Italy; the war with Japan was not then effective. There were two possible points of time to which "the present war" may have referred, namely, the time when the regulations were first promulgated, and the time when the Act was amended. But the operation of the word "present" was then exhausted and was confined to events existing at that time. Anything that happened or happens after that is not embraced by the word "present." The hostilities in progress are not "the same war" or an entire war. The war between His Majesty the King and Germany, His Majesty the King and the King of Italy, and His Majesty the King and the Japanese Empire respectively are, in law, entirely different wars with entirely different consequences. In the circumstances, the words "the present war" refer to the war with Germany; alternatively, they refer to the war with Germany and Italy. The word "present" was used in contradistinction to past wars. Sec. 46 (a) of the *Acts Interpretation Act* 1901-1937 is merely declaratory of the ordinary principles of interpretation (*Craies on Statute Law*, 3rd ed. (1923), p. 258). The same interpretation should be given to terms used in the regulations as is given to the same terms in the Act under which the regulations were framed (*Blashill v. Chambers* (1)). Sec. 10A of the *Acts Interpretation Act* 1901-1937 does not assist in this matter because of the actual form of the regulations. The definition that "the war" means "the present war" is a restricted definition identifying a particular state of hostilities with a particular nation or nations. Alternatively, as regards sec. 46 (a) of the *Acts Interpretation Act* 1901-1937, and the ordinary rule of construction, the regulations do show a contrary intention. The special leave to appeal should be rescinded.

Dwyer K.C., in reply. The words now under consideration should not be given a restricted or limited meaning (*Stockholms Enskilda Bank Aktiebolag v. Schering Ltd.* (2)).

The following judgments were delivered:—

LATHAM C.J. This is an appeal, by special leave, from a decision of the Court of General Sessions in Victoria, setting aside a conviction of the respondent, William Francis Allen, for a breach of reg. 42

(1) (1884) 14 Q.B.D. 479, at p. 485.

(2) (1941) 165 L.T. 19, at pp. 21, 22.

contained in the *National Security (General) Regulations* made under the *National Security Act*. H. C. OF A.
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Reg. 42 provides that a person shall not endeavour, whether orally or otherwise, to influence public opinion in Australia or elsewhere in a manner likely to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. The prosecuting authority chose to charge the respondent with endeavouring to influence public opinion "in a manner likely to be prejudicial to the efficient prosecution of the war," and not "in a manner likely to be prejudicial to the defence of the Commonwealth." If the charge had been laid in the last-mentioned form the difficulties with which we have to deal would not have arisen.

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The charge, then, was endeavouring to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war. It is therefore necessary to ascertain what "the war" means. The respondent was convicted. The Court of General Sessions set aside the conviction, holding that "the war" in reg. 42 meant the war between His Majesty the King and Germany, and the learned Chairman of General Sessions, Judge *Clyne*, indicated his view that, on the facts, he considered that it was unlikely that the respondent had committed any offence even if the words "the war" were not construed in this limited sense.

The regulations as originally promulgated in 1939 contain certain definitions. In the first place there is a definition of "the Act." "The Act" means "the *National Security Act* 1939." "The war" means "the present war." The latter definition has not been altered. Accordingly the respondent can be convicted only if he has endeavoured to influence public opinion prejudicially to the efficient prosecution of "the present war," whatever that may mean.

These regulations were passed under the *National Security Act* 1939 and were made on 13th September 1939. At that time the only war in existence was a war between His Majesty the King and Germany. "The present war" at that date meant that war, and it is contended that it still means that war.

In 1940 the *National Security Act* was amended in various particulars. The title was changed by omitting a reference to "the present state of war" and inserting the words "any war in which His Majesty is or may be engaged." So the title of the Act now reads as follows: "An Act to make provision for the safety and defence of the Commonwealth and its territories during any war in which His Majesty is or may be engaged."

It may be proper to look at the title for the purpose of determining the scope of an Act; it may be referred to, not to contradict any clear and unambiguous language, but if there is any uncertainty it

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may be referred to for the purpose of resolving the uncertainty. "The title is an important part of the Act, and is so treated in both Houses of Parliament," *Lindley M.R.* said in the case of *Fielding v. Morley Corporation* (1).

In the present case not only is the title altered, but also certain definitions which appeared in the Act originally were struck out so that they no longer appear in the Act as amended. Those definitions were two, first a definition of "the present state of war," and, secondly, a definition of "the present war." The latter definition had appeared in these words: "The present war means the war between His Majesty the King and Germany existing during the present state of war."

I refer to sec. 19 of the Act, which was also amended. Originally sec. 19 said: "This Act shall continue in operation during the present state of war and for a period of six months thereafter and no longer." It was amended in 1940 to read: "This Act shall continue in operation until a date to be fixed by proclamation and no longer, but in any event not longer than six months after His Majesty ceases to be engaged in war."

The regulations also were amended in 1940. The definition of "the Act" was altered, so that, instead of meaning the *National Security Act 1939*, it was expressly provided that it means "the *National Security Act 1939* as amended from time to time." This amendment, as Mr. *Barry* said, made it unnecessary to resort to the *Acts Interpretation Act* in order to discover that the *National Security Act* meant in the regulations that Act as amended from time to time.

For present purposes the regulations as they exist to-day are the same as they were at the time of the commission of the alleged offence. It is the duty of the Court to construe them in their legal setting as it exists. What is that legal setting? The regulations refer to the *National Security Act* as amended from time to time. That Act has been amended, and the regulations must, in my opinion, be regarded as regulations which are made under and by virtue of the Act as amended and not merely by virtue of the original Act. Any other view would lead to a possible diversity of interpretation of identical words or phrases in the different regulations and would also produce difficulties as to the period during which the regulations would remain in force.

I agree with Mr. *Barry* that penal Acts must be construed strictly, that is to say, that the Court is not to adopt an interpretation against the liberty of the subject unless the words are clear.

Sec. 46 of the *Acts Interpretation Act 1901-1937*, sub-sec. (a), so far as it is relevant, provides that when an Act confers upon any authority

(1) (1899) 1 Ch. 1, at p. 4.

power to make regulations, unless the contrary intention appears, expressions used in the regulations shall have the same meaning as in the Act conferring the powers. I approach the matter from this point of view: either there is an Act conferring the power to make these regulations, or there is no such Act. In my opinion there is such an Act and that Act is the *National Security Act 1939-1940*—that is, the original Act as amended. The regulations must be read in the setting of that Act, and words and phrases such as “the war” must be construed having regard to the provisions as they existed at the time of the offence. More particularly, I read these regulations as made under an Act which is entitled: “An Act to make provision for the safety and defence of the Commonwealth and its Territories during any war in which His Majesty is or may be engaged.” The Act is an Act also which has struck out the definitions of “the present war” and “the present state of war” which were limiting provisions in the Act in its earlier form, and it is an Act which includes the provision of sec. 19 to which I have already referred.

In other words, the Act as it now stands, looks to futurity and to possible changes in the area of warlike operations and hostilities. Particularly I read reg. 42 since the amendment of the Act as meaning “any war in which His Majesty is or may be engaged.”

Mr. *Barry* has truly said that if the definition of “the war” as being “the present war” had been altered the matter would have been clearer, but in my opinion it is sufficiently clear.

The Commonwealth desires an interpretation of the Act and regulations and does not press for a conviction in this case. Accordingly it is unnecessary for the Court to deal with the facts of the case. In my opinion the proper order to make is that the appeal should be dismissed, the appellant to pay the respondent’s costs of the appeal in this Court.

RICH J. I agree.

STARKE J. I agree.

McTIERNAN J. I agree.

WILLIAMS J. I agree.

Order accordingly.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *Maurice Blackburn*, Melbourne, by *C. Jollie-Smith & Co.*

J. B.

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