[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS;

EX PARTE THE STATE OF VICTORIA AND ANOTHER.

THE STATE OF VICTORIA AND ANOTHER . PLAINTIFFS;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1942.

MELBOURNE, *Nov.* 3, 5.

SYDNEY, *Nov.* 26.

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

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE VICTORIA.

National Security—Industrial peace—"Industrial matter"—Meaning—Employment of State public servants—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *sec.* 4—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5—*National Security* (*Industrial Peace*) *Regulations* (*S.R.* 1940 *No.* 290), *regs.* 2, 3, 5, 9.

The expression "industrial matter," as used in the *National Security* (*Industrial Peace*) *Regulations*, does not include questions relating to the employment of public servants of a State engaged in its ordinary governmental departments.

VICTORIA v. THE COMMONWEALTH.

Constitutional Law—Defence—Ambit of power of Commonwealth—State public servants not engaged in war work—Holidays and remuneration—National Security Act 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5—*National Security* (*Supplementary*) *Regulations* (*S.R.* 1940 *No.* 126—1942 *No.* 422), *reg.* 29.

Sub-regs. 8, 9 and 10 of reg. 29 of the *National Security* (*Supplementary*) *Regulations*, in so far as they purport to control the holidays and remuneration of members of the public service of the State of Victoria who are not engaged in work associated with the prosecution of the war, are not within the ambit of the defence power of the Commonwealth.

The matters of *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*, wherein the State of Victoria and the Public Service Board of that State sought an order absolute prohibiting the Commonwealth Court of Conciliation and Arbitration and Judge Kelly from further proceeding with a reference to the Court by the Minister for Labour and National Service, and *Victoria* v. *The Commonwealth*, which was a demurrer to a statement of claim wherein the State of Victoria and the Attorney-General thereof sought declarations that certain Commonwealth regulations were invalid, were heard together. The provisions of the relevant regulations are set forth in the judgments hereunder.

The King v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria.*

ORDER NISI for prohibition.

On 20th June 1942 the Minister of State for Labour and National Service made a reference under reg. 9 of the *National Security* (*Industrial Peace*) *Regulations* (Statutory Rules 1940 No. 290) to the Commonwealth Court of Conciliation and Arbitration as follows:

"Whereas the hours of duty of members of the Victorian Public Service Association have been increased by the Government of the State of Victoria.

And whereas the Public Service Board of the State of Victoria has refused to determine the rate of pay of the members of the Victorian Public Service Association who worked on the days referred to in Regulation 44 (2) (*a*) (*sic*) of the *National Security* (*Supplementary*) *Regulations.*

And whereas I am satisfied that the industrial dispute arising out of the said industrial matters is one proper to be dealt with by the Commonwealth Court of Conciliation and Arbitration in the interests of industrial peace and national security by virtue of the provisions of Regulation 5 (*a*) of the *National Security* (*Industrial Peace*) *Regulations.*

Now therefore I, Edward John Ward, the Minister of State for Labour and National Service, in pursuance of the powers conferred by Regulation 9 of the *National Security* (*Industrial Peace*) *Regulations* do hereby refer the said matters to the Court to hear and determine."

The Victorian Public Service Association served on the Crown Solicitor for Victoria particulars of claim which were substantially as follows:—

1. The Association is a voluntary association of officers employed by the State of Victoria in the Public Service of Victoria under the

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provisions of the *Public Service Act* 1928 (No. 3757) (which with its amendments is cited as the *Public Service Acts*) and of regulations made under the *Public Service Acts*.

2. The Public Service Board is constituted by Part II. of the *Public Service Act* 1928 as amended by several Acts and particularly by the *Public Service Act* 1940.

3. In respect of work done on holidays appointed by or pursuant to the *Public Service Act* 1928, sec. 187, the Association claims that officers should be paid holiday pay as follows:—(*a*) for work done on Saturday, 27th December 1941, one day's pay calculated at ordinary rates; and (*b*) for work done on each of the following days —to wit, Labour Day 1942, Easter Monday 1942, and Easter Tuesday 1942—at overtime rates according to the scale set out in Part I. of Chapter XII. of the Regulations under the *Public Service Acts*.

4. In respect of time of duty the Association claims that the hours of attendance of its members should be fixed by an award of the Court at not less than those set out in Part I. of Chapter XII. aforesaid before the amendment thereof made on 21st April 1942, and that the said hours should not be increased or otherwise varied to the detriment of officers without the authority of the Court.

5. In respect of time worked by him on any day in excess of the hours (*a*) fixed for such day each officer shall be paid overtime at rates not less than the overtime rates according to the scale set out in Part I. of Chapter XII. aforesaid, and (*b*) that as to such payment the award be made retrospective to 13th April 1942.

The Victorian Public Service Association is a voluntary organization of the members of the Victorian public service banded together to promote their common interests in matters connected with the occupations carried on by the members. It is not registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. Members of the Association include officers of the first, professional, clerical and general divisions of the public service, employed under the *Public Service Acts* (Vict.) in the various departments, such as the Departments of the Premier, Treasurer, Chief Secretary, Lands, Law, Water Supply, Forests, Mines and Agriculture, and in State instrumentalities such as the Country Roads Board and the Liquid Fuel Control Board.

On 21st April 1942 the Public Service Board had amended Chapter XII. of the Public Service Regulations. The effect of the amendment was that hours of attendance of officers were increased from seventy-six to eighty-one per fortnight, and overtime was paid only for hours worked in excess of eighty-three per fortnight.

All members of the Victorian public service had been called on to work, in pursuance of the *National Security* (*Supplementary*) *Regulations*, on 27th December 1941, 16th March 1942, and 6th and 7th April 1942, and certain members of the public service were called on to work on 15th June 1942, all of which were public holidays in Victoria. The secretary of the Public Service Association had made demands on the Public Service Board for pay in respect of the work done on those days based on alleged rights to such payments given by the Regulations, but the Board refused to make the payments.

Judge *Kelly*, before whom the reference came on to be heard, held:—(1) That the Governor-General had authority, pursuant to sec. 5 of the *National Security Act* 1939-1940, to make the *National Security* (*Industrial Peace*) *Regulations*. (2) That the matters referred to the Court by the Minister of State for Labour and National Service on 20th June 1942 were industrial matters within the meaning of the *National Security* (*Industrial Peace*) *Regulations*. (3) That the Court had power to hear and determine the said industrial matters. The matter was listed for further hearing.

On application made on behalf of the State of Victoria and the Public Service Board of that State *Latham* C.J. ordered the Commonwealth Court of Conciliation and Arbitration and Judge *Kelly* to show cause before the Full Court of the High Court why a writ of prohibition should not be issued to restrain them and each of them from further proceeding to hear and determine the reference, on the following grounds:—

1. That the "matters" referred to in the reference dated 20th June 1942 signed by the Minister of State for Labour and National Service were not "industrial matters" within the meaning of the *National Security* (*Industrial Peace*) *Regulations*.

2. That the *National Security* (*Industrial Peace*) *Regulations*, or alternatively reg. 9 thereof, were or was invalid and not authorized by any power conferred upon the Parliament of the Commonwealth by the Commonwealth Constitution.

3. That the granting of the application of the Victorian Public Service Association, which was the claimant against the State of Victoria and the Victorian Public Service Board in the Commonwealth Court of Conciliation and Arbitration, involved an alteration of rates of remuneration applicable to an employment on 10th February 1942 contrary to the *National Security* (*Economic Organization*) *Regulations* of the Commonwealth.

By amendment, Joseph Charles MacDonald, representing himself and all other members of the Victorian Public Service Association, was added as a respondent.

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Victoria v. *The Commonwealth.*

DEMURRER.

The State of Victoria and the Attorney-General for that State brought an action in the High Court against the Commonwealth of Australia.

The statement of claim was, in substance, as follows :—

1. The plaintiffs are the State of Victoria and His Majesty's Attorney-General for the State of Victoria.

2. The defendant is the Commonwealth of Australia.

3. Purporting to act pursuant to the provisions of the *National Security Act* 1939-1940 the Governor-General of the Commonwealth has made certain Regulations entitled *National Security* (*Supplementary*) *Regulations*, being Statutory Rules 1940 No. 126, and has from time to time amended the same.

4. On 23rd September 1942 the Governor-General of the Commonwealth made an amendment to the *National Security* (*Supplementary*) *Regulations* by Statutory Rules 1942 No. 407 as follows :—

" Regulation 29 of the *National Security* (*Supplementary*) *Regulations* is amended by adding at the end thereof the following sub-regulation :—

' (8) The foregoing provisions of this regulation shall, in respect of the State of Victoria, apply also, on the last Thursday in September, 1942 (being Royal Agricultural Show Day), to employers and managers (being persons engaged in the business of banking or of insurance) and to every Commonwealth or State Department, or authority of the Commonwealth or of a State, engaged on any work whatsoever and to all employees of any such employer or manager and to officers and employees of any such Department or authority.' "

5. On 1st October 1942 the Governor-General of the Commonwealth made an amendment to the *National Security* (*Supplementary*) *Regulations* by Statutory Rules 1942 No. 422 as follows :—

" Regulation 29 of the *National Security* (*Supplementary*) *Regulations* is amended by adding at the end thereof the following sub-regulations :—

' (9) If under any law or industrial award, order, determination or agreement, an employee in the State of Victoria would have been entitled to a holiday on the first Tuesday in November, 1942, had that day been appointed by proclamation under any law of that State to be observed as a public holiday, he shall, in respect of work on which he was engaged on that day, be entitled to the compensation to which he would have been entitled under the law or industrial award, order, determination or agreement if that day had been so proclaimed.

(10) Where an employee who is so engaged on the first Tuesday in November, 1942, is not entitled under any law or industrial award, order, determination or agreement to additional payment in respect of his being or having been so engaged, the provisions of sub-regulations (3) and (4) of this regulation shall extend to any such employee.' "

6. (*a*) The regulations made by Statutory Rules 1942 No. 407 are, either wholly or in so far as the same purport to affect or apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.) not authorized by any power validly conferred upon the said Governor-General by the *National Security Act* 1939-1940 or by any other enactment of the Parliament of the Commonwealth.

(*b*) The *National Security Act* 1939-1940 if and so far as it purports to confer upon the Governor-General power to make the regulations contained in Statutory Rules 1942 No. 407, or alternatively if and so far as it purports to confer power upon the Governor-General to affect by the said regulations persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.), is not authorized by sec. 51 (vi.) of the Constitution of the Commonwealth or by any other power conferred by the Constitution upon the Commonwealth.

(*c*) Alternatively to (*b*) hereof, upon the true construction of the regulations made by Statutory Rules 1942 No. 407, the same do not affect or apply to persons employed by the plaintiff the State of Victoria, pursuant to the provisions of the *Public Service Act* 1928 (Vict.).

7. (*a*) The regulations made by Statutory Rules 1942 No. 422 are, either wholly or in so far as the same purport to affect or apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.), not authorized by any power validly conferred upon the Governor-General by the *National Security Act* 1939-1940 or by any other enactment of the Parliament of the Commonwealth.

(*b*) The *National Security Act* 1939-1940, if and so far as it purports to confer upon the Governor-General power to make the regulations contained in Statutory Rules 1942 No. 422, or alternatively if and so far as it purports to confer power upon the said Governor-General to affect by the said regulations persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 of the said State, is not authorized by sec. 51 (vi.) of the Constitution of the Commonwealth or by any other power conferred by the Constitution upon the Commonwealth.

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(*c*) Alternatively to (*b*) hereof, upon the true construction of the regulations made by Statutory Rules 1942 No. 422, the same do not affect or apply to persons employed by the plaintiff the State of Victoria, pursuant to the provisions of the *Public Service Act* 1928 (Vict.).

The plaintiffs claim :—

(*a*) A declaration that the regulations made by Statutory Rules 1942 No. 407 are, either wholly or in so far as the same purport to affect or apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.), not authorized by any power validly conferred upon the Governor-General by the *National Security Act* 1939-1940 or by any other enactment of the Parliament of the Commonwealth.

(*b*) A declaration that the *National Security Act* 1939-1940, if and so far as it purports to confer upon the Governor-General power to make the regulations contained in Statutory Rules 1942 No. 407, or alternatively if and so far as it purports to confer upon the Governor-General power to affect by the said regulations persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.), is not authorized by sec. 51 (vi.) of the Constitution of the Commonwealth or by any other power conferred by the Constitution upon the Commonwealth.

(*c*) A declaration that upon the true construction of the regulations made by Statutory Rules 1942 No. 407 the same do not affect or apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.).

(*d*) A declaration that the regulations made by Statutory Rules 1942 No. 422 are, either wholly or in so far as the same purport to affect or apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.), not authorized by any power validly conferred upon the Governor-General by the *National Security Act* 1939-1940 or by any other enactment of the Parliament of the Commonwealth.

(*e*) A declaration that the *National Security Act* 1939-1940, if and so far as it purports to confer upon the Governor-General power to make the regulations contained in Statutory Rules 1942 No. 422, or alternatively if and so far as it purports to confer upon the Governor-General power to affect by the said regulations persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.), is not authorized by sec. 51 (vi.) of the Constitution of the Commonwealth of Australia or by any other power conferred by such Constitution upon the Commonwealth.

(*f*) A declaration that upon the true construction of the regulations made by the Statutory Rules 1942 No. 422 the same do not affect or

apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928 (Vict.).

The Commonwealth demurred to the statement of claim. The demurrer was as follows :—

1. The defendant demurs to the statement of claim herein.
2. Among the grounds on which the defendant will rely are :—

(*a*) The regulations made by the Statutory Rules referred to in the statement of claim are respectively authorized by power validly conferred upon the Governor-General by the *National Security Act* 1939-1940.

(*b*) The *National Security Act* 1939-1940 is authorized by the Constitution of the Commonwealth of Australia.

(*c*) Upon their true construction the regulations made by the said Statutory Rules respectively affect or apply to persons employed by the plaintiff the State of Victoria pursuant to the provisions of the *Public Service Act* 1928.

Royal Agricultural Show Day is a statutory holiday under the *Public Service Act* 1928 (Vict.), sec. 187 (*f*), but it was cancelled in 1942. The first Tuesday in November is ordinarily Melbourne Cup Day. It is not declared by statute to be a public holiday, and in 1942 was not proclaimed a public holiday.

The two matters were argued together.

Fullagar K.C. (with him *Dean*), for the State of Victoria, the Attorney-General thereof, and the Victorian Public Service Board. It was not competent for the Minister to refer, nor for Judge *Kelly* to adjudicate on, the matters contained in the reference. The members of the Public Service Association of Victoria are not engaged in an "industry," and their claim did not involve an "industrial matter." Expressions used in the *National Security* (*Industrial Peace*) *Regulations* have the same meaning as in the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The work of the State public service is not "industrial" (*Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1); *Bank Officials' Association* v. *Bank of Australasia* (2); *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (3); *Federated State School Teachers' Association of Australia* v. *State of Victoria* (4); *Commonwealth Public Service Commissioner* v. *Government Service Women's Federation* (5)). The fact that the *National Security* (*Industrial Peace*) *Regulations* were made under the defence power

(1) (1919) 26 C.L.R. 508.
(2) (1923) 33 C.L.R. 517.
(3) (1931) 45 C.L.R. 409.
(4) (1929) 41 C.L.R. 569, at pp. 574, 591.
(5) (1920) 14 C.A.R. 794.

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does not give the expressions used therein a wider meaning than they have in the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The *National Security* (*Industrial Peace*) *Regulations* are not authorized by the defence power of the Commonwealth and are invalid (*South Australia* v. *The Commonwealth* (1)). Reg. 29 (8), (9) and (10) of the *National Security* (*Supplementary*) *Regulations* is not a valid exercise of the defence power. The relations between the State public servants and the State are prima facie a matter for State regulation alone: See Constitution, sec. 106. The defence power is not unlimited: See *South Australia* v. *The Commonwealth* (2), where *Latham* C.J. and *Starke* J. held that the *Income Tax* (*War-time Arrangements*) *Act* 1942 was invalid, and *Rich*, *McTiernan* and *Williams* JJ. said that there was a limit to the defence power (3).

Menzies K.C. (with him *Dethridge*), for J. C. MacDonald, representing the members of the Victorian Public Service Association. The *National Security* (*Industrial Peace*) *Regulations* are a valid exercise of the defence power. The term "industrial dispute" has a wider meaning in regulations made under the defence power than in legislation enacted under the arbitration power. Reg. 9 of the *Industrial Peace Regulations* is designed to anticipate industrial unrest, so that a matter may be dealt with by the Commonwealth Court of Conciliation and Arbitration before dislocation, with consequent danger to public security, arises. In time of war the Commonwealth may tell citizens where and when and for whom they are to work (*South Australia* v. *The Commonwealth* (4)). The granting of the application of the Public Service Association would not involve an alteration of rates of remuneration applicable to an employment contrary to the *National Security* (*Economic Organization*) *Regulations*. No rate of remuneration has been prescribed for Victorian public servants who work on public holidays in accordance with Commonwealth regulations. The public servants were not required to work on the holidays under sec. 187 of the *Public Service Act* 1928 (Vict.), but under the Commonwealth regulations.

Ham K.C. (with him *Barry* K.C. and *Fraser*), for the Commonwealth. The matters contained in the reference were "industrial matters" within the meaning of that phrase in the *National Security* (*Industrial Peace*) *Regulations*. Expressions used in the Regulations have the same meaning as in the *Commonwealth Conciliation and*

(1) (1942) 65 C.L.R. 373, at pp. 431, 468.
(2) (1942) 65 C.L.R. 373.
(3) (1942) 65 C.L.R., at pp. 438, 458, 468, 469.
(4) (1942) 65 C.L.R. 373.

Arbitration Act 1904-1934. The wide construction placed on the meaning of the word "industry" by decisions of this Court should be adopted. As to the meaning of "industry", see *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1); *Federated State School Teachers' Association of Australia* v. *Victoria* (2); *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (3). The meaning of expressions in the Act has been restricted because the Act is made under the limited arbitration power contained in the Constitution, sec. 51 (xxxv.); the Regulations are made under the defence power, and the meaning of expressions therein is not restricted by limitations on power. The *Industrial Peace Regulations* are within the ambit of the defence power. Under the defence power the Commonwealth can control the whole resources of the Commonwealth and suspend temporarily the policy of the States (*Farey* v. *Burvett* (4); *South Australia* v. *The Commonwealth* (5)). It is within the defence power to pass legislation conducive to the harmony of the community, and therefore to the efficient conduct of the war, by providing that in the matter of holidays all shall be on the same footing: See also *Liversidge* v. *Anderson* (6).

Fullagar K.C., in reply. The relations between the public service and the State, apart from departments related to defence, are the exclusive concern of the State. The word "industrial" in the *National Security* (*Industrial Peace*) *Regulations* has not a wider meaning than it has in the *Commonwealth Conciliation and Arbitration Act*. Reg. 29 (8) and (9) purports to regulate the relations between the State and the public service and is invalid.

Cur. adv. vult.

Nov. 26.

The following written judgments were delivered:—

LATHAM C.J. *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*.—This is an application for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration, his Honour Judge *Kelly*, a judge of that Court, and (by amendment) Joseph Charles MacDonald, a person representing himself and all other members of the Victorian Public Service Association, to prohibit any further proceeding by the said Court or judge in hearing and determining a certain alleged industrial dispute.

(1) (1919) 26 C.L.R., at p. 554.
(2) (1929) 41 C.L.R., at p. 575.
(3) (1908) 6 C.L.R. 309, at pp. 338, 368.
(4) (1916) 21 C.L.R. 433, at pp. 455, 458.
(5) (1942) 65 C.L.R. 373.
(6) (1941) 2 All E.R. 612.

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The *National Security* (*Industrial Peace*) *Regulations*, made under the *National Security Act* 1939-1940, provide in reg. 9 that: "Where the Minister is of the opinion that any industrial matter has led, or is likely to lead, to industrial unrest, he may refer that matter to the Court and, notwithstanding that an industrial dispute affecting that matter does not exist, the Court may proceed to hear and determine the matter . . . as if it were an industrial dispute." Reg. 5 provides that, in addition to the industrial disputes of which the Court has cognizance in pursuance of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, the Court shall also have cognizance of all industrial disputes which the Minister certifies to the Court as being proper to be dealt with in the interests of industrial peace and national security. Acting under these provisions the Minister for Labour and National Service has referred to the Court (reg. 9) and certified to the Court (reg. 5) certain "industrial matters" and an "industrial dispute" arising out of those matters. The matters are (1) increase by the Government of Victoria of hours of duty of members of the Association, and (2) refusal of the Public Service Board of the State of Victoria to determine rates of pay of such members who worked on certain days which normally are holidays, but which in 1942 were not holidays. Hours of duty and rates of pay of the public service of Victoria have hitherto been determined under the provisions of the *Public Service Acts* of Victoria. The members of the Association include the State public servants in the professional, clerical and general divisions of the service: see *Public Service Act* 1928, sec. 18. The Association thus includes State employees in the Departments of the Premier, of the Treasury, and in the Departments of Lands, Law, Public Works, Mines, Agriculture, Labour and Health. Manual, as well as clerical and professional employees, are included.

It is objected in the first place by the prosecutors that these "matters" are not "industrial matters" within the meaning of the *Industrial Peace Regulations*.

Reg. 2 (2) provides that expressions used in the Regulations shall, unless the contrary intention appears, have the same meaning as in the Act, i.e., the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

His Honour Judge *Kelly* has decided that the matters referred to are "industrial matters," because they fall within the meaning of "industrial matters" as (inclusively) defined in the Act. Sec. 4 of the Act provides that: "Industrial matters" include, *inter alia*, all matters relating to pay, wages, reward, hours, privileges, rights, or duties of employers or employees. "Employer" is defined as

meaning any employer in any industry, and "employee" as meaning any employee in any industry. "Industry" is declared to include: "(*a*) any business, trade, manufacture, undertaking, or calling of employers, on land or water; (*b*) any calling, service, employment, handicraft, or industrial occupation or avocation of employees, on land or water; . . ."

These provisions, as used in the Regulations, are, it was held by Judge *Kelly*, to be given their full meaning according to their terms. In particular, they are not to be read down or limited in any way in order to bring the Regulations within the legislative power vested in the Commonwealth Parliament by sec. 51 (xxxv.) of the Constitution in relation to: "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." The construction of the *Arbitration Act* has been affected by the fact that its provisions can be valid only if they can be supported under sec. 51 (xxxv.). For example, if the Act were construed to apply to all employer-employee relations, it could not validly so be applicable. It could apply only where there was a dispute, where that dispute was an industrial dispute, and where it extended beyond the limits of any one State. These limitations necessarily follow from the terms of sec. 51 (xxxv.) of the Constitution, upon which the Act relies for its authority. But the *Industrial Peace Regulations* are made under the defence power (sec. 51 (vi.), not under the arbitration power. They remove the limitations mentioned: see regs. 4, 9 and 13. Accordingly, it is said, because the State Government is an employer and also because the members of the Public Service Association are engaged in industry in that they all follow some calling, service, employment, &c., questions relating to the hours of work and pay of members of the Association are "industrial matters" within the meaning of the Regulations and so may be referred by the Minister to the Court in pursuance of reg. 9.

I agree that the interpretation of the *Industrial Peace Regulations* should not be affected by considerations derived from the terms of sec. 51 (xxxv.) of the Constitution. But the Regulations adopt the definitions contained in the Act. Close examination of those definitions shows, in my opinion, that they are all limited by reference to the word "industry" used in its ordinary sense, and that sec. 4 of the Act does not extend that meaning so as to include callings, employments, &c., which are not industrial in that sense.

"Industrial matters" includes matters relating to work, pay, hours, &c., of *employers or employees*. But "employer" *means* employer "*in any industry*"—and employee has a like meaning.

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Then "industry" is declared to include "any business, trade, manufacture, . . . of *employers*," and "any calling, service, employment, . . . of *employees*"—i.e., of employers and employees *in an industry*. These provisions would be absurd if "industry" in the definitions of employers and employees were given the meaning of employment, whether industrial or not. Unless "industry" is given some other meaning the definitions become unintelligible —they merely refer back to each other with no explication of the significance of the terms. The difficulty is solved, not by ignoring the reference to "industry" in the definitions of employers and employees or by making it meaningless, but by regarding the Act as dealing only with *industrial* disputes, in the ordinary sense of that term, and not in any case with non-industrial disputes. That this is the intention of the Act is shown by the incorporation of the reference to industry in the definitions of employers and employees. If Parliament had intended to deal with all employer-employee relations, whether in an industry or not, there would have been no reason whatever for such definitions. Those definitions are based upon the assumption that there may be employers and employees engaged "in an industry" and also not so engaged. It would, I think, be a strange procedure to use the subsequent definition of "industry" for the purpose of establishing that all employers and employees were necessarily, for the purposes of the Act, employers and employees in an industry.

This view that anything that is not industrial in the ordinary sense of that word is deliberately excluded by the Act finds support directly relevant to this case in the definition of "industrial dispute" in sec. 4. When that definition is read subject to the exclusion of the reference to inter-State extension of disputes which is effected by reg. 4, it becomes:—

"Industrial dispute . . . includes—

(I.) any dispute as to industrial matters, and

(II.) any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State, and

(III.) any threatened or impending or probable industrial dispute."

If "industry" were construed in such a way that all employers and all employees are to be taken to be engaged in industry merely because they are employers or employees, so that any dispute between such persons in such characters would be an industrial dispute, then par. II. of the definition would be quite unnecessary. If all matters affecting employer-employee relationships were

included in "industrial matters," then par. 1. of the definition would have included both Commonwealth and States as employers. But it was thought necessary to make a special and particular provision for these cases. That provision does not relate to employment *simpliciter*, but to "employment *in an industry* carried on by or under the control of the Commonwealth or a State" &c. It is not enough that there should be the relation of employer and employee: there must be employment in an industry.

Thus, in my opinion, the references in sec. 4 of the Act under "industrial matters" to "employers and employees" and to "employment" limit the effect of the provision by confining it to matters which are industrial in the ordinary sense of that word.

It is unnecessary to embark upon an examination of all the difficulties associated with the meaning and application of the word "industrial." It is a vague term—one of the terms whose meaning can be explained by illustration rather than by definition *per genus et differentiam*. In biology, classes of animals or plants may be "defined" by reference to type specimens—by reference to a central point within, rather than to a boundary line without. A plant is said to belong to a particular variety if it sufficiently resembles the type specimen. The same principle must be adopted in relation to some social and economic conceptions. In this field categories shade out into one another and it is sometimes impossible to draw an absolute line of demarcation.

An ordinary factory producing for profit is plainly an industrial undertaking. So is an enterprise providing services for reward upon a purely commercial basis. Such cases are clear. In each there is the characteristic of supplying goods or services which are paid for by the recipient, such supply being undertaken with a view to profit. Thus the publication of newspapers has been held to be an industrial enterprise. The definition of industrial disputes has been held to include disputes between municipal corporations and their employees engaged in making and maintaining roads and public lighting (*Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1)), even though there was no profit motive; and it also includes disputes between banking and insurance clerks and their employers: *Australian Insurance Staffs' Federation* v. *Accident Underwriters Association* (2), where the employees were not manual labourers.

But the Court held that a dispute as to the pay &c. of State teachers was not an industrial dispute (*Federated State School*

(1) (1919) 26 C.L.R. 508.

(2) (1923) 33 C.L.R. 517.

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Teachers' Association of Australia v. *Victoria* (1)). In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2) the fact that a State was engaged in industry, and not the mere fact that the State was an employer, was the circumstance which was held to make it possible for the State or its Minister to be a party to an industrial dispute.

No-one would say that, in the ordinary sense of the word industry, a public servant in one of the ordinary governmental departments was engaged in industry. Officers in the Lands Department and the Titles Office and the Attorney-General's Department, policemen controlled by the Chief Secretary, are all doing useful and necessary work as employees of the State, but it would be a misuse of words to describe them or their employer as engaged in industry. The questions that may arise in relation to their employment are not industrial matters.

The distinction between governmental and industrial matters has been clearly recognized by this Court: *Federated State School Teachers' Association of Australia* v. *Victoria* (3); (in connection with the first passage referred to, I refer to what I have already said as to the definition of various terms in the *Arbitration Act*)—and see per *Isaacs* J. dissenting, but nevertheless saying:—"In no case has it ever been suggested that Crown officials engaged in administering true, essential governmental authority come within the ambit of the industrial disputes power. For instance, no-one has ever thought that Treasury officials performing duties under the *State Trading Concerns Act* 1916 of Western Australia, or under the State railway systems are within the Commonwealth industrial dispute jurisdiction although the trading employees are. There is a line of demarcation inherent in all British Constitutions which inexorably divides the two classes of cases" (4).

I am accordingly of opinion that the matters referred to the Arbitration Court by the Minister were not industrial matters within the meaning of the *Arbitration Act* or of the *Industrial Peace Regulations* and that for this reason the order nisi should be made absolute. It is unnecessary to consider other grounds taken by the prosecutors.

Victoria v. *The Commonwealth*.—In this action the plaintiffs raise the question of the validity of certain regulations made under the *National Security Act* 1939-1940 and of the Act itself. The challenged

(1) (1929) 41 C.L.R. 569.
(2) (1920) 28 C.L.R. 129.
(3) (1929) 41 C.L.R. 569, at pp. 574, 575, also p. 591.
(4) (1929) 41 C.L.R., at p. 584.

regulations are Statutory Rules 1942 No. 407 and Statutory Rules 1942 No. 422. These Statutory Rules add sub-regulations to reg. 29 of the *National Security* (*Supplementary*) *Regulations* (Statutory Rules 1940 No. 126 as subsequently amended). Statutory Rules 1942 No. 407 applies to all Victorian State Departments and to employees of such departments, and Statutory Rules 1942 No. 422 applies to all employees in Victoria.

The defendant has demurred to the statement of claim upon the grounds that the regulations and the *National Security Act* 1939-1940 are valid and that upon their true construction the challenged regulations apply (i.e., validly apply) to persons employed under the *Public Service Act* 1928—i.e., to all Victorian public servants. The demurrer comes for argument before this Court.

The original reg. 29 of the statutory rule was repealed by Statutory Rules 1942 No. 242 and a new regulation was made. The new regulation in effect requires establishments, factories, &c., engaged on war work to be carried on upon holidays in the same manner as if the holidays were ordinary working days (sub-reg. 1). Sub-reg. 2 provides that employees engaged in work on such days should be paid as required by any appropriate law or industrial award, order, determination or agreement. Sub-reg. 3 provides for cases in which there is no such law or award &c. applicable and authorizes "any tribunal or authority having jurisdiction to determine disputes or claims in respect of rates of pay or conditions of employment in relation to the work on which the employee is employed" to award additional payment for such work. Sub-reg. 4 provides that an employee to whom such a determination applies shall be entitled to sue for and recover in any court of competent jurisdiction any payment to which he is entitled under the determination. The days to which the regulation applies include days in 1942 which are holidays by virtue of State law (sub-reg. 7). By Statutory Rules 1942 No. 282 a new sub-regulation (4A) was made, which authorized the Commonwealth Court of Conciliation and Arbitration or a Conciliation Commissioner or any person duly authorized by the Minister to deal with disputes under the regulations, and, in the absence of agreement, to make a determination binding upon the parties.

Reg. 29, as it stood before the making of Statutory Rules 1942 No. 407, applied to "every establishment, factory, mine, dockyard, or workshop, which is engaged wholly or partly in production for war or defence purposes, or in the repair or overhaul of munitions of war, and every Commonwealth or State Department, or authority of the Commonwealth or of a State engaged on work associated with the prosecution of the war."

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Statutory Rules 1942 Nos. 407 and 422 extended reg. 29 so as to make it apply to all State public servants, without any reference to the character of their work, i.e., the application of the regulation in such cases is not made to depend upon the work in question having any connection with war or defence purposes.

Statutory Rules 1942 No. 407 adds the following sub-regulation to reg. 29 :—

"(8) The foregoing provisions of this regulation shall, in respect of the State of Victoria, apply also, on the last Thursday in September, 1942 (being Royal Agricultural Show Day), to employers and managers (being persons engaged in the business of banking or of insurance) and to every Commonwealth or State Department, or authority of the Commonwealth or of a State, engaged on any work whatsoever and to all employees of any such employer or manager and to officers and employees of any such Department or authority."

Statutory Rules 1942 No. 422 adds the following sub-regulations to reg. 29 :—

"(9) If under any law or industrial award, order, determination or agreement, an employee in the State of Victoria would have been entitled to a holiday on the first Tuesday in November, 1942, had that day been appointed by proclamation under any law of that State to be observed as a public holiday, he shall, in respect of work on which he was engaged on that day, be entitled to the compensation to which he would have been entitled under the law or industrial award, order, determination or agreement if that day had been so proclaimed.

(10) Where an employee who is so engaged on the first Tuesday in November, 1942, is not entitled under any law or industrial award, order, determination or agreement to additional payment in respect of his being or having been so engaged, the provisions of sub-regulations (3) and (4) of this regulation shall extend to any such employee."

The first Tuesday in November is ordinarily Melbourne Cup Day. In 1942 this day was not proclaimed as a holiday. The plaintiffs challenge the validity of these three sub-regulations so far as they apply to Victorian State Departments and to members of the Victorian public service.

Holidays in the public service of Victoria are fixed by or under the *Public Service Act* 1928, sec. 187, and the *Public and Bank Holidays Act* 1934, sec. 4. When an officer works on such a holiday he is not, in general, entitled to extra pay (salaries are on an annual basis, not a daily basis—*Public Service Act* 1928, secs. 26 et seq.),

but is entitled in lieu thereof to a holiday upon such other occasion as does not interfere with public business (sec. 187 (2)); though upon the certificate of the permanent head of a department and with the authority of the Public Service Commissioner (now the Public Service Board—Act No. 4751, sec. 3, First Schedule) a gratuity for overtime work may be paid (sec. 192).

Thus the State Parliament has provided a legislative scheme for dealing with work done by public servants on days which would normally be holidays. The Commonwealth regulations purport to authorize the Commonwealth Court of Conciliation and Arbitration, a Conciliation Commissioner, or any person appointed by the Commonwealth Minister, to substitute some other scheme for that which has been embodied in the State statutes and to do this whether or not the State servants concerned are employed in an establishment &c. engaged in connection with war or defence purposes. The question is whether the Commonwealth legislative power extends to cover such cases.

It has not been argued that the Commonwealth Parliament has power to make laws with respect to State servants as such. The Commonwealth Parliament possesses the powers conferred upon it by the Constitution and no other powers. The Commonwealth Parliament has full power to legislate with respect to the public service of the Commonwealth and has no power to legislate with respect to the public service of a State—for the simple reason that no provision of the Constitution contained in sec. 51 or elsewhere confers such a power upon it. The Constitutions of the States are, subject to the Commonwealth Constitution, preserved by sec. 106. The State Parliaments therefore, by virtue of the Constitutions of their own States expressly preserved by the Commonwealth Constitution, have full power to legislate for their respective public services. They have no power to legislate with respect to the Commonwealth public service.

But, though the Commonwealth cannot take control of State public services, it may affect such services by laws passed under powers which do not directly relate to such services but which are such that the exercise of the Commonwealth powers affects State services. Thus I can see no reason to doubt the Commonwealth power to make laws which apply to State servants engaged in war work for the Commonwealth—but such laws are justified because it is clear that they relate to defence and to State servants only so far as they are connected with defence.

The validity of sec. 5 of the *National Security Act* 1939-1940, under which the regulations were made, is not now open to challenge

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(*Wishart* v. *Fraser* (1)). The question is whether Statutory Rules 1942 Nos. 407 and 422 are authorized by sec. 5, as being regulations "for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth", or as being "necessary or convenient to be prescribed, for the more effectual prosecution of the war."

The effect of the new provisions added by Statutory Rules 1942 Nos. 407 and 422 is to extend the operation of reg. 29 to Victorian public servants who are not employed in any department engaged in war or defence work. These provisions therefore can be supported only if such Federal control of State public servants, without reference to the character of their work, can be shown to be a measure which is really a defence measure.

In *South Australia* v. *The Commonwealth* (*Uniform Taxation Case*) (2) I quoted the very wide definitions or descriptions of the defence power which are to be found in *Farey* v. *Burvett* (3). Even upon this basis, I said that there must be "*some* connection between the legislation in question and the defence of the country." In that case I differed from the majority of the Court only in that I could not discern any such connection in the case under consideration.

The argument for the Commonwealth was principally based upon a statement of *Isaacs* J. in *Farey* v. *Burvett* (4) that a measure will be authorized under the defence power if it "may conceivably in such circumstances even incidentally aid the effectuation of the power of defence." The words "conceivably" and "even incidentally" were especially emphasized. The circumstances to which his Honour referred were the facts that the people of Australia were actors, not spectators, in a mighty and unexampled struggle and that the Court could see beyond controversy that "co-ordinated effort in every department of our life may be needed to ensure success and maintain our freedom." Those circumstances exist again to-day. It should require no argument to show that co-ordination of national effort and full utilization of national resources are essential to effective defence, and that the responsibility for defence rests with Parliament and the Government and not with any court.

The acceptance of these propositions involves the result that a court will be most cautious and indeed reluctant before it decides that measures which are promulgated under the defence power are not really defence measures, but that they exceed the limits of that power. But the most complete recognition of the power and responsibility of Parliament and of the Government in relation to defence

(1) (1941) 64 C.L.R. 470.
(2) (1942) 65 C.L.R., at pp. 431, 432.
(3) (1916) 21 C.L.R. 433.
(4) (1916) 21 C.L.R., at pp. 455, 456.

does not involve the conclusion that the defence power is without any limits whatever. The existence of the defence power in the Commonwealth Parliament and the exercise of that power do not mean that all governmental power in Australia may, by the action of the Commonwealth Parliament, be concentrated in Commonwealth authorities. The Constitution cannot be made to disappear because a particular power conferred by the Constitution upon the Commonwealth Parliament is exercised by that Parliament. Indeed, the grant of the power to legislate with respect to defence is made expressly "subject to this Constitution"—see opening words of sec. 51. If, under the defence power, the Commonwealth can control the pay, hours and duties of all State public servants, it is obvious that the Commonwealth can take complete control of all governmental administration within Australia. The result would be the abolition, in all but name, of the federal system of government which it is the object of the Constitution to establish—preamble and clause 3 of the covering clauses of the Constitution.

But such a result cannot follow if the defence power is regarded as enabling the Commonwealth Parliament to make such laws only as have a real connection with defence. In spite of the use of the word "conceivably," I do not regard the statement of *Isaacs* J. which I have quoted as meaning more than this, except that, recognizing the great scope and profound national importance of the defence power, it emphasizes the necessity for care and caution before deciding that a particular measure, put forward as appertaining to defence, in truth and in substance has nothing to do with defence. When the statement is thus understood it goes no further than the reasons for judgment of the other members of the Court in *Farey* v. *Burvett* (1), and it is only in this sense that, in my opinion, it should be accepted as authoritative.

It may be observed that the passage which I have quoted from the judgment of *Isaacs* J. begins with the following sentence:—"I do not hold that the" (Commonwealth) "legislature is at liberty wantonly and with manifest caprice to enter upon the domain ordinarily reserved to the States" (2). His Honour therefore concedes the existence of some limitations upon the defence power. Since *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (3), however, no conclusion as to the validity of Commonwealth legislation can be based upon any supposed reservation of particular matters to the States. There is nothing in the words last quoted to support the proposition that only measures which are

(1) (1916) 21 C.L.R. 433.
(2) (1916) 21 C.L.R., at p. 455.
(3) (1920) 28 C.L.R. 129.

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wanton and manifestly capricious are beyond the defence power or that wantonness and capriciousness are special tests of the constitutional validity of statutes in relation to that power. The principle which would destroy the validity of wanton and capricious measures may, I venture to think, be expressed by stating that a law must have a real connection with a subject matter in order to be validly enacted under a power to make laws with respect to that subject matter. This is the criterion which the Court has always applied, whatever may have been the legislative power in question—whether trade and commerce, taxation, arbitration in relation to industrial disputes or any other subject matter. The question always must be: "Is the challenged law really (i.e., in substance) a law with respect to the subject matter in question?" If the answer is in the negative the law cannot be valid under the power to make laws with respect to that subject matter. That test is not always easy to apply. I have stated my opinions on this question in *South Australia* v. *The Commonwealth* (*Uniform Taxation Case*) (1).

In this case the Court has to deal with regulations which substitute control by a Commonwealth authority for the control provided by Victorian statutes in relation to pay of Victorian public servants for work on days which are normally holidays. If such public servants are engaged in war work of the kind specified in reg. 29 (1), no difficulty arises. The question arises as to public servants who are not engaged in such work and who are brought within the regulations only by Statutory Rules 1942 Nos. 407 and 422.

Prima facie the work of such public servants, e.g., in the Lands Office and the Titles Office, is not connected with the war—except in so far as everything in an organized community is connected with everything else in that community. It is essentially civilian in character. Indeed, it is as far from the war as anything can be—even during a war of such gigantic percussions and repercussions as the present war.

The arguments in support of the validity of the regulations may be fairly expressed, I think, in two propositions.

In the first place, there is a suggestion that Commonwealth control of anything is more efficient than State control, and that therefore the extension of Commonwealth control promotes general efficiency and therefore assists the war effort. I gave reasons for declining to make this assumption as the basis of a legal decision in the *Uniform Taxation Case* (2), and I see no reason for making it in the present case. The rejection of this assumption is not inconsistent

(1) (1942) 65 C.L.R., at pp. 424-426. (2) (1942) 65 C.L.R., at p. 433.

with the proposition that, in relation to many matters, national control is necessary or desirable to secure efficiency and promptitude in action. This may be apparent from the nature of the case, or it may be established by evidence. But the mere fact of a desire by the Commonwealth to assume powers in relation to a particular matter does not conclude the question.

The substantial argument for the Commonwealth was that, especially in time of war, civic contentment and good feeling is very important and that this is prejudiced if State servants are dissatisfied with respect to holiday pay. Therefore, it is argued, the Commonwealth must, under the defence power, have authority to take charge of such a matter. This contention inescapably depends upon the proposition that under the defence power the Commonwealth Parliament may pass any law to promote the contentment and happiness of the people.

Sec. 51 of the Constitution provides that: "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" thirty-nine specified matters. These powers, and other specified powers, are the only legislative powers of the Commonwealth. The adoption of the argument under consideration would have the result of striking out of sec. 51 all the words relating to the subjects of possible legislation, thus leaving the Parliament with power to make laws for the peace, order and good government of the Commonwealth. The Parliament would become a Parliament not with limited powers, but with unlimited powers. Such a result is simply a contradiction of the Constitution. The Constitution, as a Federal Constitution assigning only specified legislative powers to the central legislature, would cease to exist at the will of the Commonwealth Parliament.

As I have already said, the defence power should not, in my opinion, be construed as an unlimited legislative power. It should be interpreted upon the same principle as that which is applied to other constitutional powers. If the alleged connection between a particular power of legislation and the subject of defence is either non-existent or so attenuated as to be practically non-existent, the legislation cannot be supported under that power. So far as the validity of the regulations in question is challenged, the relation which they have to defence is no greater than the relation which any legislation deemed to be desirable in the general interests of the community has to defence. A law cannot, in my opinion, be brought within the defence power merely upon this ground.

This conclusion does not place any obstruction or difficulty in the way of the Commonwealth in the full exercise of what is perhaps

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the most important power and responsibility with which it is entrusted —that of defending the people in time of war. The view which I have expressed is in accordance with the reasons for the decision of the majority of the Court in *Farey* v. *Burvett* (1).

For the reasons stated I am of opinion that Statutory Rules 1942 Nos. 407 and 422 cannot be validly applied to Victorian public servants.

The demurrer should therefore be overruled.

RICH J. I concur in the conclusion arrived at by my brother *Williams*, and, generally speaking, with the reasons given by him in arriving at that conclusion.

Victoria v. *The Commonwealth*.—In my opinion the demurrer should be overruled.

STARKE J. *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*.—Rule nisi to show cause why a writ of prohibition should not issue to the Commonwealth Court of Conciliation and Arbitration and Judge *Kelly* of that Court prohibiting the Court and the judge from further proceeding to hear and determine the reference dated 20th June 1942 by the Minister of State for Labour and National Service to the said Court pursuant to reg. 9 of the *National Security* (*Industrial Peace*) *Regulations* of the Commonwealth (Statutory Rules 1940 No. 290 and amendments thereto).

Reg. 9 provides :—" Where the Minister is of the opinion that any industrial matter has led, or is likely to lead, to industrial unrest, he may refer that matter to the Court and, notwithstanding that an industrial dispute affecting that matter does not exist, the Court may proceed to hear and determine the matter in like manner as if it were an industrial dispute." Under this regulation the Minister made the following reference which is remarkable, as well for its vagueness, as for its assumption of authority :—

" Whereas the hours of duty of members of the Victorian Public Service Association have been increased by the Government of the State of Victoria.

And whereas the Public Service Board of the State of Victoria has refused to determine the rate of pay of the members of the Victorian Public Service Association who worked on the days referred to in Regulation 44 (2) (*a*) (*sic*) of the *National Security* (*Supplementary*) *Regulations*.

And whereas I am of opinion that the said industrial matters are likely to lead to industrial unrest.

(1) (1916) 21 C.L.R. 433.

And whereas I am satisfied that the industrial dispute arising out of the said industrial matters is one proper to be dealt with by the Commonwealth Court of Conciliation and Arbitration in the interests of industrial peace and national security by virtue of the provisions of Regulation 5 (*a*) of the *National Security* (*Industrial Peace*) *Regulations*.

Now therefore I, Edward John Ward, the Minister of State for Labour and National Service, in pursuance of the powers conferred by Regulation 9 of the *National Security* (*Industrial Peace*) *Regulations* do hereby refer the said matters to the Court to hear and determine,

Dated this 20th day of June, 1942.

E. J. WARD,

Minister of State for Labour & National Service."

In the regulation the words "matter," "unrest," "dispute," are all qualified by the word "industrial," yet the reference assumes and asserts that there exists between the State of Victoria and its officers subject to the *Public Service Act* 1928 of the State an industrial relationship, that the hours of duty and remuneration of those officers are "industrial matters," that such matters are likely to lead to "industrial unrest" and constitute an "industrial dispute." Such an interpretation of the regulation is contrary to the ordinary use and signification in English of the word "industrial," to the provision in the Regulations themselves (reg. 2 (2)), that expressions used in the Regulations shall, unless the contrary intention appears, have the same meaning as in the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and really disregards the decision of this Court in *Federated State School Teachers' Association of Australia* v. *Victoria* (1).

It is unnecessary in this view and undesirable to consider a further contention on the part of the State of Victoria that the Regulations or alternatively reg. 9 are or is invalid and not authorized by any power conferred upon the Commonwealth by the *Constitution Act*.

The rule nisi for prohibition should be absolute.

Victoria v. *The Commonwealth*.—Demurrer on the part of the Commonwealth to a statement of claim delivered in an action by the State of Victoria and its Attorney-General against the Commonwealth claiming declarations that the *National Security Act* 1939-1940, if and so far as it purports to confer power on the Governor-General to make Statutory Rules 1942 No. 407 and No. 422, or, alternatively, if and so far as it purports to confer upon the Governor-General power to

(1) (1929) 41 C.L.R. 569.

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affect by the said regulations persons employed by the State pursuant to the provisions of the *Public Service Act* 1928 of the State, is not authorized by the *Constitution Act*, that the Statutory Rules 1942 Nos. 407 and 422 are wholly or in so far as the same purport to affect or apply to persons employed by the State pursuant to the said *Public Service Act* 1928 are not authorized by the *National Security Act* 1939-1940, and that upon the true construction of the Statutory Rules the same do not affect or apply to persons employed by the State pursuant to the *Public Service Act*.

It is necessary to go back to Statutory Rules 1942 No. 242 to understand the Statutory Rules 1942 Nos. 407 and 422. Statutory Rules 1942 No. 242 provided that the employer of every establishment engaged wholly or partly in production for war or defence purposes and every Commonwealth or State department or authority of the Commonwealth or of a State engaged on work associated with the prosecution of the war should on every day to which the regulation applied carry on such production in the same manner and to the same extent as would be the case if that day were an ordinary working day. The day to which the regulation applied was any day before 1st December 1942 which by virtue of any law of the Commonwealth or any State or by virtue of any award or order of any industrial tribunal or any industrial agreement was to be observed as a holiday or a public holiday at the establishment or place at which the department or authority carried on its function. Further clauses of the regulation provided for the manner in which the employees should be compensated.

The statutory rule No. 407 of 1942, which is one of the regulations attacked, amended this regulation by adding the following sub-regulation :—" The foregoing provisions of this regulation shall, in respect of the State of Victoria, apply also, on the last Thursday in September, 1942 (being Royal Agricultural Show Day), to employers and managers (being persons engaged in the business of banking or of insurance) and to every Commonwealth or State Department, or authority of the Commonwealth or of a State, engaged on any work whatsoever and to all employees of any such employer or manager and to officers and employees of any such Department or authority."

Show Day was usually proclaimed a holiday in Victoria, but it was not so proclaimed in 1942, which explains the object of the regulation. Statutory Rules 1942 No. 422 further amended reg. 29 already mentioned by adding the following sub-regulation :—" (9) If under any law or industrial award, order, . . . an employee in the State of Victoria would have been entitled to a holiday on the first Tuesday in November, 1942 " (generally known as " Cup

Day") "had that day been appointed by proclamation under any law of that State to be observed as a public holiday, he shall, in respect of work on which he was engaged on that day, be entitled to the compensation to which he would have been entitled under the law or industrial award, order . . . if that day had been so proclaimed. (10) Where an employee who is so engaged on the first Tuesday in November, 1942" (Cup Day), "is not entitled under any law or industrial award, order . . . to additional payment in respect of his being or having been so engaged, the provisions" of regulation No. 242 of 1942 providing the manner in which the employees should be compensated should extend to any such employee.

It is necessary again to remember that the *Constitution Act* provides for a Federal and not a unitary system of government, which may be regarded by some as a better and a more effective form of government, especially in time of war. The broad principle of the Federal system is to be found, as regards the States, as was said by the Judicial Committee in *James* v. *The Commonwealth* (1), in the provision of the *Constitution Act* that their powers are left unaffected except in so far as the contrary is provided. But we have again been told that the defence power enables the Commonwealth to enact any measure that might conceivably, even incidentally, aid the public safety and the defence of the Commonwealth, even to depriving the States of their executive departments, the control of their officers and their revenues. I must leave to those who were responsible for the decision of this Court in *South Australia* v. *The Commonwealth* (2), the task of expounding and explaining it. I do not profess to understand that part of it which relates to the *Income Tax (War-time Arrangements) Act*. It would have been more rational and more in accord with legal principle to have examined the Commonwealth legislation and ascertained from its terms its true character, its objects and its effect: See *Peanut Board* v. *Rockhampton Harbour Board* (3).

In *Attorney-General for Ontario* v. *Reciprocal Insurers* (4) the Judicial Committee said in relation to the Canadian Constitution:— "It has been formally laid down in judgments of this Board, that . . . the Courts must ascertain the 'true nature and character' of the enactment: . . . its 'pith and substance': . . . and it is the result of this investigation, not the form alone, . . . that will determine within which of the categories of subject matters . . . the legislation falls; and for this purpose the legislation must

(1) (1936) A.C. 578, at p. 611.
(2) (1942) 65 C.L.R. 373.
(3) (1933) 48 C.L.R. 266, at p. 283.
(4) (1924) A.C. 328, at pp. 337, 338.

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be 'scrutinized in its entirety.' . . . Of course, where there is an absolute jurisdiction vested in a legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature is really doing." "A judgment of the Supreme Court of the United States delivered in 1918 in *Hammer* v. *Dagenhart* (1) illustrates," the Judicial Committee observed, "the operation of the principle." And there was cited with approval a passage in the judgment of *Day* J.: "A statute must be judged by its natural and reasonable effect . . . We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the States. This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution" (2)—See *United States* v. *Darby* (3) as to the application of the principle in *Hammer* v. *Dagenhart* (1).

A similar principle was applied to the *Government of Ireland Act* 1920 in *Gallagher* v. *Lynn* (4), where Lord *Atkin*, in delivering the judgment of the Judicial Committee, said:—"These questions affecting limitation on the legislative powers of subordinate parliaments . . . in a federal system are now familiar. . . . It is well established that you are to look at the 'true nature and character of the legislation': . . . 'the pith and substance of the legislation.' If, on the view of the Statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

The ascertainment of the nature and character of an Act must often prove difficult, and whether legislation is, or is not, within power must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down (*Attorney-General for Alberta* v. *Attorney-General for Canada* (5)). But if all legal

(1) (1918) 247 U.S. 251 [62 Law. Ed. 1101].
(2) (1918) 247 U.S., at pp. 275, 276 [62 Law. Ed., at p. 1107].
(3) (1940) 312 U.S. 100 [85 Law. Ed. 609].
(4) (1937) A.C. 863, at p. 870.
(5) (1939) A.C. 117, at p. 129.

standards be abandoned and the Court surrender to the principle that the defence power extends to anything that can be conceived, imagined or thought of as aiding the safety and defence of the Commonwealth, then those difficulties will be multiplied and the Court launched upon inquiries that cannot be described as judicial.

Returning, however, to Statutory Rules 1942 Nos. 407 and 422, their object is to compel the State of Victoria to pay holiday rates —"compensation" is the euphemism—for days known as "Show Day" and "Cup Day," despite the fact that neither day may have been proclaimed a holiday in the State. The regulations no doubt would effect a bountiful distribution of the funds of the State, but they have nothing to do with the public safety and defence of the Commonwealth; that is not the true character of the regulations, their substance, their object nor their effect. And I take broader ground.

The maintenance of the States and their powers, as I have said before, is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. It is inconsistent with the Federal system set up by the Constitution that the Commonwealth should enact legislation compelling the States, as such, to take or to refrain from taking any action, or to expend their revenues, in manner prescribed by the Commonwealth. It is plain that the Commonwealth cannot repeal the legislation of the States, though it may render it inoperative to the extent that it is inconsistent with Commonwealth legislation within its power. But I cannot assent to the proposition that the Commonwealth can by legislation issue commands to the States as such. Such a doctrine would be subversive of the Federal system. The *Engineers' Case* (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*) (1) is no authority for that view. There the Commonwealth had power to legislate with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. No one State had any such power; it was beyond the limit of the constitutional powers of the States. The Commonwealth is thus exclusive in respect of that subject matter. Accordingly it was held that, necessarily and by reason of the subject matter, the Commonwealth power extended to all parties, States as well as persons, engaged in industrial disputes extending beyond the limits of any one State. But the *Engineers' Case* (2), which denied the doctrine of the immunity of instrumentalities propounded in earlier judgments of the Court, is no authority for the general proposition

(1) (1920) 28 C.L.R. 129.

(2) (1920) 28 C.L.R. 129.

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that the States are subject, as such, to the legislation of the Commonwealth. The legislation of the Commonwealth within its powers renders State law, inconsistent with it, inoperative by reason of sec. 109 of the Constitution, but that is a different proposition.

The demurrer in the present action should be overruled.

McTIERNAN J. *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*.—The object of this application is to prohibit the further hearing and determination of a proceeding in the Commonwealth Court of Conciliation and Arbitration. The jurisdiction of the Court to hear and determine it depends on the Commonwealth *National Security* (*Industrial Peace*) *Regulations*. These Regulations were made under the *National Security Act* 1939-1940, and contain provisions extending the jurisdiction of the above-mentioned Court beyond the limits of the jurisdiction which Parliament could and did entrust to it by the *Commonwealth Conciliation and Arbitration Act* 1904-1934. In passing this Act the Parliament exercised the powers conferred by sec. 51 (xxxv.) and (xxxix.) of the Constitution, whereas in making the above-mentioned Regulations the Executive could use powers as wide as those included within sec. 5 of the *National Security Act* 1939-1940.

The proceeding in the Commonwealth Court of Conciliation relates to the conditions of the employment of officers of the Public Service of Victoria. The jurisdiction of that Court to hear and determine the proceeding is challenged on two grounds, first that, notwithstanding the extension of the jurisdiction of the Court by the above-mentioned Regulations, it does not upon their true construction extend to the terms and conditions of the employment of those officers, and, second, that the Regulations exceed the powers conferred on the Commonwealth by sec. 51 (vi.) and (xxxix.).

The proceeding in the Court of Conciliation and Arbitration was begun by a process founded on a certificate which the Minister purported to give under reg. 5 (*a*), which provides that in addition to the industrial disputes of which the Court has cognizance in pursuance of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 the Court shall also have cognizance of all industrial disputes which the Court is satisfied are, or which the Minister certifies to the Court as being, proper to be dealt with in the interests of industrial peace and national security. The proceeding is also founded upon a reference which the Minister purported to make under reg. 9, which provides that where he is of the opinion that any industrial matter has led, or is likely to lead, to industrial unrest, he may refer the matter to the Court and, notwithstanding that an industrial

dispute affecting the matter does not exist, the Court may proceed to hear and determine the matter in like manner as if it were an industrial dispute. In the case of reg. 5 (*a*) the basis of the jurisdiction is an industrial dispute, whereas in the case of reg. 9 it is an industrial matter leading to industrial unrest.

The Minister has certified that there is an industrial dispute arising out of two occurrences in the Public Service of Victoria and that they are likely to lead to industrial unrest. The Minister alleges that these occurrences are industrial matters. Such occurrences are that the hours of duty of the members of the Victorian public service have been increased by the Government of Victoria, and its Public Service Board has refused to determine the rate of pay of members of that Association who worked on the days referred to in reg. 44 (2A) of the Commonwealth *National Security* (*Supplementary*) *Regulations*.

It appears that the Association is a voluntary association of officers employed by the State of Victoria in the public service of Victoria under the provisions of the *Public Service Act* 1928 (as amended) of that State and under the regulations made under the Act. The public service includes the Departments of the Premier, the Treasury, the Chief Secretary, Law, Lands, Water Supply, Forests, Mines and Agriculture, and the officers employed in these departments include members of the Association. These officers carry on, under the Ministers of the Crown, the administration of the Acts and regulations of the State of Victoria. None of these departments is part of the industrial system of the country. If they were it would be true to say that the organized community is an industry rather than a state. The expression "industrial matter" does not apply to a matter which is outside the industrial system. The expressions "industrial unrest" and "industrial disputes" imply a controversy between employers and employees about what are just terms and conditions of employment; but they signify a controversy of that kind within the industrial system. It follows that the expressions "industrial matters," "industrial unrest" and "industrial dispute" do not in their ordinary meaning refer to questions touching the relations between the Crown in right of the State of Victoria and its officers in the departments of the public service engaged in the executive government of the State. But it is contended that the ordinary meaning of these expressions has been stretched by sub-reg. 2 of reg. 2 of the *National Security* (*Industrial Peace*) *Regulations*, which provides that expressions used in these Regulations shall, unless the contrary intention appears, have the same meaning as in the *Commonwealth Conciliation and Arbitration Act* 1904-1934. It is

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argued that the effect of this sub-regulation is to write into the Regulations the literal meaning which sec. 4 of the Act assigns to the expressions "employer," "employee," "industrial dispute," "industrial matters" and "industry," and that because of the width of the statutory meaning of each of these expressions both reg. 5 and reg. 9 extend to the relations between every description of employer and his employees, including the Crown and all officers employed under the Crown in any capacity whatsoever.

Sec. 4 says that "employer" means any employer in any industry and includes a club. That definition is not extensive enough to include the Crown as the employer of officers discharging governmental functions. The section says that employee means any employee in any industry and includes any person whose usual occupation is that of employee in any industry. That definition is singularly inapt to apply to those officers.

The words of sec. 4 limiting the expression "industrial dispute" to one extending beyond the limits of any one State are not to be written into the Regulations. The words of the section defining "industrial dispute" which, according to the argument, should be written into the Regulations are that this expression includes (1) any dispute as to industrial matters, and (2) any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State, and (3) any threatened or impending or probable industrial dispute. It is not possible to construe any of this language as stretching the ordinary meaning of industrial dispute to cover the relations of the Crown and its officers discharging executive functions unless the expression "industrial matters" is enlarged to include matters involved in those relations.

That expression is the next one to be defined by sec. 4. It says that the expression includes all matters relating to work, pay, wages, reward, hours, privileges, rights or duties of employers or employees, or the mode, terms, and conditions of employment or non-employment. The definition then declares that numerous matters are within the scope of the expression, but these particulars are not intended to limit the generality of the expression. It is true that the matters enumerated are such as are involved in the relations between employers and employees including the Crown and the above-mentioned officers. But the effect of the definition of "industrial matters" is to show what is included within that expression, not to enlarge the meaning of "industrial" so as to make it cover every form of employment whether within or outside the industrial system. It follows that the definition of industrial

matters does not extend the first part of the definition of an industrial dispute (that is, any dispute as to industrial matters) to questions arising between employers and employees not engaged in industrial pursuits.

An inclusive definition of " industry " follows that of " industrial matters." Sec. 4 says that " industry " includes any business, trade, manufacture, undertaking, or calling of employers, on land or water. None of these words is apt to refer to the public service of the State. The section further says that industry includes any calling, service, employment, handicraft, or industrial occupation or avocation of employees, on land or water. In the *Teachers' Case* (1) it was contended in argument that engagement in an occupation and not employment in the business or industry of the employer is the feature of this part of the definition of industry. This observation was made on that contention : " But even if this be so, the definition cannot enlarge the meaning of the phrase ' industrial dispute ' in the Constitution, and the occupation must be of an industrial nature " (2). The Court was of the opinion that the occupation of State school teachers is not industrial, because it is impressed with the character of the activity in which the teachers exercise their occupation, which is not an activity within " the sphere of industrialism." A contention which is now made is that in that case the Court said teaching was not an industrial occupation and it did not decide that the second part of the definition means that " industry " includes any calling, or service, or employment, or handicraft, or industrial occupation or avocation ; another contention which is now made is that the Court read down the definition—interpreting it to apply only to employees within the industrial system—because Parliament should not be presumed to have exceeded its legislative powers, which under sec. 51 (xxxv.) are limited to " industrial " disputes. The force in this last contention is that, in so far as the defence power extends to regulating relations between employers and employees, it is not subject to the limitation in sec. 51 (xxxv.), and that there is no need to read down the definition of industrial dispute when it is written into the Regulations in accordance with sub-reg. 2 of reg. 2 in order to keep the regulation within constitutional power. It is true that the Court did not say in the above-mentioned case that the second part of the definition of industry applying to employees does not extend beyond industrial pursuits, but it is also true that it did not decide that this part of the definition literally extends to industrial and non-industrial pursuits. In my opinion the effect of the second part of the definition of industry is to indicate what

(1) (1929) 41 C.L.R. 569.

(2) (1929) 41 C.L.R., at p. 575.

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employees within the industrial system are intended to be covered by the provisions of the Act. The definitions in sec. 4 are interdependent and coherent provisions forming the basis of the jurisdiction of the Court. Those definitions are to be read with, among other sections, sec. 2, the first part of which says that one of the chief objects of the Court is to promote goodwill in industry by conciliation and arbitration. In my opinion the result of writing in or incorporating the definitions in sec. 4 into the Regulations, if sub-reg. 2 of reg. 2 requires that to be done, is not to give to the expressions "industrial matters" or "industrial unrest" or "industrial dispute", as they would stand in the Regulations, so wide a meaning as would extend them to any matter, unrest or dispute affecting the relations between employers and employees in any case in which the employment is not embraced by the industrial system of the country.

In the case of *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1), the question of the scope of the expression "industrial dispute" in the Constitution arose for discussion. *Griffith* C.J. said: "It must, of course, be a dispute relating to an 'industry,' and, in my judgment, the term 'industry' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life" (2). The respondents rely on these observations. It is plain that the Chief Justice did not mean all forms of employment whether industrial or non-industrial. The contest in the case was whether or not the word industrial in the Constitution was restricted to work connected directly or indirectly with production or manufacture. *O'Connor* J. said: "It must have been well known to the framers of the Constitution that such" (industrial) "disturbances are not confined to industries connected directly or indirectly with manufacture or production. The case of cooks, stewards, waiters, hairdressers, are instances of trades which would not come within the narrower sense of the term 'industry.' Yet it is well known that unions existed in those trades long before the enactment of the Constitution. There seems to be nothing in the Constitution itself to indicate that the power conferred was intended to cover part only of the evils aimed at. The words used are large enough to cover all of them" (3). The case decides that all forms of employment within the sphere of industry are covered by the word "industrial" and the definition of industry in sec. 4 of the

(1) (1908) 6 C.L.R. 309.
(2) (1908) 6 C.L.R., at pp. 332, 333.
(3) (1908) 6 C.L.R., at p. 367.

Commonwealth Conciliation and Arbitration Act 1904-1934, but not that the definitions in the Act transcend the industrial sphere.

In my opinion the "reference" by the Minister is not, nor are the hearing and determination of it by the Commonwealth Court of Conciliation and Arbitration, authorized by reg. 5 or reg. 9 of the *National Security* (*Industrial Peace*) *Regulations*. It is not necessary to consider the question whether the Regulations are *ultra vires* the *National Security Act* 1939-1940.

The application should succeed.

Victoria v. *The Commonwealth*.—The Commonwealth regulations which are the subject of this action are contained in Statutory Rules 1942 No. 407 and 1942 No. 422. They rest for their validity on sec. 5 of the *National Security Act* 1939-1940. The material part of this section confers power on the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth and its territories and for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged. Sec. 5 is a valid exercise of the power vested in the Parliament by sec. 51 (vi.) and (xxxix.) of the Constitution of the Commonwealth (*Wishart* v. *Fraser* (1)).

The above-mentioned Statutory Rules added new provisions to the *National Security* (*Supplementary*) *Regulations*. Statutory Rules 1942 No. 242, to which these provisions were added, introduced into these Regulations provisions replacing those in force, the object of which appears to have been to prevent any intermission in the work of production for war purposes or of war work on a day which had been observed as a holiday and to compensate employees for continuing at work on that day. These provisions became reg. 29, and it consisted of seven sub-regulations. Statutory Rules 1942 No. 407 added sub-reg. 8 and Statutory Rules 1942 No. 422 added sub-regs. 9 and 10. The principal question for decision is whether each of these new sub-regulations, in so far as it purports to apply to the public service of Victoria, exceeds the powers conferred on the Governor-General by sec. 5 of the *National Security Act* 1939-1940, or in other words is a law with respect to defence.

Sub-reg. 1 of reg. 29 imposes on (*a*) the employer, manager, or occupier of every establishment, factory, mine, dockyard, or workshop, which is engaged wholly or partly in production for war or defence purposes, or in the repair or overhaul of munitions of war, and (*b*) every Commonwealth or State Department, or authority of

(1) (1941) 64 C.L.R. 470.

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the Commonwealth or of a State engaged on work associated with the prosecution of the war, the duty of carrying on such activity on every "day to which this regulation applies" in the same way as would be done if that day were an ordinary working day. Sub-reg. 7 provides that in relation to the above-mentioned places engaged on war production and to the above-mentioned departments or authorities engaged on work associated with the war, "day to which this Regulation applies," means any day before 1st December 1942 which by virtue of any award, order or determination of any industrial tribunal or any industrial agreement is to be observed as a holiday or public holiday at such place or where such department or authority carries on its functions. Sub-regs. 2 and 3 deal with the payment of compensation to employees working at places or in departments or under authorities bound by the duty created by sub-reg. 1. Sub-reg. 2 provides that every such employee shall be entitled to the compensation prescribed by the appropriate law or industrial determination or agreement and if he is not so entitled the appropriate tribunal is authorized by sub-reg. 3 to determine the amount of the compensation, and sub-reg. 4 gives the employee the right to sue for that amount in a court of competent jurisdiction.

The connection between sub-regs. 1, 2, 3 and 4 and the prosecution of the war and the defence of the Commonwealth is plain. They constitute a law with respect to defence, and fall within sec. 51 (vi.) and (xxxix.), and hence within the powers conferred on the Governor-General by sec. 5 of the *National Security Act* 1939-1940. It follows that they are binding on the persons, departments and authorities to which they are addressed. There is ample authority for this conclusion. In the *Engineers' Case* (1), the Court said that the principles upon which it determined that case apply generally to all the powers contained in sec. 51 of the Constitution of the Commonwealth (2). One of the principles upon which the Court decided that case is stated in these words: "Laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States—in other words, bind both Crown and subjects" (3). In *Farey* v. *Burvett* (4) the defence power was the subject of this observation: "It is complete in itself, and there can be no implied reservation of any State power to abridge the express grant of a power to the Commonwealth." In the case of *South Australia* v. *The Commonwealth* (5), it was decided that the *Income Tax (War-time*

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R., at p. 144.
(3) (1920) 28 C.L.R., at p. 153.
(4) (1916) 21 C.L.R., at pp. 453, 454.
(5) (1942) 65 C.L.R. 373.

Arrangements) *Act* 1942 was a law validly made under the powers of the Commonwealth to legislate with respect to defence, and the conclusion was reached in accordance with the above-mentioned principles that this Act bound the States and the officers of the States who came within its provisions.

The eighth sub-regulation added to reg. 29 by Statutory Rules 1942 No. 407 is in these terms: "The foregoing provisions of this regulation shall, in respect of the State of Victoria, apply also, on the last Thursday in September, 1942 (being Royal Agricultural Show Day), to employers and managers (being persons engaged in the business of banking or of insurance) and to every Commonwealth or State Department, or authority of the Commonwealth or of a State, engaged on any work whatsoever and to all employees of any such employer or manager and to officers and employees of any such Department or authority." This day is, by Acts of the State of Victoria, declared to be a holiday in public offices and all banks within a part of the State. The Acts are the *Public Service Act* 1928, sec. 187 (*f*), as amended by sec. 3 of the *Public and Bank Holidays Act* 1934, and sec. 6 of this Act, which amends sec. 13 of the *Banks and Currency Act* 1928. The sub-regulation purports to bind persons, departments and authorities not covered by sub-reg. 1 of reg. 29, which, as has been observed, purports to bind only employers who are "engaged wholly or partly" in work connected with the war and only Commonwealth or State departments or authorities which are "engaged on work associated with the prosecution of the war." But sub-reg. 8 is addressed to employers and managers engaged in the business of banking and insurance and to every Commonwealth or State Department or authority which is "engaged on any work whatsoever," and to all employees of such persons, departments or authorities.

The other Statutory Rules, 1942 No. 422, which are called into question add a ninth and a tenth sub-regulation to reg. 29 in these terms: "(9) If under any law or industrial award, order, determination or agreement, an employee in the State of Victoria would have been entitled to a holiday on the first Tuesday in November, 1942, had that day been appointed by proclamation under any law of that State to be observed as a public holiday, he shall, in respect of work on which he was engaged on that day, be entitled to the compensation to which he would have been entitled under the law or industrial award, order, determination or agreement if that day had been so proclaimed. (10) Where an employee who is so engaged on the first Tuesday in November, 1942, is not entitled under any law or industrial award, order, determination or agreement to

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additional payment in respect of his being or having been so engaged, the provisions of sub-regulations (3) and (4) of this regulation shall extend to any such employee."

The first Tuesday of November is not a day which by any Act of the State of Victoria is prescribed to be a holiday. Besides the days which are so prescribed any other day may be proclaimed as a holiday pursuant to sec. 187 (2) of the *Public Service Act* 1928.

The situation then is that sub-reg. 8 applies to a day which is a holiday according to Victorian law, whereas sub-regs. 9 and 10 apply to a day which is not a holiday according to that law unless proclaimed, but which was not proclaimed. Sub-reg. 8 compels those to whom it is addressed to work as if a holiday to which it applies was an ordinary working day and it provides compensation for their employees on the footing that, although they were ordinarily entitled to a holiday on that day, yet they were obliged to remain at work. Those to whom it is addressed are employers in the business of banking and insurance and Commonwealth and State departments and authorities "engaged on any work whatsoever." Sub-reg. 8, unlike sub-reg. 1, does not make it a condition of its application that the departments and authorities should be engaged in work associated with the prosecution of the war. Sub-reg. 9 does not impose a duty on anybody to continue work on the first Tuesday of November. That was apparently unnecessary, because it was not a statutory holiday and had not been proclaimed as a holiday. This sub-regulation and sub-reg. 10 provide for the payment of compensation to any "employee in the State of Victoria" who works on that day on the footing that the day was proclaimed a holiday but he was bound to work on the day. The compensation is made payable by reference to a fiction. It is not a condition of the application of these two sub-regulations that the employee should be engaged on work associated in any way with the war.

Is a law obliging every person to work on a holiday irrespective of the character of the work in which he is engaged a law with respect to defence? Is a law which entitles every employee engaged in work of any kind on a day not a holiday, but which might have been proclaimed a holiday, to compensation on the footing that the day was proclaimed a holiday, a law with respect to defence? These two questions contain, I think, a true description of sub-regs. 8 on the one hand and 9 and 10 on the other, the validity of which is challenged in this action. The decision in *Farey* v. *Burvett* (1) and the cases in which the principle of that case has been followed

(1) (1916) 21 C.L.R. 433.

demonstrate the variety of laws which may be validly made in the exercise of the defence power of the Commonwealth. A list of those decisions is given in *Andrews* v. *Howell* (1), and to those decisions that case and *South Australia* v. *The Commonwealth* (2) should be added. It is not correct that the defence power has no bounds. Hence in *Farey* v. *Burvett* (3) a test is proposed for determining whether a law made in circumstances comparable with the present emergency is a valid exercise of the power. "If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end." That test was relied upon to justify the sub-regulations which are assailed in this action. It is necessary, if this test is to save them, that it should appear that they may conceivably in the present grave emergency even incidentally aid the effectuation of the defence power. There is no relation on their face with national defence. The question then is whether the Court can reasonably infer—in this case its only guidance is the text of the sub-regulations—that they might aid in an appreciable degree the effectuation of the defence power. So far as regards the members of the public service who are not engaged in work connected with the war, there are no reasonable grounds for the inference that the sub-regulations might have that result. Nothing better than a relation, which appears to me to be a fanciful one, could be suggested in argument between the sub-regulations and national defence. It was suggested that discontent among persons engaged on war work, or work connected with the war, on days ordinarily observed as holidays would be avoided if persons engaged on work of any kind were required to work on those days. There is nothing to warrant the Court in reaching that conclusion. The content of the defence power is not to be whittled down by applying any more stringent test than the above-mentioned test which was propounded in *Farey* v. *Burvett* (4), but if a regulation fails by that test it is the duty of the Court to say that it falls outside the powers conferred by the provisions of sec. 5 of the *National Security Act* 1939-1940, pursuant to which the statutory rules embodying the sub-regulations which are attacked in this action were made.

For these reasons I think the demurrer should be overruled.

(1) (1941) 65 C.L.R. 255, at p. 287.
(2) (1942) 65 C.L.R. 373.
(3) (1916) 21 C.L.R., at pp. 455, 456.
(4) (1916) 21 C.L.R. 433.

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WILLIAMS J. This judgment relates to two matters which have been heard together. In the first matter the State of Victoria and the Public Service Board of that State are seeking an order absolute prohibiting the Commonwealth Court of Conciliation and Arbitration and his Honour Judge *Kelly* from further proceeding to hear and determine the reference dated 20th June 1942 made by the Minister of State for Labour and National Service to that Court pursuant to reg. 9 of the *National Security* (*Industrial Peace*) *Regulations*. In the second matter the State of Victoria and its Attorney-General have brought an action against the Commonwealth of Australia seeking declarations that the regulations made by Statutory Rules 1942 No. 407 and 1942 No. 422 are either wholly or in so far as the same purport to affect or apply to persons employed by the State of Victoria pursuant to the provisions of the *Public Service Acts* not authorized by any power validly conferred upon the Governor-General by the *National Security Act* 1939-1940 or by any other enactment of the Parliament of the Commonwealth and that the *National Security Act* 1939-1940 if and so far as it purports to confer upon the Governor-General power to make these regulations or alternatively if and so far as it purports to confer upon him power to affect by these regulations persons employed by the State of Victoria pursuant to the provisions of the *Public Service Act* is not authorized by sec. 51 (vi.) of the Constitution of the Commonwealth of Australia or by any other power conferred by such Constitution upon the Commonwealth.

In the first matter on 21st September 1942 his Honour Judge *Kelly* held (1) that the Governor-General had authority pursuant to sec. 5 of the *National Security Act* 1939-1940 to make the *National Security* (*Industrial Peace*) *Regulations*, (2) that the matters referred to the Court by the Minister on 20th June 1942 were industrial matters within the meaning of these Regulations, and (3) that the Court had power to hear and determine these matters. He proposed to proceed with the hearing on 5th November 1942, but on 27th October 1942 his Honour the Chief Justice of this Court made an order nisi for the issue of a writ of prohibition upon three grounds, the third of which was abandoned at the hearing, so that I need only refer to the first two: (1) that the matters referred to in the reference are not industrial matters within the meaning of the *National Security* (*Industrial Peace*) *Regulations*, and (2) that these Regulations or alternatively reg. 9 thereof are or is invalid and not authorized by any power conferred upon the Parliament of the Commonwealth by the Constitution.

In the second matter the defendant Commonwealth has demurred to the statement of claim on the grounds that the regulations referred to in the statement of claim are authorized by the powers validly conferred upon the Governor-General by the *National Security Act*; that this Act is authorized by the Constitution; and that upon their true construction these regulations apply to persons employed by the plaintiff State pursuant to the provisions of the *Public Service Act*. In the two matters, therefore, the constitutionality of the *Industrial Peace Regulations* as a whole and in particular reg. 9 thereof, and also of the provisions of Statutory Rules 1942 Nos. 407 and 422 generally and so far as they purport to bind the State of Victoria, have been challenged.

But as the application to make the rule nisi absolute will succeed if the reference does not relate to industrial matters within the meaning of the Regulations I shall deal with this point first. The matters referred to the Court were (1) that the hours of duty of members of the Victorian Public Service Association have been increased by the Government of the State of Victoria, and (2) that the Public Service Board of the State has refused to determine the rate of pay of public servants who worked on the days referred to in reg. 44 (2A) of the *National Security (Supplementary) Regulations*. The evidence shows that on 21st April 1942 the normal hours of duty were increased from 76 to 81 hours per fortnight, and that the Public Service Board has refused to pay any overtime for work done on Labour Day (March 16th), Easter Monday and Tuesday (April 6th and 7th), and the day observed as the King's Birthday (June 15th), all of which were public holidays within the meaning of the regulation. The whole of the public service worked on the first three holidays, but on the King's Birthday the only workers were the officers employed in the Departments of Forests and Mental Hygiene, whose work was concerned with matters associated with the war.

Under the *Public Service Act*, the public service of Victoria is organized into the first, professional, clerical and general divisions. The first division consists of high officers, including the Under-Secretary, Under-Treasurer, Director of Education, and Secretary to the Law Department. The professional division includes the members of the public service who work in such departments as those of the Treasury, Lands, Law, Premier and Chief Secretary. The four divisions are paid annual salaries. Sec. 187 enumerates certain days to be observed as holidays and authorizes the Governor in Council to proclaim other days as holidays. Sec. 192 provides that the permanent head of any department may if he thinks fit certify that in his opinion any officer in the public service in his department is

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entitled to a gratuity or to a payment for overtime, but no gratuity shall be paid upon such certificate without the authority of the Board. Regulations made under the Act prescribe rates to be paid for such overtime.

The secretary of the Public Service Association made demands on the government for holiday pay in respect of the work done by the public servants in all divisions on these holidays, based on alleged rights to such payments given by the Commonwealth *National Security Regulations*, and requested the Public Service Board to amend the Public Service Regulations so as to provide for payment where officers were called upon to work on statutory public holidays, but the Board refused. This refusal was followed by the reference of 20th June 1942.

Reg. 3 of the *Industrial Peace Regulations* expressly provides that the Act and Regulations shall, so long as the Regulations continue in force, be construed as if the provisions of the Regulations were incorporated in the Act as amendments thereof. The Act, which is an exercise by the Commonwealth Parliament of its powers under sec. 51 (xxxv.) of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, contains in sec. 4 definitions of "industrial dispute," "industrial matters" and "industry." It has been pointed out by this Court that the words "industrial dispute" in the *Commonwealth Conciliation and Arbitration Act* must be construed so as not to exceed the ambit of the power conferred upon the Commonwealth Parliament by sec. 51 (xxxv.) (*Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1); *Australian Insurance Staffs' Federation* v. *Accident Underwriters' Association* (2)).

In *Federated State School Teachers' Association of Australia* v. *Victoria* (3), *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), held that the educational activities of the States carried on under the appropriate statutes and statutory regulations of each State relating to education did not constitute an industry within the meaning of sec. 4 of the Act; that the occupation of the teachers so employed was not an industrial occupation; and that the dispute which existed between the States and the teachers employed by them was therefore not an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution and of the *Commonwealth Conciliation and Arbitration Act*. *Isaacs* J., who dissented,

(1) (1908) 6 C.L.R., at p. 369. (2) (1923) 33 C.L.R. 517.
(3) (1929) 41 C.L.R. 569.

held that the art of teaching was an industry; but it is clear from his judgment (1) that he considered that Crown officials engaged in administering "true, essential governmental authority" would not come within the ambit of the industrial disputes power. He divided governmental functions into two broad classes: (1) those "regal" functions which a State must necessarily undertake, such as the legislative power, the administration of the laws, and the exercise of judicial power, and (2) those functions which a State may voluntarily undertake and which individuals can and do also undertake, and included education in the latter class. It is clear, therefore, that his Honour would not have regarded public servants engaged in duties incidental to the execution of the legislative powers, the administration of the laws, and the exercise of the judicial powers, as being engaged in industry. So that, if the general body of public servants of two or more States had formed themselves into an inter-State organization and applied to the Court of Conciliation and Arbitration in peace-time for an award, the case can be regarded as a unanimous decision of this Court that the dispute would not have been considered an industrial dispute within the meaning of the Act.

The *Industrial Peace Regulations* were first introduced by Statutory Rules 1940 No. 290. They contained the following preamble:— "Whereas it is necessary for the efficient prosecution of the present war that peace in industry should be preserved in the Commonwealth: And whereas, in order to preserve that peace in industry, it is desirable that certain limitations on the jurisdiction of industrial tribunals constituted under the laws of the Commonwealth should be removed and that provision should be made for those tribunals to deal with industrial disputes with greater expedition." The Regulations are therefore an exercise of the defence power in relation to industry. Reg. 4 provides that so long as the Regulations continue in force, the provisions of the Act shall be applied and construed as if from the definition of "industrial disputes" in sec. 4 the words "extending beyond the limits of any one State" were omitted, and the jurisdiction of the Court shall be extended accordingly. It was successfully contended before the learned judge that the definitions in the Act had to be read in peace-time in a restricted sense so as not to exceed the powers conferred upon the Parliament by placitum xxxv., but that, since in war-time the defence power can also be invoked to justify the legislation, the definitions of industrial matters and industry can be given their ordinary grammatical meaning, which, it was said, is wider than the ordinary grammatical meaning of industrial disputes in placitum xxxv., and capable of embracing

(1) (1929) 41 C.L.R., at pp. 584, 585.

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"all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life" (per *Griffith* C.J. in *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1)).

This contention is in my opinion fallacious. If sound it would involve the extraordinary result that without any amendment of the Act the Court of Conciliation and Arbitration would have power in war-time to make an award on the application of the Federated School Teachers' Association of Australia, although it had no power to do so in peace-time. In the previous cases this Court has sought to discover the meaning of the word "industrial" in its ordinary and popular acceptation, naturally and inescapably founding its inquiry upon the basis that the word bears the same meaning in the *Commonwealth Conciliation and Arbitration Act* as it does in the Constitution. The object of the *Industrial Peace Regulations*, as defined in the preamble and to be gathered from the Regulations themselves, is to extend the provisions of the Act and the Regulations to intra-State disputes and to industrial matters such as industrial unrest, and to provide a speedy method of having industrial questions heard and determined. The Regulations do not attempt to enlarge the scope of the word "industrial" in its new collocations beyond its meaning in the Act. If they did chaos would probably result, because in administering the Regulations resort must be had to many sections of the Act in which the word still having its previous meaning occurs over and over again (*Australian Coal & Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (2)).

The true position is, in my opinion, that the Regulations must be construed, as indeed reg. 3 expressly provides, as amendments of the Act, and that the definitions in the Act mean the same thing in war-time as in peace-time. It may be that some of the public servants are engaged in industry within this meaning (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 2] (3)), but the reference applies to the whole of the public service indiscriminately.

It follows that, in my opinion, the Minister had no authority to refer the disputes enumerated in the reference to the Court under reg. 9, and that the order nisi should be made absolute on this ground. It is therefore unnecessary to discuss whether the Regulations as a whole or reg. 9 in particular are beyond the powers conferred upon the Commonwealth Parliament by the Constitution.

(1) (1908) 6 C.L.R., at p. 333.
(2) *Ante*, p. 161.
(3) (1920) 28 C.L.R. 436.

It remains to discuss the questions raised in the action. Statutory Rules 1942 No. 242 was passed on 28th May 1942. It repealed regs. 29 and 44 of the *National Security* (*Supplementary*) *Regulations* and inserted a new reg. 29. This new reg. 29 was subsequently amended by Statutory Rules 1942 No. 282 made on 25th June 1942, No. 407 made on 23rd September 1942, and No. 422 made on 1st October 1942. Sub-reg. 1 provides that the employer, manager, or occupier of every establishment, factory, mine, dockyard, or workshop, which is engaged wholly or partly in production for war or defence purposes, or in the repair or overhaul of munitions of war, and every Commonwealth or State department, or authority of the Commonwealth or of a State engaged on work associated with the prosecution of the war, shall, on every day to which this regulation applies, carry on such production, repair, overhaul or work in the same manner and to the same extent as would be the case if that day were an ordinary working day. Sub-regs. 2, 3 and 4 provide that an employee engaged on any such production, repair, overhaul or work on any day to which the regulation applies shall become entitled to compensation, that where he is not entitled under any law to compensation he may apply to any tribunal or authority having jurisdiction to determine disputes or claims in respect of rates of pay or conditions of employment in relation to work on which the employee is employed or any Conciliation Commissioner to determine the compensation, and that an employee shall be entitled to sue for and recover in any court of competent jurisdiction any payment to which he is entitled under the determination. Sub-reg. 7 provides that the day to which the regulation applies means any day before 1st December 1942 which, by virtue of any law of the Commonwealth or any State, is to be observed as a holiday or public holiday at the establishment, factory, mine, dockyard or workshop or the place at which the department or authority carries on its functions. Sub-reg. 8, added by Statutory Rules 1942 No. 407, provides that the foregoing provisions of the regulation shall, in respect of the State of Victoria, apply also, on the last Thursday in September 1942 (being Royal Agricultural Show Day), to employers and managers (being persons engaged in the business of banking or of insurance) and to every Commonwealth or State department, or authority of the Commonwealth or of a State, *engaged on any work whatsoever* and to all employees of any such employer or manager and to officers and employees of any such department or authority. Sub-regs. 9 and 10, added by Statutory Rules 1942 No. 422, provide that (9) if under any law an employee in the State of Victoria would have been entitled to a holiday on the first Tuesday in November 1942, had that day been

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appointed by proclamation under any law of that State to be observed as a public holiday, he shall, in respect of work in which he was engaged on that day, be entitled to the compensation to which he would have been entitled under the law if that day had been so proclaimed, and (10) where an employee who is so engaged on the first Tuesday in November 1942, is not entitled under any law to additional payment in respect of his being or having been so engaged, the provisions of sub-regs. 3 and 4 of this regulation shall extend to any such employee.

Royal Agricultural Show Day is one of the statutory holidays under the *Public Service Act*, but it was cancelled this year, and Melbourne Cup Day only becomes a holiday under the Act if it is proclaimed. It has been the usual practice to run the Cup on the first Tuesday in November and to proclaim this day a holiday under the Act, but only in certain parts of Victoria. This year the Show was not held at all, and the Cup was run on a Saturday. It will be seen that until sub-regs. 8 and 9 were added, reg. 29 was confined to employees, whether of private employers or of the Commonwealth or a State, employed in establishments engaged in production for war or defence purposes or on work associated with the prosecution of the war, but these sub-regulations extended the regulation on the two days mentioned to employees in Victoria, whether employed by private employers or by the Commonwealth or by the State of Victoria, engaged, in the case of sub-reg. 8, when in private employment, in the business of banking or insurance, and in the case of sub-reg. 9 on any work whatsoever.

In the *Uniform Tax Case* (*South Australia* v. *The Commonwealth*) (1), where the ambit of the defence power was discussed, I expressed the view, to which I adhere, that States, like individuals, are subject to its exercise. I shall assume that the Commonwealth can legislate under the power to compel employers and employees, whether private or State, engaged upon the production or repair of war materials, to work upon holidays. But I am unable to see how it can possibly be said that it can conceivably aid in the prosecution of the war for the Commonwealth to require employers or employees, either private or State, who are not engaged upon work in any way connected with or incidental to the production or repair of war materials, to work upon such days. The effect of the war has been seriously to interfere in many instances with the amount of business available to employers who are not engaged in the production or repair of war materials, but they are compelled to open their business premises even on holidays and to pay their employees holiday rates

(1) (1942) 65 C.L.R. 373.

although there is no business to do and the day's work is a total loss. It was suggested in argument that those employers and employees who are engaged on the production or repair of war materials would become restless and dissatisfied if other employers and employees not engaged on such work could take a holiday when they could not, even when the employees who worked received holiday pay as a solatium, a suggestion which would appear to place a grave stigma on the patriotism of war workers. The sub-regulations refer not to actual but to fictitious holidays, and the days in question are ordinary week days. I cannot see how the imposition of penalty rates for work done on these days, especially in the case of employers like the State of Victoria who are not engaged in any industry or any work associated with the prosecution of the war, can conceivably aid in the defence of the Commonwealth. The Commonwealth Parliament cannot interfere with the exercise by a State of its legislative, judicial or executive functions. Questions such as the days and hours of work and of the remuneration of public servants of a State engaged upon duties incidental to the execution of such functions arise solely between the State and its public servants. They are beyond the ambit of any power conferred upon the Commonwealth Parliament by the Constitution.

The decision of the majority of the Court in the *Uniform Tax Case* (1), that the *Arrangements Act* was valid, does not, as counsel suggested, give support to any argument in favour of the validity of sub-regs. 8 and 9 as against the plaintiff. My conclusion that the Act was a valid exercise of the defence power was based upon the premises that the expeditious collection of Commonwealth income tax by the Commonwealth itself could conceivably assist in the prosecution of the war, so that, as the Commonwealth in order to prosecute the war has a prior call upon the services of any members of the community however employed or can acquire any property however owned on just terms, it followed that the Commonwealth could conscript into its own service the persons employed by the States in their income tax departments and acquire the premises where these departments were located in order to create an income tax department. The other provisions of the Act related to the reinstatement of State servants in the employment of the State upon the cesser of their period of compulsory service with the Commonwealth. It appeared to me that the States were as much subject to Commonwealth law in this respect as private individuals. My judgment cannot be regarded as the slightest authority for the suggestion that the defence power is wide enough to enable the Commonwealth

(1) (1942) 65 C.L.R. 373.

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Government to legislate with respect to State servants who are not impressed into the service of the Commonwealth, but remain in the employment of a State, and who are not engaged in carrying out duties which are of an industrial nature or connected with or incidental to defence.

For these reasons I am of opinion that the demurrer should be overruled.

The King v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*.—*Order absolute.*

Victoria v. *The Commonwealth*.—*Demurrer overruled.*

Solicitor for the State of Victoria, the Attorney-General thereof, and the Victorian Public Service Board, *F. G. Menzies*, Crown Solicitor for Victoria.

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

Solicitors for the Victorian Public Service Association, *Maurice Blackburn & Co.*

B. B. M.