[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE UNIVERSITY OF SYDNEY;

Ex parte JOHN McPHERSON DRUMMOND.

H. C. of A. 1943.

Sydney, *May* 4, 5;

Melbourne, *June* 11.

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

Constitutional Law—Defence—Scope of power—Universities Commission—Control of admission to universities—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*vi.*)—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5—*National Security* (*Universities Commission*) *Regulations* (*S.R.* 1943 *No.* 28—1943 *No.* 58), *regs.* 4, 7, 15, 16—*University and University Colleges Act* 1900-1937 (*N.S.W.*) (*No.* 52 *of* 1900—*No.* 35 *of* 1937), *secs.* 15, 17, 31c, 46—*By-laws of the University of Sydney, ch. XX.*

Reg. 16 of the *National Security* (*Universities Commission*) *Regulations*, purporting to make provision for the control of admission to universities, is not within the defence power of the Commonwealth and is invalid. So *held* by *Rich*, *Starke* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting) on the return of a rule nisi for a writ of mandamus to admit to a faculty in the University of Sydney, and without deciding whether mandamus lies to the University to enforce admission to a particular faculty.

Order Nisi for mandamus.

At the leaving examination held in November 1942, John McPherson Drummond, then aged eighteen years, obtained a pass which satisfied the requirements for matriculation in the University of Sydney and for admission to the faculty of medicine or the faculty of dentistry in accordance with the *University and University Colleges Act* 1900-1937 (N.S.W.) and the by-laws made thereunder by the Senate of the University.

Upon making an application to that university for acceptance as a first year student in the faculty of medicine, or, alternatively, in the faculty of dentistry, he was informed by the registrar of the university that, in view of the limitation of numbers in both of those

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faculties fixed under the *National Security* (*Universities Commission*) *Regulations*, it was not possible to accept him as a first year student in either of those faculties.

Drummond, by his next friend John Hugh Drummond, obtained from *Latham* C.J. an order nisi returnable before the Full Court of the High Court for a writ of mandamus directing the university to admit and enrol Drummond in and to the faculty of medicine, or, in the alternative, the faculty of dentistry upon the grounds: (*a*) that he was a matriculated student entitled to be so enrolled and admitted in the said university, (*b*) that he had complied with the by-laws and regulations under the *University and University Colleges Act* 1900-1937 entitling him to such admission and enrolling, and (*c*) that the *National Security* (*Universities Commission*) *Regulations*, Statutory Rules 1943 No. 28 as amended by Statutory Rules 1943 No. 58, were bad in law.

Upon the return of the order nisi the Court was informed by way of an affidavit by the acting registrar of the university that, in accordance with a recommendation thereto by the Universities Commission and pursuant to reg. 16 (1) of the *National Security* (*Universities Commission*) *Regulations*, the Director-General of Man Power had determined, on 5th April 1943, that the total number of students who may be enrolled as first year students in the respective faculties of medicine, dentistry, agricultural science, veterinary science, science and engineering in the universities of Australia should be as therein set forth and being so far as the faculties of medicine and dentistry in the University of Sydney are concerned one hundred and seventy and seventy respectively; that the Chairman of the Universities Commission acting under delegated powers had issued a direction to the University of Sydney restricting the respective numbers of students who might be enrolled in these faculties to those stated in the determination of the Director-General of Man Power and determining the method of selection of the students who might be so enrolled; that students equivalent to those numbers had been selected in accordance with the method properly so determined by the Chairman of the Universities Commission; that Drummond failed to gain selection in the number of students enrolled in the first year of either of those faculties; and that there were a number of students who under the above-mentioned method of selection had higher claims for admission than Drummond and who were available for selection in the event of a vacancy occurring amongst those already selected.

The Commonwealth was given leave to intervene upon the question of the validity of the Regulations.

The Regulations are sufficiently set forth in the judgments hereunder.

Dr. *Louat* (with him *Smyth*), for the prosecutor. The words, "entering the university by means of a leaving certificate", in sec. 31D of the *University and University Colleges Act* 1900-1937 indicate the creation of a right to enter the university. The relevant by-laws are made in exercise of the power given by sec. 31C of the Act. They are not merely by-laws for the internal regulation of the university; they affect the public. The visitor is concerned with matters arising within the university and not with any question arising as between a stranger to the university and the university. He is not a proper person to decide the substantial question which is now under consideration, namely, the validity or otherwise of the Regulations. Reg. 16 of the *Universities Commission Regulations*, and the action taken under it, is invalid in that it transcends the power conferred by the *National Security Act*. The regulation and the action taken thereunder exceed the defence power of the Commonwealth because they have no real connection with the prosecution of the war. The effect of the regulation is that persons are excluded arbitrarily from the university. They start with a right to enter the university and are excluded therefrom by an arbitrary rule based on an order of merit which has no relation to any consideration for advancing the war. Reg. 16 is invalid, because it purports to authorize the exclusion of persons by number on any method of selection. The operation of reg. 16 in the events which have happened is one not authorized by the *National Security Act*. The restriction imposed is a restriction of education; this is a matter which is outside the war effort. Reg. 16 is by its nature a regulation the powers given by which cannot be exercised in a way conformable with the limitations for the conservation of man power imposed by reg. 4. The effect of reg. 16 is to exclude from study persons who cannot be of any conceivable assistance to the war effort. The regulation excludes persons without regard to whether (*a*) they are better fitted for other forms of occupation, (*b*) they are exempt from service under sec. 61 of the *Defence Act* 1903-1941, or (*c*) they are physically unfit, and also without provision for diverting them elsewhere. The true character of reg. 16 is not the character of assisting the war effort (*Victoria* v. *The Commonwealth* (1)). The prosecutor is entitled to a mandamus.

(1) (1942) 66 C.L.R. 488.

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Teece K.C. and *Sugerman* appeared for the respondent and took no part in the argument.

Maughan K.C. (with him *Holmes*), for the Commonwealth (intervening). The *Universities Commission Regulations* are demonstrably *intra vires*. The Regulations control not the activities of individuals but of the university, a great instrumentality directly connected with the war effort and, as such, it is within the power of the Commonwealth Parliament and of the Governor-General to exercise control over it and the faculties of the university for the purpose of the war effort (*South Australia* v. *The Commonwealth* (1); *Australian Apple and Pear Marketing Board* v. *Tonking* (2)). The present war is a total war in which all members of the community are and must be engaged in some way or other, either in the armed forces or upon work which contributes directly or indirectly to the successful prosecution of the war. It is, therefore, a matter of great importance and concern to the executive that the man power and the woman power of the community shall be properly utilized and properly distributed amongst the various professions and occupations in accordance with the various needs of the community organized for purposes of war and in order to obtain the maximum war effort. Reg. 16 is not aimed at the individual, it is aimed at the work the university is to do. For the purposes of war the Commonwealth Parliament is able to control and in fact manage the economic resources, the financial resources, the commercial resources and the educational resources of the Commonwealth if it thinks proper. It must not be overlooked that the smaller the number of students the greater the number of the teaching staff of the university who can, and the greater the quantity of equipment which can, be made available for other activities more closely associated with the prosecution of the war. The powers conferred by reg. 16 are exercisable only so far as may be necessary for giving effect to the objects of the Regulations as set forth in reg. 4. The prosecutor has not been denied admittance to the university; he has only not been permitted to enter a particular faculty in the university. It is not the function of the *Universities Commission Regulations* to prescribe what is to be done with a person who does not attend the university. Those Regulations have nothing to do with general education; they are designed only for the conservation of the man power and woman power of the community. Even if the Commission has done something not authorized by the Regulations, that does not make the Regulations invalid.

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

(2) (1942) 66 C.L.R. 77.

Dr. *Louat*, in reply. The fixing of the number of students permitted to enter the faculty of medicine or the faculty of dentistry is not a matter which is of any assistance to the war effort. Reg. 16 does not permit of the construction that it controls the university but does not control students. The power purports to extend to all faculties and may be exercised in such a way as to preclude all students from all faculties. Reg. 16 does not assist the war effort. Regard should be had to its true nature and effect (*Uniform Taxation Case* (1)).

Cur. adv. vult.

The following written judgments were delivered :— June 11.

LATHAM C.J. By regulations made under the *National Security Act* 1939-1940 the Commonwealth has assumed power to control the entry of students to the universities of Australia. This power has been exercised in the case of the University of Sydney by fixing the number of students to be admitted to certain faculties, including the faculties of medicine and dentistry. The prosecutor, John McPherson Drummond, a youth of eighteen years of age, desires to undertake a medical, or, alternatively, a dental course at the university. He has qualified for matriculation in the university, and has qualified for admission to either of the faculties mentioned. The Universities Commission which has been established under the *National Security* (*Universities Commission*) *Regulations* has fixed a quota of students for these faculties and Drummond does not fall within the quota fixed. The university accordingly, in compliance with the Regulations, has refused to accept him as a student in either faculty. He obtained an order nisi for a writ of mandamus directing the university to enrol and admit him in and to the faculty of medicine or, in the alternative, the faculty of dentistry, upon the grounds that he is a matriculated student entitled to be so enrolled and admitted, that he has complied with the relevant university by-laws, and that the *Universities Commission Regulations* are bad in law.

Upon the return of the order nisi the university was content with establishing that the action taken in excluding Drummond was in accordance with the Regulations. The university did not argue the case, but it submits to such order as the Court may think proper to make. The Commonwealth obtained leave to intervene upon the question of the validity of the Regulations, and has submitted argument supporting the Regulations.

(1) (1942) 65 C.L.R., at p. 424.

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The Commonwealth Parliament has no power to legislate with respect to the subject of education as such. The challenged Regulations were made under the *National Security Act* 1939-1940, the validity of which was established in the case of *Wishart* v. *Fraser* (1). The question which arises is whether the Regulations can be supported under the Act, sec. 5, as being regulations " for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth," or " 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."

The Regulations are administered by the Minister of State for War Organization of Industry (reg. 2). Reg. 4 is in the following terms :—

" 4. The objects of these Regulations are to provide, during the present war, for financial assistance to students at Universities and the supervision and control of their enrolment and studies, for the purpose of conserving, organizing and directing man-power and woman-power in the best possible way to meet the requirements of the Defence Force and the maintenance of supplies and services essential to the life of the community, and these Regulations shall be administered and construed accordingly."

Under reg. 7 a Universities Commission is established which, by reg. 15, is made responsible for the administration of the Regulations, including a scheme of financial assistance to students, which is contained in Part III. of the Regulations. Reg. 16 is the most important provision. In the first place, in par. 1 it provides that the Director-General of Man Power may, on the recommendation of the Commission, from time to time determine the total number of students who may be enrolled in any faculty or course of study in the universities in Australia. Par. 2 contains the following provision :—

" (2) For the purpose of giving effect to any determination of the Director-General of Man Power under the last preceding sub-regulation, the Commission may, from time to time, by direction in writing to the Vice-Chancellor or other appropriate officer of any University—

(*a*) regulate, restrict or enlarge the number of students who may be enrolled in any faculty or course of study at that University ".

Sub-par. *b* enables the Commission to determine the method of selection of students who may be enrolled in any faculty, and to prescribe examinations or tests for admission. Sub-par. *c* deals

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

with students who have failed in a course. Par. 4 provides that the powers conferred by the regulation shall be exercised only in so far as is necessary for giving effect to the objects of the Regulations.

The substantial question for consideration in this case is whether reg. 16 is valid. No question arises as to the provisions for financial assistance. The other regulations can have effect in affecting the right of any person to enter upon a course of study at a university only if reg. 16 is valid. It is contended for the prosecutor that reg. 16 is invalid because it is not, and, indeed, cannot be, auxiliary to any war effort. In particular, it is urged that the regulation operates only to restrict the number of persons obtaining a university education, and that such a restriction cannot possibly be said to assist the defence of the Commonwealth. (It may be pointed out that the regulation certainly enables the Universities Commission to restrict the number of students enrolled in a faculty, but that it also enables the Commission to enlarge that number.) It is argued for the prosecutor that under the Regulations an intending student can be excluded from a university without any regard to the question of whether or not he or she is able to make a better contribution to the war effort than by engaging in university studies, and without any regard to whether or not he or she is liable for national service under other regulations, or whether, being a male, he can be called up for service under the *Defence Act*. Further, it is pointed out that the Regulations make no provision for utilizing in any way the services of persons who, by the operation of the Regulations, are excluded from the universities.

If attention is limited to pars. 1 and 2 of reg. 16 these contentions might be sustained, though, even in that case, it would not necessarily follow, in my opinion, that the regulation could not be supported under the defence power. But par. 4 of reg. 16 provides that the powers conferred by that regulation shall be exercised only in so far as necessary for giving effect to the objects of the Regulations. The objects of the Regulations are stated in reg. 4, and those objects are (omitting a reference to financial assistance to students which is not relevant in this case) " to provide, during the present war, for . . . the supervision and control of their enrolment and studies, for the purpose of conserving, organizing and directing man-power and woman-power in the best possible way to meet the requirements of the Defence Force and the maintenance of supplies and services essential to the life of the community ". It is also expressly provided in reg. 4 that the Regulations shall be administered and construed accordingly. The ultimate object specified is " to meet the requirements of the Defence Force and the

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maintenance of supplies and services essential to the life of the community." This object is plainly within the defence power of the Commonwealth Parliament (Constitution, sec. 51 (vi.)). The means of obtaining this ultimate object (which means may be described as an intermediate object) is by " conserving, organizing and directing man-power and woman-power in the best possible way " to attain the ultimate object. It seems to me to be obvious that, in order to conduct the present war effectively, it is not only proper, but also necessary, to conserve, organize and direct man power and woman power. This intermediate object is to be attained by seeking to secure the immediate object of the Regulations, namely, the supervision and control of the enrolment and studies of university students. The declaration that the Regulations are to be administered to give effect to this object does not in itself conclusively show that the attainment of this immediate object will promote the achievement of the intermediate and ultimate objects specified, though, as I have said—the *Uniform Taxation Case* (1)—such a declaration is entitled to respectful consideration. But if the supervision and control of enrolment and studies of university students can operate toward either the conservation, the organization or the direction of man power and woman power so as to meet military and essential civilian requirements, the validity of the Regulations is established.

The Regulations are only part of a far-reaching scheme for the utilization of man power and woman power. It is the Director-General of Man Power who, upon the recommendation of the Commission, may determine the number of students to be admitted to a faculty (reg. 16). The Director-General of Man Power holds his office under the *National Security* (*Man Power*) *Regulations*, Statutory Rules 1942 No. 34 as amended. Under these Regulations there is provision for regulating the engagement of employees and wide powers are conferred for the purpose of securing the effective utilization of man power.

The total war in which Australia is at present engaged demands a total war effort. It may be necessary for the Government to assist and develop essential activities, that is, activities which the Government, subject to the control of Parliament, regards as essential because they are either necessary or useful in the war effort or in maintaining the civilian population, the activities of which are necessary to support any war effort. It may be necessary to shut up useless (or relatively useless) industries altogether. Further, it may be necessary to deal with occupations which are not

(1) (1942) 65 C.L.R., at p. 432.

industries in the ordinary sense. For example, the Commonwealth might entirely prohibit dog racing, and the prohibition would (in my opinion) be valid and effective without any provision being made in the prohibiting legislation for the utilization of the services of any persons who at present occupy their time in this pursuit. Thus the Commonwealth in time of war, being concerned with the most effective organization and utilization of man power, is not limited to the promotion of essential work. It can also prevent the diversion of human energy from work which, at the moment, is of national importance.

In many cases there will be room for bona fide difference of opinion with respect to the value of various activities. The decision of this question, however, must be left to Parliament, or by Parliament to the Government, or to some authority established by law. It is not possible for a court, for example, to determine whether, having regard to the present outlook and the possible duration of the war, it is better for a young woman to enter upon a five year medical course, or to occupy herself for the time being in some other form of immediately required activity, such as nursing or clerical work.

By limiting or closing some avenues of occupation man power is made available for other permitted occupations. Persons prevented from following certain pursuits may be left (under the guidance of an economic motive) to find employment in work which is still permitted, or may be compelled under other regulations to work as required. No-one knows how long the war will last, and the requirements of man power must vary from time to time, so that necessary adjustments can be made only by a body which is in touch with the almost infinitely varying requirements of the war effort.

The fighting services and the civilian population must be provided with a sufficient number of university graduates from various faculties, but it would be a wastage of man power to provide a surplus of such graduates, just as it would be an inefficient utilization of man power not to provide a sufficiency of them if students of the requisite ability are available. Without some control, large numbers of young people might undertake lengthy university courses which, for periods varying up to five years, would remove them from any possibility of assisting the war effort. From the point of view of the effective defence of Australia it may be wise to increase the number of students in some faculties, and to decrease them in others.

The Regulations provide for determining the method of selecting students. It is important from the point of view of the war effort that, where only a limited number of students can be taken, those most capable of profiting and least likely to fail should be accepted

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in the universities. Further, the staff and equipment of our universities are not unlimited, and it is not unimportant to see that they are utilized to their full capacity by requiring them to take further students where thought desirable, and also to prevent them from being unduly burdened where too many students are desirous of entering upon a particular course.

The Regulations, in my opinion, have a direct relation to the maximum utilization of the man power of Australia. By assuming control of the channels along which human energy may be directed, they assist the fighting services and the civilian activities upon which the existence of the fighting services necessarily depends. In my opinion the Regulations are valid.

It is therefore unnecessary for me to consider whether, if the Regulations were held to be invalid, it would be proper to issue a writ of mandamus directing the university to admit Drummond to one of the faculties which he has chosen. It is true that the *University and University Colleges Act* 1900-1937 (N.S.W.) provides in sec. 31c that certain certificates shall entitle the holder to matriculate at the university. Further, the by-laws of the university, which provide for its internal management, contain a provision that if a candidate has passed in certain subjects so as to comply with the special requirements prescribed for a faculty, he shall be entitled to admission to that faculty. No argument, however, has been presented upon this question. I would require to hear argument before holding that all persons who comply with the prescribed conditions for entry are entitled as of right to admission to such faculty as they may select, without regard to the capacity of the university to provide instruction in that faculty.

In my opinion, for the reasons which I have stated, the Regulations are valid and the order nisi should be discharged.

RICH J. The prosecutor in this case—J. M. Drummond—obtained an order nisi for a writ of mandamus directing the University of Sydney to enrol and admit him in and to the faculty of medicine or, in the alternative, the faculty of dentistry. The grounds upon which he relies are (1) that he is a matriculated student entitled to be so enrolled and admitted, and (2) that he has complied with the by-laws and regulations under the *University and University Colleges Act* 1900-1937 entitling him to such admission and enrolling, and (3) that the *National Security* (*Universities Commission*) *Regulations* are bad in law.

Counsel for the university took no part in the argument. The Commonwealth having obtained leave to intervene its counsel

argued in support of the Regulations. These Regulations purport to have been made under sec. 5 of the *National Security Act* 1939-1940. During the argument regs. 4, 7, 15 and 16 in particular were referred to. Reg. 16 is the regulation most relevant to the matter under consideration. As the regulations are already in statement I shall not set them out verbatim. Reg. 15 (1) (*a*) and 15 (2) are wide enough to empower the relevant authority to control education throughout Australia from the crèche to the university. Reg. 15 (1) (*b*) deals with the exemption of students and employees of universities and 15 (1) (*c*) with employment of graduates and persons who have completed any course at a university. Reg. 16, which is concerned strictly with universities, is aimed at the control of the number of students to be enrolled in any faculty or course of study; their number may be regulated, restricted or enlarged; the method of selection of the quota and the examinations or tests for admission to any faculty or course may be determined and in case of failure in the whole or part of any course permission to continue that course during the present war may be allowed. As no power of legislation with respect to education is conferred on the Federal Parliament, it is sought to call in aid the defence power, and the crucial question for determination is whether reg. 16 has any real connection with that power. Is there any justification for interfering with education in Australia under the pretence of aiding its defence? Why should a student who has passed the examination or test set by the university and has not been called to or is not already engaged in any war service be prevented from attending there, thus frustrating the efforts, ambitions and aspirations of parents and children? If there are vacancies in any of the military or essential services professors, lecturers and students may be enrolled to fill such vacancies. In my opinion it is outside the power of the Commonwealth Parliament to exercise general control of education in the schools or universities of Australia, prescribe what children, and how many of them, shall attend the schools, the method of qualification for entrance, regulate the number of students entitled to matriculate, discriminate between faculties and restrict the number of students to be admitted to or enrolled in any faculty, determine the course of study and curricula in the various faculties of the universities, the nature and subjects of examinations, and set the standards for passing the examinations. In expressing this opinion I confine my judgment to the validity of reg. 16 and consider it to be invalid.

The question as to the issue of a writ of mandamus to the university was not argued and I refrain from expressing any opinion as to

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whether it should issue to enforce enrolment and admission of the prosecutor to either of the faculties in question.

STARKE J. Order nisi issued by this Court to the University of Sydney to show cause why a writ of mandamus should not issue directing the university to enrol and admit the prosecutor Drummond into the faculty of medicine or, in the alternative, the faculty of dentistry in the university.

The provisions of the *Judiciary Act* 1903-1934, sec. 33, do not give to this Court general authority to issue writs of mandamus, but only in aid of its appellate or original jurisdiction. It is claimed, however, that this Court had original jurisdiction to issue the order because the matter arises under the Constitution or involves its interpretation or because there arises a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales. No argument was addressed to the Court on the subject, but the jurisdiction of the Court must be established on this basis.

The right to be enforced by a writ of mandamus must be of a public nature affecting the public at large or specially affecting the rights of some individual.

The *University and University Colleges Act* 1900-1937 of New South Wales enacts (sec. 31c) that " a leaving certificate or higher leaving certificate which certifies that a student has passed the required examination in the subjects and at the standards which the Senate " of the university " determines are necessary for matriculation . . . shall entitle the holder of such certificate . . . to matriculate at the University."

This is a right of a public nature specially affecting the rights of students who fall within its terms. The prosecutor is a student who has satisfied the conditions of the section, but the university refuses to allow him to matriculate at the university. The prosecutor claims that he is entitled to matriculate in the faculty of medicine or the faculty of dentistry, but I shall come back to that matter later. It is enough for the moment to say that the right given by the section is denied to the prosecutor and a foundation is thus laid for a writ of mandamus in a court of competent jurisdiction.

The university justifies its action under the *National Security (Universities Commission) Regulations*. But the prosecutor contends that these Regulations transcend the constitutional power of the Commonwealth, and also exceed the powers conferred upon the Governor-General by the *National Security Act* 1939-1940. Further, it was suggested that the Regulations involve questions as to the

limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales: See *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1); *Ffrost* v. *Stevenson* (2). Prima facie, therefore, the original jurisdiction of this Court is attracted in the matter of the order nisi for a mandamus which is now before the Court.

The objects of the *Universities Commission Regulations* are to provide, during the present war, according to reg. 4, "for financial assistance to students at Universities and the supervision and control of their enrolment and studies, for the purpose of conserving, organizing and directing man-power and woman-power in the best possible way to meet the requirements of the Defence Force and the maintenance of supplies and services essential to the life of the community," and the Regulations are to be administered and construed accordingly. The financial assistance to students is limited to students enrolled in medicine, dentistry, engineering, science, veterinary science, and agriculture, and does not call for consideration in this case. But I may perhaps refer to some observations of mine in *Attorney-General (Vict.)* v. *The Commonwealth* (3).

The provisions relevant to this case are in Part II. of the Regulations. The Commonwealth, it must be remembered, has no power to make laws with respect to education; so the authority for the Regulations must be found in the constitutional power with respect to naval and military defence and the *National Security Act* 1939-1940, which authorizes the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth. A Universities Commission is set up under the Regulations. Amongst other powers and authorities the Commission shall inquire into and report upon any matter for ensuring the provision of facilities to enable persons to receive suitable education and training to meet the requirements of the defence force and the maintenance of supplies and services essential to the life of the community. The Commission shall also advise the Director-General of Man Power on all questions relating to the exemption of students and employees of universities from service in the defence force or any form of service authorized by the *National Security (Man Power) Regulations*. And reg. 16 provides that "the Director-General of Man Power may, on the recommendation of the Commission, from time to time determine the total number of students who may be enrolled in any faculty or course of study in the Universities in Australia." For the purpose of giving effect to any determination of the Director-General the Commission may, from time to time, by direction in

(1) (1917) A.C. 528; 24 C.L.R. 396. (2) (1937) 58 C.L.R. 528, at p. 617.
(3) (1935) 52 C.L.R. 533, at pp. 567, 568.

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Starke J.

writing to the Vice-Chancellor or other appropriate officer of any university—(*a*) regulate, restrict or enlarge the number of students who may be enrolled in any faculty or course of study at that university; (*b*) in any case where such direction is given "determine the method of selection of students who may be enrolled in any faculty or course of study at the University and prescribe the examinations or tests by which students may be admitted to any faculty or course of study; and (*c*) determine whether any student who has failed in the whole or any part of any course of study shall be permitted to continue that course of study during the present war."

Pursuant to this regulation the Commission recommended to the Director-General of Man Power the total numbers of students who might be enrolled as first year students in the faculties of medicine, dentistry, agricultural science, veterinary science and engineering in the universities of Australia and the Director-General adopted the recommendation and directed accordingly. The Commission then, pursuant to the Regulations, gave directions to the University of Sydney accordingly.

There is no dispute that the University of Sydney complied with this direction in refusing to enrol and admit the prosecutor into the faculty of medicine or, alternatively, into the faculty of dentistry. There are ten faculties in the University of Sydney according to its calendar of 1942, but the direction under the *Universities Commission Regulations* only applies to six of them, and those six are the same faculties in respect of which financial assistance may be given to students. So, apparently, though financial assistance to students is advisable in aid of defence in six faculties, yet it is also advisable in aid of defence to determine the total number of students in those faculties, whilst such faculties as arts, law, economics and architecture are entirely unregulated. Students may be assisted and encouraged in six faculties under one set of provisions and yet be unable to enrol under another, as in the case of the present recommendation and direction. But, though this may appear strange, yet there may be more reason for it than I have appreciated. The vital defect, however, in the Regulations is that, though the total number of students who may be enrolled in any faculty or course of study may be determined, yet the remainder are not diverted to the armed forces or to any purpose of defence or used for the safety of the Commonwealth. These students may enrol in the faculties of arts, law, &c., or other educational courses, or take such employment as they can find, subject to the provisions of the *Defence Act*, secs. 59 and 60, and the *Man Power Regulations*. But all these

provisions exist and can be used without any resort to the *Universities Commission Regulations*. In truth, in taking power to determine the total number of students who may be enrolled in any faculty or course of study in the universities of Australia, the Commonwealth is seeking to control education in the universities of Australia, which is wholly beyond its power, and, as the regulation and the determination and direction made under it are framed, without any connection whatever with the defence or safety of the Commonwealth. Therefore, in my opinion, Universities Commission reg. 16, which is the vital one here, is beyond power and invalid.

But I am not prepared to make absolute the order nisi in the form in which it has been granted. The University of Sydney has extensive powers under its Act to make by-laws and regulations (See Act, secs. 15 and 46), and they are contained in some thirty-four chapters, some of which are set out in its 1942 calendar. These by-laws and regulations are for the internal government of the university and many of them confer discretionary powers. In chapter XX., dealing with matriculation, it is provided that candidates for any degree granted by the university shall be required to matriculate before entering upon the prescribed course. And, to matriculate, students must pass the prescribed examination. A pass in accordance with the prescribed requirements will admit to matriculation in any faculty for which no special requirements are prescribed, and if the pass complies with the special requirements prescribed for any faculty, the student will be entitled to admission to that faculty.

It is said that these by-laws and regulations constitute a right of a public nature affecting the public at large and the students who pass the prescribed examinations which may be enforced by the writ of mandamus. The university has, it was suggested, no discretion. All students must be enrolled in any faculty which their pass entitles them to enter, whether they be or be not of good fame and character, whether the university has or has not sufficient professorial and tutorial staff, whether it has or has not sufficient accommodation and equipment, or any other good reason. And this in the face of sec. 17 of the Act, which enacts that the Governor of New South Wales shall be the visitor of the university, with authority to do all things that pertain to visitors as often as he deems meet. It has been stated that this provision is obsolete, but it is there to be used in case of need. A similar clause has been invoked on more than one occasion in the University of Melbourne. Moreover, the university has not seen fit to argue the question, owing to some pressure to which it was proper that it should yield, despite some pointed observations from members of this Bench. The position is

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not satisfactory from the point of view of the Court. Apart from the *Universities Commission Regulations* the university has not considered whether it should or should not enrol and admit the prosecutor into the faculty of medicine or the faculty of dentistry. It may be, apart from the Regulations, that the university will enrol and admit the prosecutor as he desires. At all events the university has no purpose to serve but the advancement of learning, and in the achievement of that purpose it will no doubt do all that is proper and possible in the circumstances.

The university, I take it, has no objection to the prosecutor matriculating at the university in the terms of sec. 31c of its Act, and it is but a matter of form to make the order nisi absolute to that extent. But whether the prosecutor can have a writ of mandamus to the university to enrol and admit him in the faculty of medicine or of dentistry is another question, which may never arise and should be left open for further consideration, in the light of the relevant facts, if and when a decision becomes necessary.

McTIERNAN J. I agree with the reasons and judgment of his Honour the Chief Justice. The connection between the regulation 16 which is principally attacked and the defence of the Commonwealth is obvious and direct. The plain object of the regulation is to organize the man power and woman power of the Commonwealth for the prosecution of the war. The regulation is part of the very substance of the war effort. I cannot doubt that according to the ratio which this Court has applied in deciding whether regulations are within the powers conferred on the Executive by sec. 5 of the *National Security Act* 1939-1940, these Regulations are valid. It is for the executive to decide how the mental and physical powers of the men and women of the community are to be organized and how they should be directed and focussed for the advantage of the war effort. It is not necessary to refer to the cases which contain the ratio for deciding whether regulations are within the above-mentioned Act: as an instance of the explanation and application of that ratio I refer to *Andrews* v. *Howell* (1).

WILLIAMS J. This is the return of a rule nisi calling upon the University of Sydney to show cause why a writ of mandamus should not be issued directing the university to enrol and admit the applicant in and to the faculty of medicine or in the alternative the faculty of dentistry at the University of Sydney on the grounds (1) that the applicant is a matriculated student entitled to be so enrolled and

(1) (1941) 65 C.L.R. 255, at pp. 263, 277-279, 286, 287.

admitted, (2) that he has complied with the by-laws and regulations under the *University and University Colleges Act* 1900-1937, entitling him to such admission and enrolling, and (3) that the *National Security* (*Universities Commission*) *Regulations* (Statutory Rules 1943 No. 28 as amended by Statutory Rules 1943 No. 58) are bad in law.

At the hearing, after the Commonwealth had been given leave to intervene, Mr. *Teece*, senior counsel for the University of Sydney, made the following statement:—"Our instructions are that the Senate does not desire to commit itself on the question of a possible discretion by objecting to this student's admission upon any discretionary ground; consequently we do not intend to argue the question of discretion. The real issue so far as the university is concerned is whether these Regulations are valid or invalid. If valid the university is bound by them; if invalid then the whole matter must be the subject of arrangement between the Senate, the State and the Commonwealth. We realize that the Court must itself be satisfied upon the question of discretion before a mandamus will issue, but since the Senate does not desire to take the point, assuming it to be open to us, our instructions are to raise no objection to a mandamus on this ground."

The effect of the recent decision of the Supreme Court of New South Wales in *Ex parte King*; *In re The University of Sydney* (1) is that, on the evidence, apart from these Regulations, the applicant would be entitled to a mandamus. As the university has refused to challenge this decision, I can see no reason why this Court should not follow it for the purposes of this application without expressing any final opinion as to its correctness or otherwise. It is to be noted that in *Halsbury's Laws of England*, 2nd ed., vol. 12, p. 101, footnote *a*, cases are cited where a mandamus has been granted against a university.

I shall proceed therefore to discuss the only question that was argued before this Court, namely the constitutional validity of reg. 16 of the *National Security* (*Universities Commission*) *Regulations*.

The regulation is in the following terms:—

(1) The Director-General of Man Power may, on the recommendation of the Commission, from time to time determine the total number of students who may be enrolled in any faculty or course of study in the Universities in Australia. (2) For the purpose of giving effect to any determination of the Director-General of Man Power under the last preceding sub-regulation, the Commission may, from time to time, by direction in writing to the Vice-Chancellor or other appropriate officer of any university—(*a*) regulate, restrict or enlarge

(1) Unreported. Supreme Court (N.S.W.), 15th April 1943.

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the number of students who may be enrolled in any faculty or course of study at that University; (*b*) in any case where any direction is given under paragraph (*a*) of this sub-regulation, determine the method of selection of students who may be enrolled in any faculty or course of study at the University and prescribe the examinations or tests by which students may be admitted to any faculty or course of study; and (*c*) determine whether any student who has failed in the whole or any part of any course of study shall be permitted to continue that course of study during the present war. (3) The Commission may, by order, make provision for any matters or things necessary or convenient for exercising its powers or performing its functions under these Regulations. (4) The powers conferred by this regulation shall be exercised only in so far as is necessary for giving effect to the objects of these Regulations.

Pursuant to this regulation the Commission fixed quotas for the universities in the faculties of medicine, engineering, dentistry, science, agricultural science and veterinary science, but the applicant failed to gain inclusion in the quotas fixed for the University of Sydney in medicine or dentistry.

The Regulations authorize the Commission to inquire into and report to the Minister upon any matter relating to universities or to education in Australia (reg. 15 (1) (*a*)), and to require any person to furnish any information or to answer any questions in relation to any matter arising under the Regulations (reg. 15 (2)). They authorize the Director-General of Man Power, on the recommendation of the Commission, from time to time to determine the number of students who may be enrolled in any faculty or course of study in the universities in Australia (reg. 16 (1)). They provide that, in order to give effect to this determination, the Commission may, from time to time, regulate, restrict or enlarge the number of students who may be enrolled in any faculty or course of study at any university; and that it may determine the method of selection of students who may be enrolled in any faculty or course of study and prescribe the examinations or tests by which students may be admitted to any faculty or course of study (reg. 16 (2)). The Regulations are therefore comprehensive enough to authorize any inquiry into any aspect of the education of any persons of any age anywhere in Australia, to enable the Commission to regulate the number of students who may be enrolled in any faculty or course of study in any university in Australia, and to prescribe the examinations and tests which any student must pass in order to gain admission to any faculty or course of study in any university in Australia.

The Regulations purport to have been made under the powers to legislate conferred upon the Governor-General (which means the

Governor-General acting with the advice of the Federal Executive Council) by the *National Security Act* 1939-1940. This Act, by sec. 5, authorizes the Governor-General to make regulations for securing the public safety and defence of the Commonwealth and for prescribing all matters which are necessary or convenient for the prosecution of the war. The purpose of the Act is therefore to delegate to the Governor-General while the Commonwealth is engaged in war and for six months thereafter (sec. 19) the power to make laws for the peace, order and good government of the Commonwealth conferred upon the Commonwealth Parliament by the Constitution, sec. 51 (vi.). But as the Commonwealth Parliament could not confer upon its delegate ampler powers of legislation than are conferred upon the Parliament, it follows that if the Parliament could not validly pass an Act in the same terms as the *Universities Commission Regulations*, the Regulations cannot be valid.

The Constitution does not confer upon the Commonwealth any specific power to legislate with respect to education. This power is therefore reserved to the States by secs. 106 and 107 of the Constitution.

The Regulations purport to be an exercise of the defence power. They contain a statement that the objects of the Regulations are to provide during the present war for financial assistance to students at universities and the supervision and control of their enrolment and studies for the purpose of conserving, organizing and directing man power and woman power in the best possible way to meet the requirements of the defence force and the maintenance of supplies and services essential to the life of the community and that the Regulations shall be administered and construed accordingly (reg. 4), and a further statement that the powers conferred by reg. 16 shall be exercised only in so far as is necessary for giving effect to the objects of the Regulations (reg. 16 (4)). These statements are entitled to respect, but they are in no way conclusive (*South Australia* v. *The Commonwealth* (1)).

However comprehensive the ambit of the defence power may be in time of war, it must still be exercised subject to the Constitution, so that an attempted legislative exercise of the power can only be valid if the Court can see that the Act or regulation impeached can conceivably be capable even incidentally of aiding defence.

It is manifest that a university has facilities for research and for training men and women in subjects that appertain to defence. In so far as the Commonwealth makes even a prior use of these facilities in time of war there could be no objection if the ordinary curriculum has to be interrupted.

(1) (1942) 65 C.L.R., at p. 432.

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The Commonwealth has the most ample powers under the Constitution, sec. 51 (vi.), to conscript men and women for defence either in the armed forces or for any industrial or other work which is capable of assisting defence. It can also prohibit or curtail activities where the object is to conserve supplies of materials required for defence. A university must therefore carry on as best it can with such professors and other teachers as are not conscripted and with such supplies as it can obtain. The result may be that owing to a dearth of professors and other teachers or a curtailment of supplies it will become difficult or impossible for a university in one or more of its faculties to teach as many students as in times of peace, but this is a matter for the governing body of each university.

Once it is realized that the services of any professor or other member of the staff of any university or of any student desiring to matriculate in any university can be conscripted, it appears to me that it cannot conceivably aid defence even incidentally for the Commonwealth under colour of exercising the defence power to attempt to regulate the number of students who may be enrolled in any faculty or course of study or to prescribe the examinations or tests which they must pass in order to be eligible for admission to any faculty or course of study.

The expense of educating boys and girls may have caused their parents considerable hardship, and they themselves may have devoted much time and study in order to pass the examinations required to enable them to matriculate at a university. They may have inherited or acquired an ambition to practise in some particular profession for which the necessary qualification can only be obtained by graduating in a faculty in a university. There are, generally speaking, only a limited number of years during which it is practicable for a student to attend a university. But the Regulations can operate to prevent every young man and woman who fails to gain inclusion in a quota from attending any faculty in any university for the indefinite duration of the war and for six months afterwards, although he or she may be exempted from, incapable of, or may not be called upon to undertake any work of national importance.

The justification for the extension of the ambit of the defence power which occurs in time of war is that the operation of the power must be enlarged to meet the abnormal but temporary conditions which war creates. But education under modern conditions is a necessity for every individual in peace and in war. This does not mean that the Commonwealth Parliament has not the fullest power to exempt only a limited number of young men or women from military or industrial conscription on the ground that they desire to study in a faculty at a university, or to refuse to make this

a ground of exemption at all. But it is an entirely different thing for the Commonwealth Parliament to claim that it can prevent a university prescribing its own standard for matriculation in the different faculties or accepting for enrolment students whose services are not available or availed of in the defence force or in any industrial or other undertaking associated with the prosecution of the war.

Mr. *Maughan* contended that the Commonwealth Government was in the best position to decide how many graduates from the various faculties would be required in the national interest during the rest of the war and during the period of reconstruction after the war. Supposing that it could be an advantage to the Commonwealth that a paternal government should plan how many of its citizens should engage in each of the manifold walks of life, an attempt to embody the whole or part of such a grandiose plan in regulations made under the *National Security Act* would be quite beyond the scope of the powers conferred upon the Commonwealth Parliament by the Constitution, sec. 51 (vi.). If the Commonwealth in the exercise of the defence power can regulate the number of students who can be educated at a university it must also be able to regulate the number of children who can be educated in the schools and to prescribe the matters which will qualify them for admission. The Commonwealth Parliament is not entitled, in my opinion, under the defence power even in time of war to assume complete control of the systems of education operating in the States either in the universities or in the schools, or to prescribe what subjects shall be taught in the universities or in the schools, and what examinations shall be held to qualify for matriculation in the universities. Reg. 16 is therefore invalid. It is unnecessary to express any opinion as to the validity of the remaining regulations.

As the only ground urged against the granting of the application has failed, the order nisi should be made absolute.

Let a writ of mandamus issue commanding the University of Sydney that it do allow the prosecutor John McPherson Drummond to matriculate at the university. No order as to costs.

Solicitors for the prosecutor, *Fred C. Emanuel & Co.*

Solicitors for the University of Sydney, *Minter, Simpson & Co.*

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

J. B.