[HIGH COURT OF AUSTRALIA.]

THE VICTORIAN CHAMBER OF MANUFACTURES AND OTHERS . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . . DEFENDANTS.

(WOMEN'S EMPLOYMENT REGULATIONS.)

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MELBOURNE, *June* 21-23.

SYDNEY, *Aug.* 13.

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

Constitutional Law—Defence—National security—Women's employment—Statute—Regulations—Validity—Disallowance of regulations by Senate—New regulations "the same in substance" as those disallowed—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*)—*Women's Employment Act* 1942 (*No.* 55 *of* 1942)—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *ss.* 48, 49—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *s.* 5 (4)—*Women's Employment Regulations* (*S.R.* 1942 *No.* 548—1943 *Nos.* 75, 92).

The *Women's Employment Act* 1942 was validly enacted under the defence power of the Commonwealth Parliament.

So *held* by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting).

Held, further, by *Latham* C.J., *Rich* and *Williams* JJ. (*McTiernan* J. dissenting), that reg. 2 of the *Women's Employment Regulations* (*No.* 2) (Statutory Rules 1943 No. 75) contravenes s. 49 (1) of the *Acts Interpretation Act* 1901-1941 and is therefore void; by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ., that reg. 4 of Statutory Rules 1943 No. 92 contravenes s. 49 (1) and is void; by *Rich*, *McTiernan* and *Williams* JJ. (*Latham* C.J. dissenting), that reg. 3 of the *Women's Employment Regulations* (*No.* 2) does not contravene s. 49 (1) and is valid.

Observations on the bearing of s. 5 (4) of the *National Security Act* 1939-1940 and s. 48 (1) (*c*) and (3) of the *Acts Interpretation Act* 1901-1941 upon decisions of the Women's Employment Board.

DEMURRER.

The Victorian Chamber of Manufactures, the Metal Trades Employers' Association and certain companies engaged in the industries mentioned hereunder brought an action in the High

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Court against the Commonwealth, the Minister for Labour and National Service and the members of the Women's Employment Board.

In their statement of claim the plaintiffs alleged:—"1. The plaintiff the Victorian Chamber of Manufactures is a company incorporated in Victoria as a company limited by guarantee and registered as an organization of employers under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, the members of which include upwards of 2,800 persons firms and/or companies engaged in manufacturing in the State of Victoria many of whom at present employ or desire or propose in the future to employ women in manufacturing work. Of such members, upwards of 1,000 are engaged in one or more of the industries or branches of industry referred to in clause 1 of an award of the Commonwealth Court of Conciliation and Arbitration made on 5th December 1941 in the matter of a dispute between The Amalgamated Engineering Union and others and Metal Trades Employers' Association and others and known as the Metal Trades Award and upward of 800 are bound by the said Metal Trades Award and many of the members engaged as aforesaid at present employ and others desire or propose in the future to employ women in manufacturing work of the kind specified in" a decision of the Women's Employment Board of 11th December 1942 and/or a decision of the Board of 29th January 1943. "2. The plaintiff Metal Trades Employers' Association is an unincorporated association registered as an organization of employers under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, the members of which include upwards of 1,100 persons firms and/or companies bound by the said Metal Trades Award, many of whom at present employ and others desire or propose in the future to employ women in manufacturing work of the kind specified in the said decision of the Women's Employment Board of" 29th January 1943. "3. The remaining plaintiffs are companies incorporated in Victoria and/or in New South Wales and carrying on one or more of the industries or branches of industry referred to in clause 1 of the said Metal Trades Award all of whom employ women in manufacturing work of the kind referred to in paragraph 2 hereof."

The statement of claim also contained allegations the substance of which was as follows:—On 25th March 1942 the Governor-General, purporting to act under the *National Security Act* 1939-1940, made the *National Security* (*Employment of Women*) *Regulations* (Statutory Rules 1942 No. 146), and from time to time prior to 23rd September made amending Regulations including Statutory Rules 1942 Nos.

236, 263 and 294. The Regulations empowered the Minister to appoint a Women's Employment Board. The Board was appointed in June 1942, and applications were made to it for decisions in relation to the employment of women by several of the plaintiffs. On 23rd September 1942 the Board made a decision purporting to bind one of the plaintiffs and other named employers. On the same day the Senate disallowed the amending Regulations above mentioned. On 6th October 1942 the Royal assent was given to the *Women's Employment Act* 1942, which provided (by s. 3) that the provisions in the schedule to the Act (entitled *Women's Employment Regulations* and reproducing the previous Regulations) should have, and continue to have, and be deemed as on and from 23rd September 1942 to have had, the force of law. The Governor-General was given power (by s. 6) to make regulations for the repeal, alteration of, or addition to, the provisions in the schedule to the Act; it was provided (by s. 5) that the *National Security Act* should, so far as applicable, apply to the provisions in the schedule and to regulations made under the Act, and (by s. 4) that " all decisions, variations and interpretations " of the pre-existing Board up to and including 23rd September 1942 should have full force and effect and that applications to the Board which were pending on 22nd September 1942 might be dealt with by the new Board to be established in accordance with the schedule to the Act. This Board was constituted in October 1942. It made decisions affecting some of the plaintiffs in respect of applications which were pending on 22nd September 1942 and also in respect of fresh applications. On 22nd December 1942 the Governor-General made Regulations (Statutory Rules 1942 No. 548) amending the Regulations in the schedule to the Act; in particular (by reg. 4), they repealed reg. 6 in the schedule (which defined the conditions upon which applications should be made to the Board and the functions of the Board in relation thereto) and inserted in its stead a new reg. 6. Subsequently, other relevant decisions were made by the Board. On 16th March 1943 Statutory Rules 1942 No. 548 was disallowed by the Senate. On 25th March 1943 the Governor-General made the *Women's Employment Regulations* (*No.* 2) (Statutory Rules 1943 No. 75), which provided (by reg. 2) that the *Women's Employment Regulations*, as existing prior to the date on which Statutory Rules 1942 No. 548 came into operation, should have full force and effect, and (by reg. 3) that all decisions, variations and interpretations of the Women's Employment Board given or made between the commencement of the *Women's Employment Act* 1942 and the date of disallowance of Statutory Rules 1942 No. 548

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should have full force and effect. On 8th April 1943 the Governor-General made Regulations (Statutory Rules 1943 No. 92), which purported to amend reg. 6 and other regulations.

The plaintiffs further alleged—and (amongst other relief) claimed declarations—that (*a*) " the *Women's Employment Act* 1942 or alternatively that ss. 3 and/or 4 and/or 5 and/or 6 of the said Act, is or are beyond the powers of the Parliament of the Commonwealth and is or are void and of no effect " ; (*b*) " the *Women's Employment Regulations* and/or each and every regulation thereof are beyond the powers of the Parliament of the Commonwealth and/or the Governor-General and are void and of no effect " ; (*c*) " the *Women's Employment Regulations* (*No.* 2) and/or reg. 2 and/or reg. 3 thereof are beyond the powers of the Governor-General and/or are contrary to the *Acts Interpretation Act* 1901-1941 and are void and of no effect " ; (*d*) " Statutory Rules 1943 No. 92 and/or each and every regulation thereof are beyond the powers of the Governor-General and/or are contrary to the *Acts Interpretation Act* 1901-1941 and are void and of no effect " ; (*e*) " each and every decision purporting to have been made by the Women's Employment Board between the 6th day of October 1942 and the 16th day of March 1943 and expressed to be binding on any member of the plaintiff Chamber or the plaintiff Association or any of the other plaintiffs is void and of no effect :—(i) By reason of the promulgation and subsequent disallowance by the Senate of Statutory Rules 1942 No. 548 ; and/or (ii) By reason of the fact that none of the said decisions was laid before each House of Parliament as required by s. 48 of the *Acts Interpretation Act* 1901-1941."

The defendants demurred to the statement of claim on grounds which dealt *seriatim* with the plaintiffs' claims *a* to *e* and alleged the validity of all the matters challenged by the plaintiffs.

The demurrer now came on for hearing, and it was agreed that counsel for the plaintiffs should begin.

Fullagar K.C., *S. C. G. Wright* and *R. Ashburner*, for the plaintiffs.

Fullagar K.C. (1) The *Women's Employment Act*, including the *Women's Employment Regulations* contained in the schedule, is not within the defence power of the Commonwealth and is therefore void. The defence power does not authorize general industrial regulation by the Commonwealth. Neither the war nor any circumstance arising out of it empowers any such general regulation. The Regulations in the schedule cover females on work usually performed by males even though these females may have performed that work

previously, although the work may have no connection with the defence of the country, and is not occasioned by any circumstance arising out of the war. It may be said that in order to deal with conditions arising out of a great plenty of money circulating in the community and the great scarcity of consumer goods, it is necessary to control what is commonly called inflation, to peg wages, &c. : that could be connected with circumstances arising out of the war, but there is no such connection as regards general regulation of conditions of employment. Such regulation may be desirable, but that does not bring it within the defence power. The general proposition that peace in industry is so important during war that the Commonwealth can do anything to obtain it is negatived by *Victoria* v. *The Commonwealth* (1). (2) The disallowance by the Senate of Statutory Rules 1942 No. 548 had the effect of depriving the Board of all jurisdiction for the future ; that jurisdiction was not effectively restored by Statutory Rules 1943 No. 75, and Statutory Rules 1943 No. 92 is void. The disallowance of Statutory Rules 1942 No. 548 had the effect of repealing regs. 4 and 5 thereof, including the words repealing the scheduled regs. 6 and 7 respectively (*Acts Interpretation Act*, s. 48 (6)—See also s. 50) ; but No. 548 is an " instrument " within the meaning of s. 46 (*a*) of the *Acts Interpretation Act*, and therefore that Act applies to the instrument as if it were an Act ; accordingly, s. 7 of the Act applies, with the result that the scheduled regs. 6 and 7 were not revived by the disallowance, and, as these were the vital provisions relating to the Board's jurisdiction, it had no jurisdiction after the disallowance. Statutory Rules 1943 No. 75 is void. As to reg. 2 thereof, in attempting to restore (in particular) regs. 6 and 7 of the scheduled regulations it contravenes s. 49 (1) of the *Acts Interpretation Act*, which prohibits the making of regulations " the same in substance " as the disallowed Statutory Rules 1942 No. 548 within six months after the disallowance. Regs. 6 and 7 as inserted by No. 548 and regs. 6 and 7 of the scheduled Regulations do not differ in substance : there are differences of expression and also some difference in details, but the tenor generally is the same. Similarly, Statutory Rules 1943 No. 92 is void : its purport is substantially to restore Statutory Rules 1942 No. 548 ; it altogether disregards s. 49 (1) of the *Acts Interpretation Act*. (3) None of the decisions of the Board was tabled in Parliament, and all the decisions (other than those saved by the *Women's Employment Act*, if it is valid) are therefore void. This results from the combined operation of s. 5 of the *Women's Employment Act*, s. 5 (4) of the

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

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National Security Act, and s. 48 (1) (*c*) and (3) of the *Acts Interpretation Act*. The decisions of the Board are "orders . . . which are of a legislative and not an executive character" within the meaning of s. 5 (4) of the *National Security Act*, which applies by virtue of s. 5 of the *Women's Employment Act* (See also s. 5 (3) of the *National Security Act*) and makes s. 48 (1) (*c*) of the *Acts Interpretation Act* applicable; s. 48 (3) then makes the decisions void if not tabled as provided in s. 48 (1) (*c*). A "legislative order" means an order which purports of its own force to create legal rights or obligations; it is distinguished from an executive order, which is an order that does not of its own force create legal rights or obligations. The decisions of the Board are therefore legislative in character; if this is not so in respect of all the decisions, it is so at least in respect of those decisions which make a common rule. [He referred to *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (2); *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (3); *Clyde Engineering Co. Ltd.* v. *Cowburn* (4); *Ex parte McLean* (5).]

R. Ashburner. Decisions of the Board given between 6th October 1942 (when the *Women's Employment Act* came into force) and 16th March 1943 (when Statutory Rules 1942 No. 548 was disallowed) have no effect after the latter date. Decisions given between 6th October and 22nd December 1942 (when Statutory Rules 1942 No. 548 was made) depended for their efficacy upon the scheduled regs. 6 and 7. When those regulations were repealed by No. 548, the decisions given between the last-mentioned dates did not have any further efficacy; alternatively, if they were saved impliedly by the new reg. 6 (1) inserted by No. 548, the saving ceased to operate when the regulation was disallowed. [He referred to *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (6).] Statutory Rules 1943 No. 75, reg. 3, is not a regulation for carrying out or giving effect to the *Women's Employment Act*: it does not give the prior decisions force as such, but re-enacts them, directly fixing conditions of employment in terms of the prior decisions. It is not a saving clause and is beyond the powers conferred by the Act, which contemplates a board, an application and a decision. If this argument is not correct, then reg. 3 is void

(1) (1910) 10 C.L.R. 266, at pp. 279, 289, 318, 320, 333.
(2) (1910) 11 C.L.R. 1, at pp. 36, 39.
(3) (1910) 11 C.L.R. 311, at pp. 318, 326.
(4) (1926) 37 C.L.R. 466, at pp. 494-497.
(5) (1930) 43 C.L.R. 472.
(6) (1931) 46 C.L.R. 73, at p. 106.

for the same reason as reg. 2—it purports to create conditions which are "the same in substance" as the disallowed Regulations. A further ground of invalidity is that it contravenes s. 48 (2) of the *Acts Interpretation Act*.

Ham K.C. and *P. D. Phillips*, for the defendants.

Ham K.C. (1) The *Women's Employment Act*, including the Regulations in the schedule, is valid under the defence power. The object of the Act is to encourage women to take the places previously held by men because the men are required for war purposes and essential industries could not be carried on without them unless women took their places. This cannot be confined to industries having an immediate relation to the war. It is essential to the efficiency of the community for the purposes of the war that its industries generally be carried on. The Act contemplates that the Board will provide conditions which will make it possible for women to carry on the work effectively. Whether it has chosen the best means of achieving that result is not to the point. (2) Statutory Rules 1942 No. 548 did not repeal the scheduled regs. 6 and 7, but merely amended them. The expression of the amendment in each case as a repeal and substitution did not make it any the less an amendment; that is merely the machinery of amendment. On the disallowance of No. 548, the amendments ceased to have effect and the scheduled regulations reverted to their original form. The schedule cannot be destroyed by regulations under the power to repeal. Regulations made under the Act must be necessary or convenient for carrying out the purposes of the Act. In any event, the schedule was validly revived by Statutory Rules 1943 No. 75, which does not contravene s. 49 of the *Acts Interpretation Act*. The contention that No. 75 is substantially the same as No. 548 is unsound. Comparing what appears on the face of the two sets of regulations, nothing could be more different. Even if—as contended for the plaintiffs—the comparison is to be, not between the words of the two Regulations, but between the results of the operation of each of them, they are still not the same in substance—they are as unlike as they could possibly be. No. 548 is merely a series of amendments; it does not contain any scheme which could have an independent operation, whereas No. 75 reinstates something which is assumed to have been repealed. To be "the same in substance" No. 75 must not differ *at all* from No. 548 in subject matter—it must produce *exactly* the same legal result. If the comparison is to be between the scheduled Regulations which No. 75 revives and the

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provisions of No. 548, they clearly do not produce the same legal result. No. 75 could do no more to the schedule to the Act than to restore the repealed regs. 6 and 7 (if they had been repealed), and those regulations differ substantially from those which had been inserted by No. 548. No. 75 is not retrospective so as to contravene s. 48 (2) of the *Acts Interpretation Act*: See *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1). (3) The decisions of the Board are not legislative in character; they merely implement the Regulations and are executive (*The Commonwealth* v. *Grunseit* (2); *Opp Cotton Mills* v. *Administrator of Wage and Hour Division of Department of Labour* (3)).

[WILLIAMS J. referred to *R.* v. *City of Westminster Assessment Committee*; *Ex parte Grosvenor House* (*Park Lane*) *Ltd.* (4).]

Perhaps the word "administrative" would be more apt than "executive" to describe the functions of the Board; in any event, those functions are not legislative.

P. D. Phillips. The decisions of the Board are not of a legislative character; alternatively it cannot be postulated in general terms that all the decisions are legislative. The test applied by the Supreme Court of the United States is to ascertain the extent of independent discretionary power given to the authority making the order. Another test is that an order is of a legislative character if it contains within its own four corners all the essential details of the legislative rule, prescription, law or standard laid down; it is executive if it contains only part of the rule or prescription. There is logical ground for saying that to determine whether an order is of a legislative or an executive character one should look at the order and see what it has done by way of giving commands to the subject rather than look at the nature of the power to make orders. Whichever of these tests is applied, the decisions of the Board lack an element which is essential to a legislative command—the Board has not a discretion to say who shall be the beneficiaries of the command. Even as to "common-rule" decisions all that the Board does is to implement the legislative policy contained in the Act and Regulations.

Fullagar K.C., in reply. For the purposes of s. 49 (1) of the *Acts Interpretation Act* the distinction is between substance and detail, not between substance and form. The differences between the relevant Regulations here are no more than differences in details;

(1) (1942) 66 C.L.R. 161.
(2) *Ante*, p. 58.
(3) (1941) 312 U.S. 126 [85 Law. Ed. 624].
(4) (1941) 1 K.B. 53.

there is no difference in substance. The legal result of each of the two sets of regulations is the same in substance. The decisions of the Board impose obligations and are therefore legislative. [He referred to *Baxter* v. *Ah Way* (1).]

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. Demurrer to statement of claim.

Acting under authority assumed to be given by the *National Security Act* 1939-1940, the Governor-General in 1942 made three statutory rules, Nos. 236, 263 and 294, relating to the employment of women. All these Regulations were disallowed by the Senate, and therefore became void and of no effect (*Acts Interpretation Act* 1901-1941, s. 48 (4)). The Parliament then passed the *Women's Employment Act* 1942, including in the schedule to the Act provisions (entitled *Women's Employment Regulations*) corresponding with the Regulations which had theretofore been made. The plaintiffs in this action ask for a declaration that the Act is beyond the powers of the Parliament and is therefore void.

The *Women's Employment Act* in s. 6 provides that the Governor-General may make regulations for, *inter alia*, the repeal or alteration of, or addition to, any of the provisions in the schedule relating to the employment of women. Under this power Statutory Rules 1942 No. 548 was made on 22nd December 1942. On 16th March 1943 that statutory rule was disallowed by the Senate. It thereupon ceased to have effect (*Acts Interpretation Act* 1901-1941, s. 48 (4)). On 25th March 1943 a new statutory rule entitled the *Women's Employment Regulations* (*No.* 2) (Statutory Rules 1943 No. 75) was made, and on 8th April 1943 Statutory Rules 1943 No. 92 made further changes in the *Women's Employment Regulations*. It is contended for the plaintiffs that Statutory Rules 1943 No. 75 and No. 92 are void and of no effect because they were made in contravention of s. 49 of the *Acts Interpretation Act*, which provides that where either House disallows a regulation, no regulation " being the same in substance as the regulation so disallowed " shall be made within six months after the date of disallowance, except in circumstances which do not exist in the present case. It is contended by the plaintiffs that on this ground these statutory rules are invalid.

The *Women's Employment Act* provides in s. 5 that the provisions in the schedule and any regulations made under the Act shall be subject to the provisions of the *National Security Act*. Accordingly s. 5 (3) and (4) of that Act are applicable, with the result that if

(1) (1909) 8 C.L.R. 626.

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" orders, rules or by-laws " made under the provisions in the schedule or under regulations made under the Act were " of a legislative and not an executive character," certain provisions of s. 48 and the provisions of s. 49 of the *Acts Interpretation Act* 1901-1941 became applicable to such orders, rules and by-laws. Section 48 (3), so applied, provides that if such orders, &c., are not laid before each House of the Parliament they shall be void and of no effect. The provisions in the schedule, and regulations which were subsequently substituted for some of them, provided that a Board, entitled the Women's Employment Board, should have power to make certain decisions with respect to the employment of women. The Board made decisions upon this subject which applied to certain of the plaintiffs. It is contended for the plaintiffs that these decisions were orders of a legislative and not an executive character. They were not laid before each House of the Parliament pursuant to s. 48 (3) of the *Acts Interpretation Act*, and if the section applied they were therefore void and of no effect and the plaintiffs seek an appropriate declaration. The defendants have demurred to the statement of claim, contending that the Act, the Regulations, and the decisions of the Board are valid.

I. The first question which arises concerns the validity of the *Women's Employment Act*. This Act is entitled: " An Act to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war." It is argued for the plaintiffs that the general subject of the encouragement and regulation of the employment of women is not and cannot be so connected with the prosecution of the war as to authorize the Parliament to legislate upon that subject under the defence power. It is further argued that even if there is any authority under the defence power of the Commonwealth Parliament to deal with the employment of women, there is no authority to deal with such employment in the manner in which the relevant legislation has dealt with it, because that legislation is not limited by any reference to women engaged in work which is directly associated with the war, but extends to all kinds of work which may be done by women if that work had not formerly been done by women either at all, or usually, or in a particular establishment.

The war has withdrawn, and necessarily withdrawn, large numbers of men from their normal work into the fighting and other war services. In order to supply the needs of the fighting services, and to maintain the activities of the civil population which are necessary both for the purpose of supplying such services and for the continued existence of the community, replacement of the men who have given

up their customary work has become an important matter. As men are no longer available in sufficient numbers, it has become necessary to resort to the services of women. The Act and the Regulations, as is apparent from their terms, are designed to deal with these new circumstances. The operation of the legislation is limited to certain cases which have been defined in the Act and the Regulations which have been passed from time to time. The scope of the Regulations may be illustrated by taking as an example reg. 4 of Statutory Rules 1943 No. 92, which provides as follows :—

"(1) Where an employer proposes to employ, is employing, or has at any time since the second day of March, 1942, employed, females on work—

(*a*) which is usually performed by males ;

(*b*) which within the establishment of that employer, was performed by males at any time since the outbreak of the present war ; or

(*c*) which prior to the outbreak of the present war, was not performed in Australia by any person,

the employer shall, unless an application in relation to that employment has already been made (whether before or after the commencement of this sub-regulation), or a decision of the Board in respect of that work is in force, or a decision in respect of that work is in force by virtue of the Act, forthwith make application to the Board for a decision in accordance with this regulation."

This legislation is directed to dealing with certain cases which have become more common by reason of changes in employment brought about by the war. The legislation does not (as it might have done) compel women to work ; it provides means for determining their wages and conditions of employment in the hope that the offer of such wages and conditions will encourage them to work.

In my opinion the legislation, that is, the Act and the Regulations, deals with a problem which has arisen from the war, and with which it may reasonably be considered to be necessary to deal in order to promote the successful prosecution of the war. The legislation is directed towards the efficient supply of goods and services, both for the army and for the civil community, by organizing the labour power of the community, in so far as it may depend upon the work of women, who in large numbers have been brought into such employment by reason of war exigencies. Legislation to deal with such a war-created problem (whether considered in relation to the general community or to the fighting services) is, in my opinion, within the power to legislate with respect to the naval and military defence of the Commonwealth conferred upon the Parliament by s. 51 (vi.)

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of the Constitution. The method of dealing with the problem and the extent to which it should be dealt with are matters for the consideration of the legislature and not of the courts. In *Victoria* v. *The Commonwealth* (1) I expressed my view of the nature of the defence power by saying that the defence power should be regarded as enabling the Commonwealth to make such laws as have a real connection with defence: See also *South Australia* v. *The Commonwealth* (*Uniform Taxation Case*) (2). Judged by this test, legislation relating to women's employment can be validly enacted under the defence power, even though it is not limited to employment in munition factories or war activities, or to cases in which women as a direct result of the war have replaced men. The same result, in my opinion, follows from the application of the test adopted by my brother *Starke* in *Attorney-General* (*Vict.*) v. *The Commonwealth* (3): "It is not for the courts to determine whether the matters and things deemed necessary or desirable by the Governor-General are or are not appropriate for the constitutional object: all that the courts have to consider is whether the means selected have some real and substantial relation to that object, or are calculated in some appreciable degree to advance it," with a reference to *Farey* v. *Burvett* (4). Applying this test, I am of opinion that legislation with respect to the encouragement and regulation of the employment of women has a real and substantial relation to the prosecution of the war and is calculated in an appreciable degree to advance it.

II. The next question which arises relates to the effect of the disallowance of the Regulations contained in Statutory Rules 1942 No. 548. It will be convenient in the first place to examine the relevant provisions of the *Acts Interpretation Act* 1901-1941. Section 48 of the Act provides that when an Act confers power to make regulations, unless the contrary intention appears, regulations shall be notified in the *Gazette*, shall take effect from a date as prescribed in the section, and shall be laid before each House of the Parliament within a specified time. Sub-section 4 provides: "If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of those regulations, the regulation so disallowed shall thereupon cease to have effect." Sub-section 6 provides: "Where a regulation is disallowed . . . under this section, the disallowance of the regulation shall have the same effect as a repeal of the regulation."

(1) (1942) 66 C.L.R. 488, at p. 507.
(2) (1942) 65 C.L.R. 373, at pp. 431, 432.
(3) (1935) 52 C.L.R. 533, at p. 566.
(4) (1916) 21 C.L.R. 433.

Sub-section 4 provides that, if a regulation is disallowed by resolution, the regulation disallowed shall "thereupon" cease to have effect. The regulation therefore operates up to the date of its disallowance. Some provisions of a regulation may accordingly completely attain their objective during the period of operation of the regulation, even though the regulation is subsequently disallowed. In the present case the disallowed Regulations (1942 No. 548) provided in reg. 4 for the repeal of reg. 6 of the *Women's Employment Regulations*—a regulation contained in the schedule to the Act which defined the conditions upon which the Women's Employment Board could exercise its functions. No. 548 was in operation from 23rd December 1942 to 16th March 1943, when it was disallowed by the Senate. It therefore brought about the repeal of reg. 6 of the *Women's Employment Regulations*. From and after 16th March 1943, the new Regulations contained in Statutory Rules 1942 No. 548 ceased to have effect, but a blank had been effectively created in the *Women's Employment Regulations* by removing reg. 6 therefrom.

The disallowance of No. 548 of 1942 had the same effect as a repeal (*Acts Interpretation Act*, s. 48 (6)). Section 7 of the Act provides that the repeal of an Act or part thereof by which a previous Act or part thereof was repealed shall not have the effect of reviving such Act or part thereof without express words. Section 46 of the *Acts Interpretation Act* provides that where an Act confers upon any authority power to make (*inter alia*) regulations, then, unless the contrary intention appears, the *Acts Interpretation Act* shall apply to any regulation so made as if it were an Act. Accordingly the *Acts Interpretation Act* applies to No. 548 of 1942 as if it were an Act, and accordingly produces the result, by virtue of s. 7, that the repeal of No. 548 did not revive the *Women's Employment Regulations* which had been repealed by No. 548.

A statute is made by both Houses of Parliament. Regulations under a statute are made by the Governor-General. The *Acts Interpretation Act* has at all times since 1904 contained provisions providing for the disallowance by either House of the Parliament of regulations made under a statute. It was found, however, that these provisions were ineffective to prevent the immediate or early re-introduction of a new regulation which produced the same legal effect as the disallowed regulation. A regulation could be disallowed by a House, and could be immediately promulgated again even in the same terms. Thus a regulation, though disallowed, could, as *Starke* J. pointed out in *Dignan* v. *Australian Steamships Pty. Ltd.* (1), be kept in perpetual operation, notwithstanding even

(1) (1931) 45 C.L.R. 188, at p. 202.

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repeated disallowance. See the further references to this practice in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1). These cases provided examples of regulations being disallowed and then being re-enacted in terms which had, as *Starke* J. said, " substantially the same effect." These cases were decided in 1931.

By the *Acts Interpretation Act* 1932, s. 4, a new section was inserted in the *Acts Interpretation Act* which dealt with the re-enactment of regulations being the same in substance as a regulation which had been disallowed. That provision now appears in s. 49 of the *Acts Interpretation Act* 1901-1941, with an addition to deal with the case of regulations which are " deemed to have been disallowed " in pursuance of a provision contained in s. 48 (5). Section 49, so far as relevant to the present case, is in the following terms :—

" (1) Where, in pursuance of the last preceding section, either House of the Parliament disallows any regulation . . . no regulation, being the same in substance as the regulation so disallowed . . . shall be made within six months after the date of the disallowance, unless . . . the resolution has been rescinded by the House of the Parliament by which it was passed. . . .

(2) Any regulation made in contravention of this section shall be void and of no effect."

It should be observed that ss. 48 and 49 deal with regulations contained in statutory rules. A statutory rule frequently consists of a number of regulations, and either House may disallow a single regulation or a number of regulations or all the regulations in a statutory rule. (See the words " any of those regulations " in s. 48 (4).) Both plaintiffs and defendants in the present case contended that the sections should be so interpreted, and that, for the purpose of applying s. 48 (4), regulation could be compared with regulation, and not necessarily statutory rule with statutory rule. I agree that regulation may be compared with regulation, but in my opinion this proposition should not be adopted as an exhaustive statement of the manner in which s. 49 may be applied. A particular new regulation may, it is true, be compared with a particular disallowed regulation for the purpose of determining whether those particular regulations are the same in substance. But I see nothing to prevent the comparison of a new set of regulations, as a whole, with a disallowed set of regulations, for the same purpose. In such a case it might appear that no single one of the new regulations was the same in substance as any particular disallowed regulation, and yet the effect of the new re-drafted and re-arranged regulations, taken as a

(1) (1931) 46 C.L.R. 73, at pp. 103, 104, 129-131.

whole, might be the same in substance as that of the regulations which had been disallowed. In such a case, it should, in my opinion, be held that the new regulations were void if they were passed within six months of the disallowance.

Further, a new set of regulations may be so drafted as to deal in the same way with cases covered by disallowed regulations but so as also to deal with other cases to which the disallowed regulations did not apply. Such new regulations would have the same operation as the previous regulations, but would have an additional operation as well. Such a re-enactment of old regulations with additions should, in my opinion, be held to be ineffectual to escape the operation of s. 49. To hold otherwise would be to reduce the section to a complete futility. If it should happen that the objection of a House to the old regulations was that they were not sufficiently extensive in their operation, s. 49 provides a method which will enable the Government to procure the re-enactment of the old regulations, but with an addition which would give effect to the objection which had brought about their disallowance. The House which had disallowed the regulations could in that case rescind the resolution of disallowance, and there would then be no obstacle in the way of making the new regulations (s. 49 (1) (*a*)). Similar considerations apply to any case where the ground of disallowance is an objection that the regulations are too extensive in their operation.

When a regulation has been disallowed more than one course is open if it should be desired by Parliament, by the House of the Parliament which has disallowed the regulation, or by the Government, to enact provisions applying to the matters to which the disallowed regulation related. In the first place Parliament may itself legislate upon the matter. Parliament may, if it thinks proper, incorporate in a statute all the provisions of the disallowed regulations, and no question can arise as to their validity under s. 49, because that section applies only to the re-enactment of regulations being the same in substance as disallowed regulations, and not to statutes. This course was adopted when, after the disallowance of certain regulations, the *Women's Employment Act* was passed.

In the second place (as already stated) the House which has disallowed a regulation may, if it thinks proper, rescind the resolution of disallowance. In such a case s. 49 has no application and regulations may then properly be enacted forthwith even though they are the same in substance as the disallowed regulations.

In the third place, if the Government desires to re-enact a regulation which is the same in substance as the regulation disallowed

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and cannot persuade the disallowing House to rescind its resolution, it may, after waiting six months from the date of the disallowance, move the Governor-General to make such a regulation, and s. 49 will not be applicable to the new regulation.

In the fourth place, regulations relating to the same subject matter may be made immediately after the disallowance and notwithstanding the disallowance, provided that they are not the same in substance as the regulation disallowed.

But, finally, it is not open to the Governor-General, acting upon the advice of the Government of the day, to re-enact within six months of disallowance any regulation which is the same in substance as the regulation disallowed.

This provision must be applied by the court without any knowledge of the reasons which prompted a House of the Parliament in disallowing a regulation. No statement of reasons is required in the resolution of disallowance. The Regulations in question in the present case may have been disallowed for many reasons. They may have been disallowed because the Senate objected to any legislation at all upon the subject in question, to the manner in which the subject was dealt with by the Regulations, to the method in which the Board applying the Regulations was constituted, to the personnel of the Board appointed, to the extent of the powers given to the Board, to provisions requiring the Board to fix rates of wages within particular limits, to decisions given by the Board, or to many other matters. In the absence of a statement of reasons in a resolution of disallowance, reasons for disallowance could be ascertained, with more or less accuracy, only by an examination of such speeches as might have been made in support of the resolution for disallowance. But such a resolution might be carried without any speeches, and in most cases some members would have voted for it without speaking. The court must apply the section independently of any knowledge or any speculation as to the reasons which prompted disallowance. It is left to the court to determine whether a new regulation is the same in substance as a disallowed regulation by applying such tests as the court may think proper. The court can have no basis for saying that a regulation was disallowed only because it was objectionable in some particular characteristic, so that a new regulation which has omitted that characteristic would for that reason necessarily be not the same in substance as the disallowed regulation. The court must do its best to determine in each case whether such differences as exist between the disallowed regulation and the new regulation are differences in substance.

The statutory provision preventing the re-enactment of a disallowed regulation within six months of disallowance is plainly intended to give effective parliamentary control over such subordinate legislation as Parliament has authorized the Governor-General, upon the advice of the Government of the day, to enact. That authority is given by a statute passed by *both* Houses. The principle introduced in ss. 48 and 49 of the *Acts Interpretation Act* taken together is that if *either* House objects to the substance of a regulation made in pursuance of that authority the regulation shall be of no force or effect, so that no Government can exercise a legislative power against an objection of either House.

The court should not, in my opinion, hesitate to give the fullest operation and effect to such legislation. The question whether a new regulation is the same—not identically in all particulars, but "in substance"—as a disallowed regulation will often be a question of degree, upon which opinions may reasonably differ. But, if the intention of the disallowing House has been misunderstood by the court, that House can easily put the matter right by rescinding the resolution of disallowance and so making possible the immediate re-enactment of the substituted regulation. No decision of the court that one regulation is the same in substance as another regulation can prevent the disallowing House from giving effect to a contrary opinion if it wishes to do so.

The words which are found in s. 49 (1) have a long history, but they have apparently not been the subject of judicial interpretation. On 1st June 1610 the House of Commons agreed for a rule that "no Bill of the same substance be brought in the same session." It is a rule in both Houses at Westminster that no question or Bill shall be offered which is substantially the same as one on which their judgment has already been expressed in the current session. It is established that a mere alteration of the words of a question "without any substantial change in its object" will not be sufficient to evade the rule: See *May's Parliamentary Practice*, 10th ed. (1893), pp. 292, 286, 288. Provisions of a similar character are contained in the Standing Orders of both Houses of the Commonwealth Parliament: Senate Standing Order 133, House of Representatives Standing Order 125.

Two views of the meaning of s. 49 have been submitted to the Court. In the first place, it has been said that the section must be interpreted as relating to substance, as distinct from form, and as meaning that the provision is intended only to prevent the re-enactment of regulations which are identical in substance with a disallowed regulation, and which vary *only in form* from that regulation. The

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result of the adoption of this view would be that *any* variation (however small) in substance (that is, in what may be described as the matter of the regulation, as distinct from its manner of expression), would be effective to prevent the application of the invalidating provision to the new regulation.

On the other hand it is submitted that the interpretation above suggested would, in practice, deprive the legislation of all effect. In almost every case it would be simple for a draftsman of any dexterity to provide in new regulations some alteration which would vary the matter of the provision but which would leave its legal operation and its practical effect unchanged. Accordingly, it is said that, in order to give any real effect to the legislation, it should be interpreted as preventing the re-enactment within six months of any regulation which is " substantially the same " as any disallowed regulation ; and that regulations should be held to be substantially the same not only if they differ only in form but also if their material provisions, as in fact operative, produce the same substantial result as a disallowed regulation, even though there may be a difference in details. Upon the first view suggested, the distinction upon which s. 49 is based is a distinction between substance and form. Upon the second view the relevant distinction is the distinction between substance and detail—between essential characteristics and immaterial features.

In my opinion the words are capable of either interpretation. But upon the first view they would not deal with the position to which attention had pointedly been called in *Dignan* v. *Australian Steamships Pty. Ltd.* (1) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). It would still be possible, by making any variation in the substance (in the sense of the matter as distinct from the form) of a regulation to prevent the application of s. 49. In my opinion, in order to give any practical effect to the section, it should be construed in the second of the senses above stated : that is to say, the section prevents the re-enactment by action of the Governor-General, within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation. The adoption of this view prevents the result that a variation in the new regulation which is real, but quite immaterial in relation to the substantial object of the legislation, would exclude the application of s. 49.

(1) (1931) 45 C.L.R. 188.

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

It is now necessary to consider whether certain re-enacted Regulations were the same in substance as Regulations contained in Statutory Rules 1942 No. 548. The Regulations in question are Statutory Rules 1943 No. 75 and No. 92. Statutory rule No. 548 was disallowed on 16th March 1943. A temporary regulation, No. 41 of 1943, the effect of which is now exhausted, was made, and on 25th March 1943 statutory rule No. 75 was made.

Statutory Rules 1943 *No.* 75.—Reg. 2 of this statutory rule provides that the *Women's Employment Regulations*, as existing prior to the date on which Statutory Rules 1942 No. 548 came into operation, shall have full force and effect. The effect of this regulation, if valid, was to bring into operation again the provisions of the schedule to the *Women's Employment Act*. The words of reg. 2 are quite different from anything contained in statutory rule No. 548, but the important matter to consider is the legal effect of the words. If the provisions of the schedule brought into operation by reg. 2 are the same in substance as the provisions of statutory rule No. 548, then the regulation is obnoxious to s. 49 of the *Acts Interpretation Act* and is void and of no effect.

Reg. 3 of Statutory Rules 1943 No. 75 provides that all decisions, variations and interpretations of the Women's Employment Board given or made between the commencement of the *Women's Employment Act* 1942 and the date of disallowance of Statutory Rules 1942 No. 548 shall have full force and effect. The effect of this regulation is to continue in operation all decisions, &c., made under either the schedule to the Act, or the disallowed statutory rules. A question arises as to whether in continuing the operation of decisions made under statutory rule No. 548 this regulation is not in a relevant sense the same in substance as statutory rule No. 548.

The disallowed statutory rule No. 548 must be taken as the starting point in making the comparison required by s. 49. The question is whether statutory rule No. 75 is the same in substance as statutory rule No. 548. Thus the question is whether provisions of the schedule to the Act, re-introduced by statutory rule No. 75, are the same in substance as provisions contained in statutory rule No. 548.

It will be pointed out later that some of these provisions are identical, not only in substance, but in terms. In others, however, there are variations. The most important regulation is reg. 6 as enacted by reg. 4 of statutory rule No. 548. Reg. 6 of the schedule must be compared with this regulation. These regulations specify the cases in which the Women's Employment Board is authorized to act. The two regulations are in very similar terms, but there are

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some variations. The variations which require attention are those which are to be found in par. 1 of reg. 6 in each case.

Reg. 6 (1) in statutory rule No. 548 is as follows :—

" 6.—(1) Where an employer is employing or proposes to employ females on work—

(*a*) which is usually performed by males ;

(*b*) which was, during the period from the third day of September, 1939, to the date of the employment of, or proposal to employ, females, performed by males in the establishment of the employer ; or

(*c*) which was not, during that period, performed in Australia by any person,

the employer shall, unless an application under these Regulations (including an application within the meaning of sub-section (2.) of section 4 of the Act) in relation to that employment has already been made or the Board has given a decision in respect of that work under these Regulations, or a decision in respect of that work is in force by virtue of the Act, forthwith make application to the Board for a decision in accordance with this regulation."

Reg. 6 (1) in the schedule is as follows :—

" 6.—(1.) Where an employer has, since the second day of March, 1942, employed, is employing, or proposes to employ, females on work which is usually performed by males or work which was, prior to that employment of females, or is, performed by males in the establishment of that employer, or is work which, prior to that employment or proposed employment of females, was not being performed in Australia by any person, the employer shall, unless an application in relation to that employment has already been made, forthwith make application to the Board for a decision in accordance with this regulation."

The two regulations are framed upon a similar plan, the regulation in No. 548 being more clearly expressed than the regulation in the schedule. In outline each regulation provides as follows :—(1) In certain cases of employment of females (2) upon defined work (3) an application, with certain exceptions, must be made by an employer to the Women's Employment Board for a decision in accordance with the regulation. I deal with these three parts of the regulations in turn.

(1) Reg. 6 (1) in statutory rule No. 548 begins : " Where an employer is employing or proposes to employ females on work " which is defined in the regulation. These words do not cover the case of an employer who has employed females only in the past. Reg. 6 (1) in the schedule begins with the following words : " Where

an employer has, since the second day of March, 1942, employed, is employing, or proposes to employ, females on work" which is defined by the regulation. Accordingly, reg. 6 in the schedule (as re-introduced by statutory rule No. 75) applies to cases of employment before the introduction of statutory rule No. 548 (on 23rd December 1942) to which No. 548 did not apply. The regulation contained in the schedule includes all the cases to which No. 548 applied, and so far is identical with No. 548; but it adds another case, namely, the case mentioned of certain past employment (between 2nd March 1942 and 22nd December 1942), to the cases included in No. 548. This is the difference between the two regulations so far as element 1 is concerned. No. 548 is re-enacted with a small addition.

(2) The next element in the regulations relates to what I have called the defined work. In reg. 6 in statutory rule No. 548, the work is defined as follows: Work—

"(*a*) which is usually performed by males;

(*b*) which was, during the period from the third day of September, 1939, to the date of the employment of, or proposal to employ, females, performed by males in the establishment of the employer; or

(*c*) which was not, during that period, performed in Australia by any person".

In reg. 6 in the schedule the work is defined in the following manner (I have added distinguishing letters for the sake of clearness):

(*a*) work which is usually performed by males;

(*b*) work which was, prior to that employment of females (that is, employment by the particular employer concerned), or is, performed by males in the establishment of that employer;

(*c*) work which, prior to that employment, or proposed employment of females, was not being performed in Australia by any person.

The definition of work in (*a*) is the same in each case.

In (*b*) and (*c*) it is the same except in relation to the period during which the work has been performed. In No. 548 the relevant period is "from the third day of September, 1939, to the date of the employment of, or proposal to employ, females." In the schedule the period in the case of (*b*) is described by the words "prior to that employment of females," and in the case of (*c*) by the words "prior to that employment or proposed employment of females."

The effect, therefore, of the re-introduction of the provision in the schedule is to repeat in respect of this part of the regulation all the provisions of statutory rule No. 548 but to include also in respect of the definition of "work" contained in (*b*) and (*c*) the period before 3rd September, as well as a period after that day. Thus the

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provision introduced by statutory rule No. 75 of 1943, as far as this part of the regulation is concerned, re-enacts the old No. 548 and makes its operation more extensive in the particular mentioned. The difference does not, in my opinion, for reasons which I have stated, amount to a difference in substance which excludes the application of s. 49 of the *Acts Interpretation Act*.

(3) The third element in the regulation relates to the obligation of the employer, if the circumstances already mentioned exist, to make an application to the Board for a decision in accordance with the regulation. Under statutory rule No. 548 the employer is bound to make an application to the Board unless (1) an application under the Regulations (including applications pending when prior Regulations had been disallowed) in relation to the employment in question has already been made, or (2) the Board has given a decision in respect of work under the Regulations, or (3) a decision in respect of that work is in force by virtue of the Act (see s. 4 (1) of the Act, a saving clause as to decisions given under prior Regulations).

The provision in the schedule dealing with this matter requires the employer to make an application to the Board unless an application in relation to the employment has already been made. The words " an application " include pending applications without express mention.

The schedule provision is different from the provision in No. 548 in that it excludes exceptions 2 and 3 which are included in No. 548. The question is whether the omission of exceptions 2 and 3 makes any substantial difference to the operation of the regulation. Exception 1—when an application has already been made—is the same in each case. Exception 2 is the case where the Board has given a decision in respect of work under the Regulations. Under Statutory Rule No. 548 the Board would normally give such a decision only when an application has been made and in such cases exception No. 2 would add nothing to exception No. 1. But reg. 7B, introduced by reg. 5 of statutory rule No. 548, enabled the Board of its own motion to give in respect of any work specified in sub-reg. 1 of reg. 6 any decision which it would be required or empowered to give under these Regulations if an application were made thereunder in respect of that work. The Board may have given a decision under reg. 7B without any application being made to it, and if such a decision had been given, the second exception mentioned in reg. 6 (1) of No. 548 would become applicable. Exception No. 3 relates to decisions which are in force by virtue of the Act. These decisions are the decisions referred to in s. 4 of the Act; that is, decisions which had been made at any time up to and including 23rd September

1942. Those decisions were made under certain prior statutory rules of 1942, namely, No. 146 as amended. Under these Regulations no decision of the Board could be given except upon an application. Accordingly, exception No. 3 makes no addition to exception No. 1. Therefore the only difference between the regulation as contained in statutory rule No. 548 and as contained in the schedule, so far as the third element of the regulations is concerned, is that already pointed out—namely, that if a decision has been given by the Board without any application having been made to it and that decision applies to an employer, that employer need not make an application to the Board for a decision in his case. Such a difference, from any practical point of view, may be called a distinction without a difference.

It is now necessary to compare the other provisions of reg. 6 as contained in statutory rule No. 548 and in the schedule. Sub-reg. 2 in the schedule is identical with sub-reg. 2 in No. 548. Sub-reg. 3 in the schedule is identical with sub-reg. 3 in No. 548. Sub-reg. 4 (*a*) in the schedule is the same, with a variation only in language, as sub-reg. 4 in No. 548. Sub-reg. 4 (*b*) (i), (ii), (iii) and (iv) in the schedule are the same as sub-reg. 5 (*a*), (*b*) and (*c*) in No. 548. Authority to fix rates of payment for females is contained in (4) (*b*) (v) and (vi) in the schedule and in (7) in No. 548. There is a provision contained in a proviso to (5) in the schedule that the rate of payment to be made to any adult female employed shall not be less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature. Sub-reg. 9 of No. 548 contains the same provision, though not in the form of a proviso. Sub-reg. 5 in the schedule gives a direction as to the matters to be taken into consideration in assessing rates of payment. This provision is the same as that contained in sub-reg. 8 in No. 548.

Statutory rule No. 548 includes regs. 6A, 6B, 6C, 7A (a common-rule provision) and 7B which have no corresponding provisions in the schedule to the Act. This fact does not prevent the other regulations in the schedule which I have examined from being the same in substance as other disallowed regulations.

This comparison of these provisions shows that they are very largely identical. Many of the regulations are precisely identical. The differences are in detail and only in detail. Accordingly, in my opinion reg. 6 of the schedule, which is re-introduced by reg. 2 of statutory rule No. 75 of 1943, is the same in substance as reg. 6 of the *Women's Employment Regulations* as enacted by statutory rule No. 548, which was disallowed. The result is that,

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in my opinion, the re-enactment of reg. 6 of the schedule is void and of no effect under s. 49 (2) of the *Acts Interpretation Act*. All the regulations depend upon reg. 6, because they all depend upon the operation of the Board acting in the cases which are specified in reg. 6. The result, therefore, is that the Board had not, by virtue of statutory rule No. 75, any authority to act after the disallowance of statutory rule No. 548.

Statutory Rules 1943 *No.* 92.—The next question which arises is whether Statutory Rules 1943 No. 92 is effective to give authority to the Board or whether it is void as being the same in substance as Statutory Rules 1942 No. 548. No. 92 substituted a new sub-reg. 6 (1) for sub-reg. 6 (1) of the *Women's Employment Regulations*. The new sub-regulation is almost identical in terms with sub-reg. 6 (1) of No. 548. The differences are :—(1) The introductory words in the sub-regulation in No. 548 are " Where an employer is employing, or proposes to employ, females on work . . ." In No. 92 the introductory words are " Where an employer proposes to employ, is employing, or has at any time since the second day of March 1942, employed, females on work . . ." In considering Statutory Rules 1943 No. 75 I have expressed my opinion as to the effect of the extension by a new regulation of the provisions of No. 548 to a past period and that opinion applies equally to the same extension in No. 92. (2) The definition of the relevant work, except in respect of the period during which it was performed, is the same in both regulations. The work is work (*a*) which is usually performed by males ; (*b*) which was within the establishment of the employer performed by males ; or (*c*) which was not performed in Australia by any person. But in the case of (*b*) and (*c*) the description of the work is limited by reference to a period within which the work was performed. In the case of (*b*) in No. 548, the period is " from the third day of September, 1939, to the date of the employment of, or proposal to employ, females." In the case of (*b*) in No. 92 the period is " at any time since the outbreak of the present war." The outbreak of the present war was on 3rd September 1939. The dates in the two regulations are the same though described in different words.

In the case of (*b*) No. 92 in words adds to the period specified in No. 548 a period of time after the date of the employment of or proposal to employ females. But this variation cannot make any difference in the legal effect of the regulation as it appears in No. 92, because the regulation begins to operate only when an employer proposes to employ, is employing, or has employed females. No employer *can* propose to employ, or employ, or have employed any persons upon work which *was* performed in the extended period

mentioned — a period still *in futuro*. Thus the variation in (*b*) makes no difference whatever to the operation of the regulation. In this respect the regulation in No. 92 is identical in operation with the regulation in No. 548 and it must be held to be the same in substance.

In respect of (*c*) the period in No. 548 is the same as in respect of (*b*) in No. 548. But in No. 92 the period is described in the words "work which prior" (i.e., at any time whatever prior) "to the outbreak of the present war, was not performed in Australia by any person." These words are wide enough to apply to all work of all kinds. It can be predicated of all work now done or hereafter to be done in Australia that it was work which at some time in past history before the outbreak of the war was not performed in Australia by any person. Before the advent of Europeans there were, so far as known, neither employers nor employees in Australia and no person was "employed" on work. Thus in this respect No. 548 is re-enacted with an addition which extends its operation. The substance of No. 548 reappears, in a new guise, in No. 92. It is difficult to regard the variation as being a genuine difference in substance.

The remainder of reg. 6 (1) in No. 92 is the same in its legal operation as the regulation in No. 548. There is a difference in wording but nothing more.

In my opinion reg. 6 (1) as contained in No. 92 is the same in substance as reg. 6 (1) contained in No. 548, and is therefore void and of no effect.

The result therefore is that reg. 6 of the schedule was repealed; that statutory rule No. 548 was disallowed and so ceased to have effect; and that statutory rules Nos. 75 and 92 of 1943, being the same in substance as statutory rule No. 548 in so far as they enacted regulations to take the place of reg. 6, are void. As the operation of the *Women's Employment Regulations* is dependent upon reg. 6 in one or other of its forms, the consequence is that those Regulations have become inoperative and that the Board can make no further decisions.

III. It is now necessary to consider the result of this conclusion in relation to decisions already given by the Board. These decisions fall into several classes, according to the time at which they were given.

(1) Decisions of the Board given up to and including 23rd September 1942 were preserved in force and effect by s. 4 of the *Women's Employment Act*. In my opinion, for reasons which I stated at the beginning of this judgment, the Act is valid, and the Parliament had power to enact s. 4 thereof as positive legislation. Accordingly,

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all decisions within this class are in my opinion valid and effective, not by virtue of any Regulations, but by reason of direct statutory enactment. They remain in operation by virtue of the statute, even if the power of the Board to give further decisions has disappeared. These decisions are not attacked by the plaintiffs if the validity of the Act is upheld.

(2) The next class of decisions comprises those which were given in the period 6th October 1942 (date of commencement of the Act) to 22nd December 1942, when statutory rule No. 548 of 1942 was made. These decisions originally depended upon the powers conferred by the schedule to the Act. The decisions were in my opinion effective up to 22nd December, the provisions of the schedule being valid. Reg. 6 of the schedule, under which they were given, was repealed by statutory rule No. 548, reg. 4, but, after some doubt, I agree with the contention for the Commonwealth that the reference in reg. 6 (1), introduced by the said reg. 4, to decisions which have already been given by the Board sufficiently showed by implication an intention that such decisions should remain in operation and accordingly they did remain in operation so long as statutory rule No. 548 continued.

But that statutory rule was disallowed on 16th March 1943. The effect of the disallowance was the same as that of a repeal—*Acts Interpretation Act* 1901-1941, s. 48 (6)—and in this case of a repeal without any saving clause. When the authority of the Board to make decisions disappeared, the decisions became decisions unsupported by any lawful authority and therefore themselves had no effect. The position is the same as in the case of the repeal of a statute authorizing the making of by-laws. If the statute is repealed without a saving clause, then the by-laws made under it cease to have effect (*Watson* v. *Winch* (1)). Section 8 of the *Acts Interpretation Act* 1901-1941, which preserves rights accrued and liabilities incurred under repealed Acts, does not operate to make it possible to enforce, as if it were in continued operation, an Act or a by-law made under an Act after the Act has been repealed: See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2)—"Upon the disallowance of the regulation it can no longer be relied upon as a source of liability." The repeal, effected by disallowance, of statutory rule No. 548 prevents the operation of prior decisions which were preserved in operation only by that statutory rule—unless they have been effectively restored by reg. 3 of Statutory Rules 1943 No. 75.

(1) (1916) 1 K.B. 688.

(2) (1931) 46 C.L.R. 73, at p. 106.

(3) The next class of decisions consists of those made by the Board after the making of statutory rule No. 548 (22nd December 1942) and before the disallowance thereof (16th March 1943), including a common-rule decision of 29th January 1943. What I have said with respect to the second class of decisions applies to this class. When the Board was deprived of authority by the disallowance of the regulation upon which its authority depended, its past decisions thereupon ceased to have any effect. (The Court is not required in this case to determine the position as to liabilities incurred under decisions while they were in operation. As to this matter, see *Bennett* v. *Tatton* (1) and *Postlethwaite* v. *Katz* (2).)

(4) The fourth class of decisions consists of those (if any) given after 16th March 1943, the date of disallowance of statutory rule No. 548. Statutory rule No. 75 of 1942 was not made until 25th March, and if any decisions were given between 16th March and 25th March, they plainly had no legal foundation. The statement of claim does not expressly attack these decisions, but it does challenge the validity of statutory rules 75 and 92, upon which these decisions depend. I have already stated the reasons for my opinion that these statutory rules are invalid so far as the essential reg. 6 is concerned. Thus any decisions of the Board given after 16th March 1943 were not valid.

But it is contended that decisions in classes 2 and 3 are saved from destruction by reg. 3 of statutory rule No. 75 of 1943. This regulation provided that all decisions of the Board given or made between the commencement of the *Women's Employment Act* 1942 (6th October 1942) and the date of disallowance of Statutory Rules 1942 No. 548 (16th March 1943) should have full force and effect. These decisions fall into two classes: (1) those which depended upon the provisions in the schedule (until No. 548 was made), and (2) those which (thereafter) depended upon those provisions as altered by No. 548—i.e., upon No. 548 itself.

As to the former class, they were impliedly preserved in operation by reg. 6 (1) of No. 548. That regulation was disallowed. As to the other class, they depended upon the substantive provisions of the disallowed statutory rule No. 548.

When statutory rule No. 548 was disallowed any decisions depending for their continuance upon it thereafter ceased to be operative in accordance with principles to which I have already referred. But reg. 3 of statutory rule No. 75 of 1943 assumes to reinstate them. The position, therefore, is that the Senate disallowed a regulation under which decisions of the Board had been either preserved in

(1) (1918) 34 T.L.R. 591. (2) (1943) 59 T.L.R. 248.

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operation or actually given. A new regulation was then made which provided, notwithstanding the disallowance, that the decisions preserved by or given under that regulation should continue to have full force and effect. So far as this statutory rule operated in relation to these decisions, it operated in defiance of the disallowance, because it preserved in full future operation everything that had been preserved by or done by virtue of the disallowed regulation. Thus it was in the whole of its operation the same in substance, that is, in legal operation, as the disallowed rule. Accordingly, in my opinion, reg. 3, statutory rule No. 75, is void and of no effect. It does not operate to preserve or give effect to any decision of the Board.

IV. It is unnecessary for me to consider the attack upon the validity of the decisions of the Board based upon the contention that they are orders, rules or by-laws of a legislative and not an executive character and are void and of no effect because they were not laid before each House of the Parliament. I am of opinion, for other reasons which I have stated, that none of the Board's decisions are now in operation except those which were kept in force by the *Women's Employment Act*, s. 4 (1)—i.e., those given up to 23rd September 1942. Effect is given to these latter decisions by direct statutory enactment made by both Houses of the Parliament. They do not now take effect as orders, rules or by-laws made under regulations made under the *National Security Act*. Accordingly they are not subject to the provisions of that Act and of the *Acts Interpretation Act* requiring such orders, &c., as are of a legislative and not of an executive character to be laid before both Houses.

Thus I am of opinion that the *Women's Employment Act* is valid and that the demurrer in relation to the claim that it is invalid should be allowed; but that there are no Regulations now in operation under which the Board can act, and that none of the decisions of the Board mentioned in the statement of claim as made between 6th October 1942 and 16th March 1943 are now in operation, so that the demurrer in relation to the Regulations and to those decisions should be overruled.

The members of the Court differ in opinion upon the questions raised by the demurrer. A majority of the Court is of opinion that the *Women's Employment Act* including the Regulations in the schedule thereto (so far as it still exists—that is, for example, subject to the effect of the repeal of reg. 6 by Statutory Rules 1942 No. 548) are within the powers of the Parliament of the Commonwealth and are valid but are no longer effective to authorize action by the Board because an essential part thereof, namely, reg. 6, is no longer

in operation. The demurrer is allowed as to the Act and the *Women's Employment Regulations*, upon the ground stated. A majority of the Court is of opinion that reg. 2 of the *Women's Employment Regulations* (*No.* 2), Statutory Rules 1943 No. 75 and Statutory Rules 1943 No. 92 are void and of no effect. The demurrer is overruled in relation to the regulations mentioned. As to the other claims of the plaintiffs, a majority of the Court is of opinion that the demurrer should be allowed. A majority of the Court is of opinion that the Women's Employment Board can no longer, under existing legislation, exercise any of its powers. The demurrer is allowed to the extent stated but otherwise is overruled. The plaintiffs are given liberty to amend the statement of claim if desired. The plaintiffs have partly succeeded and the defendants have partly succeeded. In the circumstances no order will be made as to the costs of the demurrer and all parties will bear their own costs.

The demurrer does not raise any question as to the rights of the several plaintiffs to bring this action. But, in order to avoid misunderstanding, I think it desirable to state that I can see no cause of action in either the Victorian Chamber of Manufactures or the Metal Trades Employers' Association.

RICH J. The demurrer in this case raises two main questions for determination.

The first question is a neat question, but still is productive of different opinions. It is whether the *Women's Employment Act* is within the defence power. The answer to the question does not depend upon an idiosyncratic use of words. As Lord *Atkin* said in *V/O Sovfracht* v. *Van Udens Scheepvaart en Agentuur Maatschappij* (1): "The need of the State for protection varies with the increasing dangers of modern war as compared with the warfare of earlier days . . . 'Total war' is a more or less modern development of civilization; but its practice and effects have an important bearing on the problem of the position of the resident in an occupied country."

The present war is one between nations and not, as in the old days, between armies. And I consider that although the meaning of the defence power is static its application varies with the circumstances to which the legislation in question is directed. In my opinion the employment of women in substitution for or relief of men in prescribed industries is reasonably capable of aiding the defence power.

(1) (1943) 112 L.J. K.B. 32, at p. 37.

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The second question is complicated by the anfractuous action of a branch of the legislature in disallowing from time to time Regulations made pursuant to the *Women's Employment Act* 1942. As the Chief Justice and my brother *Williams* have analysed in detail all the relevant Regulations I am relieved from any elaborate restatement of them. In order, however, to make the conclusion I have arrived at clear I shall briefly relate the history of women's employment so far as this case is concerned.

1. On 25th March 1942, the *National Security* (*Employment of Women*) *Regulations* 1942 No. 146 were made by which Statutory Rules 1942 No. 92 were repealed and a Women's Employment Board was constituted. These Regulations were amended and three of the amendments—Statutory Rules 1942 Nos. 236, 263, and 294—were disallowed by the Senate on 23rd September 1942, and became void and of no effect (*Acts Interpretation Act* 1901-1941, s. 48, sub-ss. 4, 5, and 6).

2. On 6th October 1942, the *Women's Employment Act* 1942 was assented to. This Act contained a schedule of rules which by s. 3 were as on and from 23rd September 1942 (the date of disallowance before mentioned) deemed to have had the force of law. Reg. 6 in the schedule is the king-bolt of this complex system of regulations. Section 4 of the Act saves all decisions, variations and interpretations made by the Board, under Statutory Rules 1942 No. 146 as amended, at any time up to and including 23rd September 1942, the date already mentioned. Section 6 of the Act empowers the Governor-General to make regulations prescribing all matters necessary &c. for carrying out the Act and in particular for the encouragement and regulation of the employment of women for the purpose of aiding the prosecution of the present war.

3. From 23rd December 1942 (the date of notification in the *Gazette*) Statutory Rules 1942 No. 548 took effect. Reg. 4 of these rules repeals reg. 6 in the schedule to the Act and substitutes a new reg. 6.

4. On 16th March 1943 Statutory Rules 1942 No. 548 were disallowed by the Senate and ceased to have effect (*Acts Interpretation Act*, s. 48 (4)).

5. On 25th March 1943 Statutory Rules 1943 No. 75—the *Women's Employment Regulations* (*No.* 2)—were made. Reg. 3 of these Regulations preserves all decisions, variations and interpretations of the Board given between the commencement of the Act (6th October 1942) and the date (16th March 1943) of the disallowance of Statutory Rules 1942 No. 548.

6. On 8th April 1943 Statutory Rules 1943 No. 92 were made which changed some of the regulations in the schedule to the Act and those in the *Women's Employment Regulations* (*No.* 2) and substituted by reg. 4 a new regulation for reg. 6 of the schedule regulations.

In this hotchpotch of Regulations one is called upon to decide whether reg. 6 in the schedule as amended is "the same in substance" as reg. 6 in Statutory Rules 1942 No. 548 (*Acts Interpretation Act* 1901-1941, s. 49). The words "in substance" indicate that in making the necessary comparison form should be disregarded. After making this comparison I have come to the conclusion that the regulations are the same in substance. Accordingly reg. 6 in the schedule as amended is void and of no effect. For the same reason reg. 6 (1) of Statutory Rules 1943 No. 92 fails to be operative. The result then of the changes I have briefly described is that the decisions &c. of the Board after its constitution on 25th March 1942 up to 16th March 1943, when Statutory Rules 1943 No. 548 were disallowed, remain valid. After that date the disallowance of reg. 6 which I have described as the king-bolt of the structure invalidated the decisions of the Board between 16th March and 25th March 1943, and would sterilize the future operation of the Board's decisions unless it can be said that reg. 3 of 1943 No. 75 gave them fresh life.

The question then is whether reg. 3 of the *Women's Employment Regulations* (*No.* 2), No. 75 of 1943, is the same in substance as the Regulations which have been disallowed. The disallowed Regulations define the functions of the Board in cases where an employer is employing or proposing to employ females on work under certain conditions. By virtue of these Regulations certain powers are conferred upon the Board which must exercise such powers within the provisions and upon the principles prescribed by the Regulations. Reg. 3 of No. 75 provides in effect that what has been done by the Board between certain dates shall have full force and effect: in other words the Executive itself has confirmed certain decisions, variations and interpretations affecting the employment of women and has not left these matters to be reconsidered and redetermined by the Board. It cannot be said, therefore, that what has been done by executive act is the same in substance as that which could have been done by the Board in the exercise of its functions under the repealed Regulations.

The opinion which I have expressed necessitates a further opinion as to whether the decisions of the Board are of a legislative or of an executive character. It is difficult to define precisely the distinction, but for the purpose of this case I shall apply the distinction quoted

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by *Taft* C.J. from a judgment of Judge *Ranney* of the Ohio Supreme Court: "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made" (*J. W. Hampton, Jr. & Co.* v. *United States* (1)). In the present case the legislature has laid down the policy and the principles to be followed, delegating to the Board the power to exercise its discretion in their application.

I therefore think that the decisions of the Board were of an executive character and did not require to be laid before the House.

STARKE J. The statement of claim in this action challenges the validity of the *Women's Employment Act* 1942 and the Regulations scheduled to that Act, called the *Women's Employment Regulations*, and also Statutory Rules 1943 No. 75 and Statutory Rules 1943 No. 92 and various decisions and determinations of the Women's Employment Board. And the defendants have demurred to the statement of claim.

The challenge to the validity of the Act and the Regulations on the ground that they transcend the constitutional power of the Commonwealth to make laws with respect to the naval and military defence of the Commonwealth is fundamental, for, if that Act and the scheduled Regulations are beyond power, the other Regulations and the various determinations and decisions likewise fall.

The Act of 1942 is entitled: "An Act to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war." And the scheduled Regulations set up a Women's Employment Board. Its function, without prejudice to anything contained in the Regulations, was to fix the remuneration, hours and conditions of employment of certain women employed in industry during the emergency created by the present war (reg. 5A). And reg. 6 provided: Where an employer has, since 2nd March 1942, employed, is employing, or proposes to employ, females on work which is usually performed by males or work which was, prior to that employment of females, or is, performed by males in the establishment of that employer, or is work which, prior to that employment or proposed employment of females, was not being performed in Australia by any person, the employer shall . . . forthwith make application to the Board for a decision in accordance with the regulation. The Board . . . shall decide (*a*) whether the work

(1) (1928) 276 U.S. 394, at p. 407 [72 Law. Ed. 624, at pp. 629, 630].

specified in the application is work above specified; (*b*) in respect of the employment of females on work held to be work above specified, whether females may be employed or continue to be employed, the hours of employment, the special conditions (if any) regarding safety, health and welfare of females employed to be observed, the rate of payment to be made to females employed on that work which the Board considers to be just and proper. And the Board shall, as far as practicable, assess that rate by reference to such factors as it thinks fit and in particular to the efficiency of females in the performance of the work and any other factors likely to affect the productivity of their work in relation to that of males, provided that the rate of payment so decided for any adult female employee shall not be less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature.

"Work" is undefined, but should be understood to be work "in industry" within the functions of the Board. It should, however, be observed that it covers "work in or about any bar-room of . . . licensed premises" (reg. 6 (4A)). And that an employer includes the Crown (whether in right of the Commonwealth or of a State) and all instrumentalities or authorities of or under the Crown (whether in right of the Commonwealth or a State) (reg. 4). Also that, notwithstanding anything contained in the Regulations or in any law or any instrument having effect by virtue of any law, any female may be employed in the Department of Munitions or the Department of Aircraft Production or, with the approval of the Director-General of Munitions or the Director-General of Aircraft Production, by any employer, on work reserved to males by any such law or instrument or work specified in reg. 6 (1). And the Board may not decide that females shall not be employed on such work (reg. 11). Further, notwithstanding anything contained in the law of any State, work may be performed by females in any factory or establishment engaged in the manufacture, production, repair or overhaul for war purposes of munitions of war and females may be employed on such work in the factory or establishment.

The Regulations restrict the employment of females in industry in relation to certain classes of work unless upon conditions and remuneration determined by the Board. They are a general regulation of the industrial employment of women in relation to those classes of work and are not confined to work for war purposes. They also include the States and all their instrumentalities or authorities within the definition of "employer," which, I venture to think, cuts across the Federal system established under the Constitution.

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The Regulations can only be justified under the power conferred upon the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth, for the Parliament has no authority to legislate generally for the peace, order and good government of the Commonwealth or generally for the social, industrial and economic conditions of Australia. But the argument pressed on the Court was that the war had depleted industry of male labour, that female labour must take its place, that conditions and especially remuneration must be made attractive to induce females to come forward for that purpose, and finally that the Regulations conceivably, even if incidentally, aid the effectuation of the defence power. On the other hand, we are told that an air of unreality and make-believe surrounds the Regulations: women were employed in industry long before the war and at rates fixed by wages tribunals below those prescribed by the Regulations: that the Regulations are the result of a political agitation for equal pay for equal work for the sexes.

The war, no doubt, has raised many social, industrial and economic problems for Australia. But, extensive as is the defence power, I cannot agree that it enables the Commonwealth to seize control of the whole social, industrial and economic conditions of Australia and legislate for them as it thinks proper. *Griffith* C.J. in *R.* v. *Barger* (1) observed: "And for the purpose of determining whether an attempted exercise of legislative power is warranted by the Constitution regard must be had to substance." And *Higgins* J. said: "Moreover, the validity of the Act depends on its substance, not on its form—on its true character, not on what the legislature calls it. So far, we are on common ground" (2). And note *Isaacs* J. (3); *Gallagher* v. *Lynn* (4). The legislation must be scrutinized in its entirety and its operation and legal effect ascertained. Use what words we will, securing or aiding or tending to secure or aid or appreciably or conceivably aiding the defence of the Commonwealth, "there is really only one question—a question as to the limits of the power of the Federal Parliament to make laws" with respect to naval and military defence: See *Barger's Case* (5), *Higgins* J. The motives of Parliament and the consequences of the Act are alike immaterial. But to substitute for this question some other vague and meaningless collection of words does not aid a solution of the real question, as may be gathered from the decisions of this Court.

(1) (1908) 6 C.L.R. 41, at p. 75.
(2) (1908) 6 C.L.R., at p. 112.
(3) (1908) 6 C.L.R., at p. 99.
(4) (1937) A.C. 863.
(5) (1908) 6 C.L.R., at p. 111.

The real question is difficult enough in itself without these vague phrases and the imaginative efforts of the judicial mind and must always be one of degree.

Barger's Case (1) bears some resemblance, I think, to this case. Duties of excise were imposed on goods specified in the schedule, provided that the Act should not apply to goods manufactured by any person in any part of the Commonwealth under conditions as to remuneration of labour which were declared to be fair and reasonable either by the Parliament or the President of the Commonwealth Court of Conciliation and Arbitration or were in accordance with specified industrial awards. The Court by a majority of three to two held that the Act was not an Act imposing duties of excise but an Act to regulate the conditions of manufacture of goods and therefore not an exercise of the power of taxation conferred by the Constitution. The case has been cited by the Judicial Committee without disapproval (*W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation (N.S.W.)* (2)).

In the present case employers must make an application to the Board, which is to decide whether the work falls within the categories mentioned in the Regulations and whether females may be employed and their hours, conditions and remuneration, but so that adult females receive not less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males. The Regulations regulate the employment of females in industry just as much or as little as the Excise Act in *Barger's Case* (1) regulated the manufacture of goods.

The Regulations are not limited, as we have seen, to employment of women in industry for war purposes, but for any purpose. Indeed, the Regulations make a special provision for employment of females for war purposes: See regs. 11 and 14. The determination of the question whether the legislation in question is with respect to defence or with respect to taxation involves the same method of approach. It does not differ because one power relates to defence and the other to taxation. The fundamental question in both cases is the same, namely: To what subject matter in substance does the law or the regulation relate? As the question is one of degree, differences of opinion must arise. But in the present case the *Women's Employment Regulations* are not regulations with respect to defence either in substance or in form but regulations for the purpose of regulating and controlling the employment of all women in certain categories regardless of the question whether the work to be performed relates or

(1) (1908) 6 C.L.R. 41.
(2) (1940) A.C. 838, at p. 849; 63 C.L.R. 338, at p. 341.

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does not relate to defence. The Federal Parliament is not authorized to make any such law, and the Act and Regulations as they exist or as amended are consequently invalid. The contrary opinion must lead to results that cannot now be foreseen, but I apprehend that the regulation of conditions relating to employment in industry in Australia will pass to the Commonwealth in time of war. The determinations and awards of wages boards and arbitration courts can all be overridden and the Parliament itself will have authority to regulate wages and conditions in relation to employment in industry. This may or may not be advantageous to Australia, but it is inconsistent, I think, with the Federal system of government adopted by the Constitution.

Much argument was devoted to some technical objections to the Regulations based upon the *Acts Interpretation Act* 1901-1941, ss. 48 and 49, and the *National Security Act* 1939-1940, s. 5 (4), but, in the view I take, it is unnecessary to deal with them. They but add to the unreality which surrounds this case, for they can be cured, if my view be wrong, by another Act of Parliament or a further regulation within a few months.

The Victorian Chamber of Manufactures and Metal Trades Employers' Association are not competent parties. They are not affected in their property or in their rights by the Regulations and have no interest in maintaining the action: See *Cooley, Constitutional Limitations*, 8th ed., pp. 339, 340. The other plaintiffs, however, have sufficient interest to maintain it.

The demurrer should be disallowed.

McTIERNAN J. The first question to be decided in this action is whether the *Women's Employment Act* 1942 and the Regulations made under it are beyond the constitutional powers of the Commonwealth.

From the Act itself it appears that Parliament passed it in execution of the powers conferred by placitum vi. of s. 51 of the Constitution. Parliament's statement is that it is "An Act to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war." The nature and extent of the power conferred by placitum vi. (which is commonly called the defence power) were explained in *Farey* v. *Burvett* (1). In the present war, as in the last war, the Commonwealth has relied upon the interpretation of the power which the judges gave in that case to justify the constitutional validity of many measures purporting to be exercises of the defence power. The doctrine of that case is of the highest authority and there is none affecting the interpretation

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

of the Constitution to which it is more important to give full adherence.

In *Farey* v. *Burvett* (1) *Isaacs* J. described the nature and extent of the defence power in these terms: "As I read the Constitution, the Commonwealth, when charged with the duty of defending Commonwealth and States, is armed as a self-governing portion of the British Dominion with a legislative power to do in relation to national defence all that Parliament, as the legislative organ of the nation, may deem advisable to enact, in relation to the defence of Australia as a component part of the Empire, a power which is commensurate with the peril it is designed to encounter, or as that peril may appear to the Parliament itself; and, if need be, it is a power to command, control, organize and regulate, for the purpose of guarding against that peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory."

After the outbreak of the present war the scope of the defence power was called in question in this Court in *Andrews* v. *Howell* (2). In dismissing the attack which was made in that case on the *National Security* (*Apple and Pear Acquisition*) *Regulations* as "a hopeless one," *Rich* A.C.J. rested his judgment on two passages from the judgment of *Isaacs* J. in *Farey* v. *Burvett* (3). His Honour said that the language in these passages describing the application of the defence power to the circumstances of the last war was "even more apposite to those of this war" (4).

In the first of these passages *Isaacs* J. said that the power is limited in war-time only by the requirements of self-preservation; and in the second passage his Honour stated the limits of the inquiry which the court will make into the question whether a law lies outside the defence power. The statement postulates the inquiry being made in circumstances of grave national peril where no rational person would doubt that the co-operation of every individual and a co-ordinated effort in every department are necessary to save the Commonwealth. To raise that question in those circumstances is indeed a remarkable manifestation of the rule of law. The question has been raised more than once during the present war even while the mainland of the Commonwealth has been menaced by invasion.

Where the circumstances which *Isaacs* J. postulates exist he says that the proper limits of the court's function are to see if the measure questioned "may conceivably in such circumstances

(1) (1916) 21 C.L.R., at p. 455.
(2) (1941) 65 C.L.R. 255.
(3) (1916) 21 C.L.R., at pp. 455, 456.
(4) (1941) 65 C.L.R., at p. 263.

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even "incidentally aid the effectuation of the power of defence" and, if it would do so, "the court must hold its hand." In determining whether there is this relationship between the measure and the defence of the Commonwealth, the court uses its knowledge of facts commonly known and such rational considerations as are apposite to the subject; and the court does not impute bad faith to the Parliament or the Executive in taking a measure which is impeached by a party interested in setting it aside. The court would not have the information needed to enable it to carry the inquiry beyond the limits which *Isaacs* J. has described; and the court would be trespassing on the province of Parliament and the Executive if it were to decide whether the measure would aid the defence of the Commonwealth (*Farey* v. *Burvett* (1)).

I quoted the criterion propounded by *Isaacs* J. in that case because it was so clearly endorsed by *Rich* A.C.J. in *Andrews* v. *Howell* (2). The criterion of *Griffith* C.J. (3) is not distinguishable in principle. His Honour said that the question is whether the provisions of the regulations *can* conduce to the more effectual prosecution of the war. The word "can" is italicized. *Barton* J. said: "But the necessity is not for us, when facts of which we take judicial notice establish that the thing is capable of aiding directly the execution of the power" (4).

Because of the declaration in the present Act that the purpose of its provisions is to aid the prosecution of the present war the observations of *Higgins* J. are of special importance in the present case. *Higgins* J. said: "Here, Parliament has declared, on the face of the Act" (*War Precautions Act* 1914-1916) "that it is for 'the more effectual defence of the Commonwealth'. It is not for this Court to decide that the Act does aid defence, or how it aids defence; it is enough that it is capable of being an Act to aid defence, enough that the statement of Parliament is not necessarily untrue" (5).

The *Women's Employment Act* was passed during the present war. It is expressed to come into operation on the day it would receive the Royal Assent. That day was 6th October 1942. The provisions of the Act relating to the employment of women are contained in the schedule and are described as "*Women's Employment Regulations.*"

Reg. 5 provides that for the purposes of the Regulations there shall be a Women's Employment Board. Reg. 5A provides that

(1) (1916) 21 C.L.R., at pp. 455, 456.
(2) (1941) 65 C.L.R., at p. 263.
(3) (1916) 21 C.L.R., at p. 442.
(4) (1916) 21 C.L.R., at p. 449.
(5) (1916) 21 C.L.R., at p. 460.

without prejudice to anything contained in the Regulations its functions shall be to fix the remuneration, hours and conditions of employment of certain women employed in industry during the emergency created by the present war. Reg. 6 provides that where an employer has, since 2nd March 1942, employed, is employing, or proposes to employ, women on any of three classes of work he shall forthwith make an application to the Board for a decision in accordance with the Regulations. These classes of work are: (*a*) work which is usually performed by men; (*b*) work which theretofore had been performed by men in the employer's establishment; and (*c*) work which had not been previously done in Australia. Reg. 6 further provides that upon such application by the employer, the Board shall decide whether the work specified in the application falls within these classes, and if the work is of that description, whether women may be employed or continue to be employed on it. Reg. 6 also requires the Board to fix the hours, and rate of payment for women employed on such work, if it permits women to be employed on it. In the exercise of these functions reg. 6 authorizes the Board to decide whether the employment should be in the first place on probation and, if on probation, the rate of payment for the probationary period, but the Board may not fix a rate for adults (whether on probation or otherwise) less than sixty per cent of the rate of payment made to adult men employed on work of a substantially similar nature. The Board also has power under reg. 6 to decide what conditions should be observed by the employer for the safety, health, and welfare of the women permitted by the Board to be employed on the work specified in the employer's application. Reg. 7 empowers any woman employed on any work in the above-mentioned classes or any organization of employees to which a woman thus employed belongs to apply to the Board to determine the rate of payment, hours of employment of women employed on work within the above-mentioned classes, and the conditions to be observed in respect of the employment of women thereon as if such application were made under reg. 6. If the employer's application under reg. 6 relates to the employment of women on any such work in Western Australia, reg. 5B authorizes the Board to refer the application to an industrial authority in that State which for the purposes of the reference is by this regulation vested with the powers of the Women's Employment Board. Reg. 10 gives paramountcy to the Board's decision over a determination of any other authority dealing with any matter covered by such decision. Reg. 14 provides that notwithstanding any law of a State, work may be performed by women in any factory engaged in making munitions of war on such

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days as the Minister of State administering the Regulations approves but subject to conditions which he requires to be observed for their safety, health and welfare. Reg. 13 provides for the inspection of premises where women are employed pursuant to a decision of the Board. The remaining regulation which needs to be noticed is reg. 11, which provides that notwithstanding anything in the Regulations or provided elsewhere any woman may be employed in the Department of Munitions or the Department of Aircraft Production or, with the approval of the Director-General of either of these Departments, by any employer, on work specified in reg. 6.

It is a matter of common knowledge that the emergency of war results in the employment of women on work falling within the categories mentioned in the Regulations. To estimate the importance to the organization of the country for war of any such work is a problem characteristic of war-time necessities. If the employment of women were not regulated, women, who in war-time perform work that is not generally done by women, might be employed in undue numbers, on work that adds nothing to the country's war-like resources and does not conduce to the efficiency of its war-like preparations. Between work that has no relation to the country's war effort and work that has some relation to that object it is not easy to draw a line. Everybody knows that the war effort and other essential work could not be efficiently carried on unless the nation and those carrying on these activities had the prior right to call on the services of women especially those who would seek to fill vacancies and new positions in industry and other spheres of employment created by the exigencies of war. The Parliament or the Executive or an administrative agency like the Women's Employment Board, armed with its powers of inquiry, is in a better position than the Court to determine whether the war effort would be served or any urgent or essential need of the nation in war-time met by employing any of the women who are available for employment at any work within the categories mentioned in the Regulations. And the Regulations are capable of securing that the question of employing them on such work would be considered and decided in the light of and according to the national interest. Furthermore, the Regulations are capable of operating to encourage women who are available for employment to enter on work in which it would be useful in the national interest and in the emergency created by the war to employ them.

Having regard to the substance of the provisions of the "*Women's Employment Regulations*" contained in the schedule to the Act

and the considerations which have been mentioned, these Regulations are capable of aiding defence and the prosecution of the war and are not outside the defence power.

Besides the schedule, there are six sections in the Act, of which it is necessary, in deciding the question whether the Act is beyond the defence power, to consider only two sections. No question could arise as to the other sections. Section 3 gives the provisions in the schedule a retrospective operation as from 23rd September 1942, the Act having come into operation on 6th October 1942, when it received the Royal assent. Section 4 provides that all decisions which the Women's Employment Board established under the *National Security* (*Employment of Women*) *Regulations* gave or purported to give up to 23rd September 1942 should by virtue of the Act have full force and effect according to their tenor and that the provisions of the schedule should, subject to the Act, apply to those decisions in like manner as they apply to decisions given or made under the schedule. The provisions of those Regulations are, with immaterial exceptions, identical with the provisions of the schedule.

Certain of those Regulations had been disallowed by the Senate on 23rd September 1942 under the powers given to either House of the Parliament by s. 48 of the *Acts Interpretation Act* 1901-1941. This disallowance operated by force of that section as a repeal of those Regulations. The effect of s. 4 of the Act is therefore to prevent the possibility of the decisions given by the Women's Employment Board under the *National Security Regulations* lapsing. As the provisions of those Regulations are, with immaterial exceptions, identical with the provisions of the schedule to the Act and these provisions are valid, it follows that ss. 3 and 4 are not invalid.

Section 6 of the Act gives power to the Governor-General to make regulations prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to the Act, and in particular for the encouragement and regulation of the employment of women, for the purpose of aiding the prosecution of the present war, and the repeal or alteration of, or addition to, any of the provisions in the schedule to the Act relating to the employment of women. Pursuant to these powers the Governor-General made Statutory Rules 1942 No. 548 (amendments of the "*Women's Employment Regulations*" which are contained in the schedule to the Act), Statutory Rules 1943 No. 75 (*Women's Employment Regulations* (*No.* 2)), Statutory Rules 1943 No. 41 (amendments of the *Women's Employment Regulations*) and Statutory Rules 1943 No. 92 (amendments of the *Women's Employment Regulations*). The second question is whether these Regulations or any of them are or

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is beyond the powers of the Commonwealth. In my opinion the validity of all these Regulations can be upheld upon the same considerations which, in my opinion, justify the provisions of the schedule to the Act.

The third question is whether the Regulations or any of them are or is beyond the powers conferred on the Governor-General by s. 6 of the Act. Because of the wide delegation of powers made by that section to the Governor-General, it does not seem to me that there is any substance in the objection that all these Regulations are not within those powers.

The fourth question is whether the Regulations contained in Statutory Rules 1943 No. 75 and in Statutory Rules 1943 No. 92 were made in contravention of s. 49 of the *Acts Interpretation Act* 1901-1941. This question arises in this way. On 22nd December 1942 the Governor-General made the Regulations contained in Statutory Rules 1942 No. 548. These Regulations amended the Regulations in the schedule to the Act and are entitled: "Amendments of the *Women's Employment Regulations*." Section 48 of the *Acts Interpretation Act* required them to be laid before each House of the Parliament. On 16th March 1943 the Senate, acting pursuant to the powers conferred on either House by that section, passed a resolution disallowing the Regulations. On 25th March 1943 the Governor-General made the Regulations contained in Statutory Rules 1943 No. 75 and on 8th April 1943 the Regulations contained in Statutory Rules 1943 No. 92. The condition mentioned in s. 49 (1) (*a*) was not fulfilled, but the Regulations contained in each set of the statutory rules were made within six months after the date on which the Senate disallowed the Regulations contained in Statutory Rules 1942 No. 548.

It is claimed that s. 49 was contravened by the making of the Regulations contained in Statutory Rules 1943 No. 75 because those Regulations are the same in substance as the Regulations contained in Statutory Rules 1942 No. 548, and it is claimed that the section was contravened by the making of the Regulations contained in Statutory Rules 1943 No. 92, because they are the "same in substance" as those contained in Statutory Rules 1942 No. 548.

The power given to either House by s. 48 is to disallow "any" of the regulations laid before it and the section says that the consequence of disallowance is that "the regulation" so disallowed shall thereupon cease to have effect. The restriction imposed by s. 49 is that "no regulation" being the same in substance as "the regulation" so

disallowed shall be made within six months after the date of disallowance. Section 23 (*b*) of the *Acts Interpretation Act* provides that words in the singular shall include the plural and words in the plural shall include the singular. Where either House disallows one regulation the intention of s. 49 is to prohibit the Executive, subject to the conditions imposed by the section, from making any regulation or regulations the same in substance as the disallowed regulation; or if either House disallows a series of regulations from making any regulation or regulations the same in substance as the disallowed regulations. The expression " the same in substance " does not fix precisely the limits of the prohibition imposed on the Executive. In my opinion a new regulation would be the " same in substance " as a disallowed regulation if, irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation that it could be fairly said to be the same law as the disallowed regulation.

It has been stated that Statutory Rules 1942 No. 548 which were disallowed by the Senate amended and added to the Regulations in the schedule to the Act. Statutory Rules 1943 No. 75 brought into force again the provisions of those Regulations. If these two sets of statutory rules are the same in substance, as the plaintiffs contend, the Regulations in the schedule unamended were the same in substance as those Regulations when amended and added to by Statutory Rules 1942 No. 548. There are, however, important differences between the Regulations in the schedule unamended and in their amended condition, and some of these differences should be noted.

The provisions of the Regulations in the schedule which were re-enacted by Statutory Rules 1943 No. 75 established a Board consisting of representatives of the Commonwealth, the employers, the employees and a chairman. The Board in which those provisions vested the power to hear and decide applications was required to consist of all those elements. Reg. 3 in Statutory Rules 1942 No. 548 altered the provisions of the schedule by authorizing the Board, notwithstanding any vacancy on it, to hear applications and give decisions. It was an essential part of the plan embodied in the Regulations unamended that the Board administering them should be fully constituted according to their provisions. Another difference between the Regulations unamended and as amended is that under the former the decisions of the Board were binding on the parties specified in it but under the Regulations as amended the Board could extend the operation of its decisions to any other parties included in a specified class employing women on work similar to that mentioned in the application in respect of which the decision was given. Other differences are that the Regulations unamended

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give an individual employee the right to apply to the Board to make a determination relating to conditions of her employment but the Regulations as amended deprive her of this right and confine it to an organization of employees : and while the Regulations unamended gave no power to the Board to proceed to do on its own motion what it could do upon an application under reg. 6 the Regulations as amended gave the Board that power.

These are not the only alterations which Statutory Rules 1942 No. 548 made in the Regulations in the schedule, but they are sufficient to show that those Regulations as existing prior to the making of Statutory Rules 1942 No. 548, embodied a law materially different in substance from that which came into force when those Statutory Rules were promulgated.

It follows that Statutory Rules 1943 No. 75, which re-enacted the provisions of the schedule, are not the same in substance as Statutory Rules 1942 No. 548, which amended the provisions of the schedule and had been disallowed by the Senate. For these reasons the making of Statutory Rules 1943 No. 75 did not contravene s. 49 of the *Acts Interpretation Act* 1901-1941.

The Senate by passing the *Women's Employment Act* approved of the provisions in the schedule to the Act. It is consistent with the disallowance of Statutory Rules 1942 No. 548 that the Senate took the view that these statutory rules materially altered the provisions in the schedule to the Act.

It is necessary now to consider whether Statutory Rules 1943 No. 92 are the same in substance as Statutory Rules 1942 No. 548. The laws resulting from the amendments and additions which these two sets of Regulations respectively would make to the Regulations in the schedule would be alike in all their essential parts. For example, both would authorize the Board, though incompletely constituted according to the provisions of the Regulations in the schedule unamended, to administer the Regulations ; and both would empower the Board to act on its own motion and to extend the operation of its decisions to parties other than applicants. There would be differences in the details of the provisions resulting from the amendments and additions which those two sets of Regulations would make to the Regulations in the schedule, but there would not be any essential difference in the general effect of their legal operation. The effect of Statutory Rules 1943 No. 92 would be to change the provisions of the schedule into a law which would be the same in substance as that into which Statutory Rules 1942 No. 548 changed it. It follows that the making of Statutory Rules 1943

No. 92 contravened s. 49 of the *Acts Interpretation Act* and the Regulations contained in them are void and of no effect.

The fifth question is whether s. 5 (4) of the *National Security Act* 1939-1940 applies, as the plaintiffs contend, to the decisions of the Board. If this sub-section applies to these decisions it would be necessary for the validity of each decision that it should be laid before each House of Parliament pursuant to s. 48 (1) (*c*) of the *Acts Interpretation Act* 1901-1941. The contention is that s. 5 of the *Women's Employment Act* 1942 makes s. 5 (4) of the *National Security Act* 1939-1940 apply to the decisions of the Board. Section 5 is in these terms :—" 5. The provisions of the *National Security Act* 1939-1940 shall, so far as applicable, apply to and in relation to the provisions, in the Schedule to this Act, relating to the employment of women, and to regulations made under this Act, in like manner as if they were regulations made under the first-mentioned Act." This section does not in terms apply to the decisions given under the provisions in the schedule to the *Women's Employment Act* or to the regulations made under that Act. Section 5 (4) of the *National Security Act* 1939-1940 applies to orders, rules and by-laws of the nature described in this sub-section. Such orders, rules and by-laws are exercises of the powers conferred by s. 5 (3) of the *National Security Act*. This sub-section provides that regulations made under the *National Security Act* may confer on persons or classes of persons power to make orders, rules and by-laws. Section 5 (4) is one part of a code in that Act applying to certain orders, rules and by-laws depending on s. 5 (3). Sub-sections 5 and 6 of s. 5 of the *National Security Act* are other parts of the same code and these sub-sections apply to all orders, rules and by-laws depending on s. 5 (3). The decisions of the Board, however, do not depend on any power contained in s. 5 (3) of the *National Security Act* 1939-1940 which is brought into play by reason of the operation of s. 5 of the *Women's Employment Act*. The decisions of the Board depend entirely upon powers conferred by the *Women's Employment Act* and the regulations made pursuant to s. 6 of this Act. Section 5 (4) of the *National Security Act* 1939-1940 would be applicable, if at all, by force of s. 5 of the *Women's Employment Act* only as a consequence of the application of s. 5 (3) of the *National Security Act*, if indeed this sub-section is brought into play by s. 5. But if s. 5 (4) of the *National Security Act* were made applicable by s. 5 of the *Women's Employment Act*, s. 5 (4) would apply only to such decisions of the Women's Employment Board as depended on powers which the Board could exercise by virtue of s. 5 (3). There are no such decisions of the Board. All its decisions are exercises

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of powers which are wholly created by the *Women's Employment Act* itself and not by s. 5 (3) of the *National Security Act* 1939-1940.

The source of the expression " of a legislative and not of an executive character " in s. 5 (4) of the *National Security Act* has been ascribed in argument to the reasons for judgment of *Isaacs* J., as he then was, in *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1). The appositeness of the observations there made to a decision of the Women's Employment Board is lessened by the distinctions existing between such a decision and the industrial award whose juridical nature *Isaacs* J. was describing. It seems more probable that the source of the expression is to be found in Statutory Rules 1894 No. 734 containing regulations made by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons in pursuance of the *Rules Publication Act* 1893. The first of these regulations provides that every exercise of a statutory power by a rule-making authority which is of a legislative and not an executive character, shall be held to be a statutory rule within s. 3 of the Act and these Regulations. Reg. 2 provides that an exercise of a statutory power which is confirmed only by a rule-making authority shall not be held to be a statutory rule within s. 3 of the Act and these Regulations. Reg. 3 provides that except as mentioned in reg. 2 the volumes of Statutory Rules and Orders published by the Stationery Office in 1890, 1891, and 1892, shall form a practical guide for determining those exercises of statutory powers which should be treated as statutory rules within s. 3 of the Act and these Regulations. There is no such guidance for determining the question what orders, rules and by-laws come within s. 5 (4) of the *National Security Act* 1939-1940. The description in that sub-section supplies the only criterion for determining this question. Broadly, it is whether an order, rule or by-law is one whereby a law is enacted rather than an order, rule or by-law whereby the law enacted by the regulation under which the order, rule or by-law is made, is applied or enforced. The application of this criterion would involve the examination of every decision which is called in question. But it is unnecessary to make the examination for the reason that the decisions of the Board do not depend on s. 5 (3) of the *National Security Act* 1939-1940, and s. 5 (4) of this Act is therefore not applicable to them.

Another question to be considered is what was the effect of the disallowance of Statutory Rules 1942 No. 548 on the decisions of the Women's Employment Board.

(1) (1910) 10 C.L.R., at p. 318.

These Statutory Rules came into force on 23rd December 1942. They repealed provisions of the Regulations in the schedule of the Act under which decisions had been given. But by virtue of s. 50 of the *Acts Interpretation Act* the repeal did not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Regulations. The date of the disallowance of Statutory Rules 1942 No. 548 was 16th March 1943. By force of s. 48 of the *Acts Interpretation Act* these Statutory Rules thereupon ceased to have effect. Section 48 also provides that the disallowance of a regulation shall have the same effect as a repeal of the regulation. The result is that the disallowance did not affect any right, privilege, obligation or liability acquired under the Statutory Rules prior to the date of their disallowance. The Regulations in the schedule which were repealed by Statutory Rules 1942 No. 548 did not revive after such disallowance.

Statutory Rules 1943 No. 75, which were made on 25th March 1943 and came into force on that date, again made the provisions of the Regulations in the schedule law, and by reg. 3 provided that all decisions of the Board given since the commencement of the *Women's Employment Act* 1942 on 6th October 1942 and the disallowance on 16th March 1943 of Statutory Rules 1942 No. 548 shall have full force and effect. It has been shown that reg. 2 is not the same in substance as the disallowed Regulations contained in the last-mentioned Statutory Rules. Reg. 3 also is not the same in substance as the disallowed Regulations. For while they on the one hand empower the Board to hear applications and give decisions relating to the employment of women, reg. 3 on the other hand enacts, by reference to the decisions of the Board between 6th October 1942 and 16th March 1943, various sets of provisions applying to the employment of women. The provisions contained in these decisions take effect from 25th March 1943 by force of reg. 3 as regulations made under the *Women's Employment Act*. The result is that the provisions contained in the decisions of the Board take effect from 25th March 1943 as regulations made under the *Women's Employment Act* but they have no operation between that date and 16th March 1943.

There is no claim in the action for a declaration or relief in respect of any decision of the Board given after 16th March 1943. But as Statutory Rules 1943 No. 92 are the same in substance as Statutory Rules 1942 No. 548 which were disallowed, the former Statutory Rules being void and of no effect would not confer any power upon the Board to give a valid or legally binding decision.

The result is that the defendants are entitled to succeed on grounds *a*, *b*, *c* and *e* of their demurrer and on ground *d* in so far as it denies

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that the making of Statutory Rules 1943 No. 92 was beyond the powers of the Governor-General; and the plaintiffs are entitled to succeed in so far as the defendants by ground *d* of the demurrer deny that the making of those Statutory Rules was a contravention of the *Acts Interpretation Act* 1901-1941.

To state the result in another way, I think that the Women's Employment Board has power to function under the provisions of the schedule to the Act, these provisions having been re-enacted by reg. 2 of 1943 No. 75. They were entirely unaffected by Statutory Rules 1943 No. 92 because these Rules were void and of no effect by reason of s. 49 of the *Acts Interpretation Act*. But I think that the Board is precluded by reg. 3 of Statutory Rules 1943 No. 75 from giving any decision, variation or interpretation varying any decision, variation or interpretation to which reg. 3 of Statutory Rules 1943 No. 75 applies. The legal effect produced by this regulation cannot be swept away or changed, except by a regulation made under the *Women's Employment Act*, or by an Act of Parliament.

The plaintiffs are, in my opinion, entitled to one only of the declarations claimed, that is to say, a declaration that Statutory Rules 1943 No. 92 are void and of no effect. The demurrer should be disallowed as to that claim and allowed as to all the other claims.

WILLIAMS J. The Women's Employment Board was first constituted by the Federal Executive Council by regulations made under the powers conferred by the *National Security Act* 1939-1940 on 25th March 1942. After these regulations had been amended by Statutory Rules Nos. 236, 263, 294, 381 and 393, the Regulations contained in three of the amendments were disallowed by the Senate in accordance with the provisions of the *Acts Interpretation Act* 1901-1941, s. 48, sub-ss. 4, 5 and 6.

The Commonwealth Parliament then passed the *Women's Employment Act*, which was assented to on 6th October 1942. The Act is described in the preamble as an Act to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war. It is a short Act consisting of six sections. Sections 3, 4, 5 and 6 are as follows:—

3. The provisions, in the Schedule to this Act, relating to the employment of women, shall by virtue of, but subject to, this Act, have and continue to have the force of law and be deemed, as on and from 23rd day of September 1942, to have had the force of law.

4. (1.) All decisions, variations and interpretations which the Women's Employment Board established under the *National Security (Employment of Women) Regulations* (being Statutory Rules 1942,

No. 146, as amended by Statutory Rules 1942 Nos. 236, 263, 294, 381 and 393) gave or made or purported to give or make at any time up to and including the 23rd day of September 1942, shall, by virtue of this Act, have full force and effect according to their tenor and, subject to this Act, the provisions, in the Schedule to this Act, relating to the employment of women shall apply to and and in relation to those decisions, variations and interpretations in like manner as they apply to and in relation to decisions, variations and interpretations given or made under those provisions.

(2.) Any application under the regulations specified in the last preceding sub-section which was pending on the 22nd day of September 1942 may be considered and decided by the Women's Employment Board established under the provisions, in the Schedule to this Act, relating to the employment of women, as if the application had been made under those provisions, and any evidence given, in relation to any such application, before the Women's Employment Board established under the regulations so specified, may be considered, in relation to that application, by the first-mentioned Board, as if the evidence had been given before it.

5. The provisions of the *National Security Act* 1939-1940 shall, so far as applicable, apply to and in relation to the provisions, in the Schedule of this Act, relating to the employment of women, and to regulations made under this Act, in like manner as if they were regulations made under the first-mentioned Act.

6. The Governor-General may make regulations prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for—

(*a*) the encouragement and regulation of the employment of women for the purpose of aiding the prosecution of the present war; and

(*b*) the repeal or alteration of, or addition to, any of the provisions, in the Schedule to this Act, relating to the employment of women.

The schedule, which is headed "Provisions Relating to the Employment of Women. Women's Employment Regulations," contains sixteen regulations. Reg. 5 establishes a Women's Employment Board similar to that in existence under the previous Regulations.

Regs. 5A, 6, 7, 8, 9, 10, and 12, so far as is material, are as follows:—

5A. Without prejudice to anything contained in these Regulations, the functions of the Board shall be to fix the remuneration, hours and conditions of employment of certain women employed in industry during the emergency created by the present war.

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6. (1) Where an employer has, since the second day of March 1942, employed, is employing, or proposes to employ, females on work which is usually performed by males or work which was, prior to that employment of females, or is, performed by males in the establishment of that employer, or is work which, prior to that employment or proposed employment of females, was not being performed in Australia by any person, the employer shall, unless an application in relation to that employment has already been made, forthwith make application to the Board for a decision in accordance with this regulation.

(2) A person who makes any such application shall forthwith furnish one copy thereof to the Secretary and one copy to such organization or to each of such organizations of employees and employers as the Chairman of the Board specifies.

(3) Upon receipt of any such application the Board shall forthwith proceed to consider the application.

(4) The Board, after consideration of the application, shall decide

(*a*) whether the work specified in the application is work specified in sub-regulation (1) of this regulation;

(*b*) in respect of the employment of females on work held in pursuance of these Regulations to be work specified in sub-regulation (1) of this regulation—

(i) whether females may be employed, or may continue to be employed, thereon;

(ii) the hours during which females may be employed thereon, and the maximum daily and weekly hours of work of females employed thereon;

(iii) the special conditions (if any) regarding the safety, health and welfare of females employed thereon to be observed by the employer;

(iv) whether the employment of females thereon should in the first place be on probation;

(v) if the Board decides that the employment should in the first place be on probation—

(1) the period of probation; and

(2) during the period of probation, the rate of payment to be made to females employed on that work:

Provided that the rate of payment to be made to any adult female employee shall not be less than sixty per centum of the rate of payment made to adult males employed on work of a substantially similar nature;

(vi) the rate of payment to be made to females employed on that work, if the Board decides that the employment of females

on that work should not in the first place be on probation, or after a period of probation determined in pursuance of these Regulations.

(5) The Board shall decide a rate of payment under sub-paragraph (vi) of paragraph (*b*) of sub-regulation (4) of this regulation which it considers to be just and proper in all the circumstances and shall, as far as is practicable, assess that rate by reference to such factors as it thinks fit and in particular to the efficiency of females in the performance of the work and any other special factors which may be likely to affect the productivity of their work in relation to that of males:

Provided that—

(*a*) the rate of payment so decided for any adult female employee shall not be less than sixty per centum, nor more than one hundred per centum, of the rate of payment made to adult males employed on work of a substantially similar nature; and

(*b*) the rate of payment made to any female employee, or to females in respect of the performance of any work, not being a rate decided by the Board, shall not be reduced by any decision of the Board.

7. Any female employed on work specified in sub-regulation (1) of regulation 6 of these Regulations, or any organization of employees to which any such female belongs, may make application to the Board for a determination of the rate of payment to be made to, or the hours and conditions to be observed in respect of, females employed on that work and the Board shall forthwith deal with the application as if it were an application under regulation 6 of these Regulations.

8. The Board may, on the application of any party bound by a decision of the Board, or of its own motion—

(*a*) vary the decision;

(*b*) re-open any question in relation to which the decision was given;

(*c*) give an interpretation of any term of the decision; or

(*d*) set aside the decision or any term of the decision.

9. Any decision of the Board, and any variation or interpretation of any such decision, shall be binding on the employer or employers specified in the decision, his employees and the organizations of employees whose members are affected by the decision, and shall be filed in the Court, and shall thereupon have effect in all respects and be enforceable as if it were an award or order of the Court.

10. During the currency of any decision of the Board no provision of any award, order or determination made by an Industrial Authority dealing with the subject matter dealt with by the decision or any

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variation thereof and inconsistent with the decision or variation, and no decision or determination of any authority of the Commonwealth or a State with respect to female employees of the Commonwealth or State inconsistent with the decision of the Board or any variation thereof, shall be effective.

12. Any rate of payment to be made in accordance with a decision, order or interpretation given or made by the Board in pursuance of these Regulations shall apply in respect of the work done by any female as on and from such date (whether before or after the commencement of these Regulations, but, where that rate is less than the rate payable immediately prior to the date of the decision, order or interpretation, not earlier than that date, and in any event, not earlier than the second day of March 1942) as the Board specifies, but any payment made to that female in respect of the work prior to the date of the decision, order or interpretation of the Board shall be set off against any payment to be made under the decision, order or interpretation.

Reg. 6 compels employers employing females in certain work to apply to the Board for permission to continue to employ them upon this work. This work falls into three classes.

(1) Work which is usually performed by males.

(2) Work which prior to the employment of females was being performed by males in the establishment of a particular employer.

(3) Work which prior to the employment of females was not being performed in Australia at all.

An employer must obtain the consent of the Board to the employment of females in any of these three classes of work. If he obtains the consent of the Board, the Board must decide the conditions upon which they may be employed. The Board must decide a rate of payment which shall not be less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature.

It is unfortunate that the *Women's Employment Act* does not contain an express provision, similar to that contained in the *National Security Act*, s. 19, that the operation of the Act is limited to the present war; but, having regard to the date upon which the preceding regulations made under the *National Security Act* were first enacted, to the preamble to the *Women's Employment Act*, to the fact that s. 5 could only operate while the *National Security Act* remained in force, to the provisions of s. 6 (*a*), to the reference in reg. 5A to the "emergency created by the present war," and to the nature of the work to be done by females described in reg. 6; it can be inferred that the operation of the Act is intended to be

limited in this way, and that the females to whom it applies are females substituted in work for men who have enlisted in the armed forces or who have changed from their usual employment to other work on account of the war. As the Board is to be constituted of representatives of employers and employees and before their appointment the Minister must consult with the appropriate employers' organizations and the Australasian Council of Trade Unions; the Court in the Regulations means the Commonwealth Court of Conciliation and Arbitration; the decisions of the Board are to be filed in that Court, are to have effect in all respects and be enforceable as if they were an award or order of that Court, and are to override any award, order or determination of any other industrial authority inconsistent with them; it can also be inferred (in spite of the words in reg. 5A, "without prejudice to anything contained in these Regulations") that the work to which the Regulations are intended to apply is limited to industrial work.

Females cannot be employed in any of the three classes of work specified without the consent of the Board. In the first two classes it may be said that females are being substituted to do the work of males, but in the third class the work in new industries which have been set up in Australia since the war might be as suitable in normal times for females as for males. In the second class the work could be also as suitable for females as for males in normal times because in this class the same work was being done by females in some establishments as was being done by males in other establishments. In this class the anomalous position arises that females who take the place of males are to have their wages assessed on a different and higher basis than females already employed, although all the females will be doing the same work. But the only question which this Court can consider is whether the Act and Regulations are an exercise by the Executive of the legislative power of Parliament under the Constitution, s. 51, placitum vi., to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth. If they are, the correction of such anomalies is a political matter which can only be effected by the legislature.

Recently there has been considerable discussion in the judgments of this Court as to the tests to be applied in order to ascertain whether legislation is within the ambit of the defence power. In *Andrews* v. *Howell* (1) my brother *Dixon*, referring to this power, said :—"It must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a

(1) (1941) 65 C.L.R. 255, at p. 278.

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power enabling the legislature to make a particular law. In the same way the operation of wide general powers conferred upon the Executive by the Parliament in the exercise of the power conferred by s. 51 (vi.) is affected by changing facts. The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto."

The leading case in this Court upon the scope of this power in war-time is *Farey* v. *Burvett* (1). As I said in *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (2), I adhere to the observations made by *Isaacs* J. in that case (3). The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts must concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm. As *Isaacs* J. said in *Farey* v. *Burvett* (3), " they alone have the information, the knowledge and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end." In *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (4) Lord *Haldane*, delivering the judgment of the Privy Council, said that this question is one which " the dominion Government, which in its Parliament represents the people as a whole, must be deemed to be left with considerable freedom to judge." In *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (5) the Supreme Court of the United States of America said " that to Congress, in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded." In *Hirabayashi* v. *United States* (6) the same Court said : " In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defence afforded a rational basis for the decision which they made."

In the *Fort Frances Case* (7) Lord *Haldane* referred to the analogy between the Canadian and American Constitutions in this respect, and a similar analogy between the Canadian and the Commonwealth

(1) (1916) 21 C.L.R. 433.
(2) *Ante*, p. 25, at p. 48.
(3) (1916) 21 C.L.R., at pp. 455, 456.
(4) (1923) A.C. 695, at p. 705.
(5) (1919) 251 U.S. 146, at p. 163 [64 Law. Ed. 194, at p. 202].
(6) (1943) 87 Law. Ed. (U.S.) (Advance Opinions) 1337, at p. 1348.
(7) (1923) A.C. 695.

Constitutions has been recognized by this Court in *The Commonwealth* v. *Australian Commonwealth Shipping Board* (1). There is also an analogy, in my opinion, recognized by *Isaacs* J. in *Farey* v. *Burvett* (2) in his reference to *The Zamora* (3), between the validity of regulations made under the Imperial *Defence of the Realm Act* 1914 and Commonwealth legislation which is an exercise of the defence power in time of war.

The framework of the Canadian Constitution differs from our own. Exclusive legislative powers are conferred upon the Parliament of Canada by s. 91 and upon the Provincial Parliaments by s. 92 of the *British North America Acts* 1867 *to* 1940. Legislative powers not expressly conferred upon the Parliaments of Canada or of the Provinces are reserved to the Parliament of Canada by the opening words of s. 91. One of the exclusive powers expressly conferred upon the Parliament of Canada by s. 91 is (7) militia, military and naval service and defence. One of the exclusive powers expressly conferred upon the Parliaments of the Provinces by s. 92 is (13) property and civil rights in the Provinces. In the *Fort Frances Case* (4) the Privy Council, applying what it had already said in *In re Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (5), held that emergencies such as the perils of war can give rise to circumstances in which property and civil rights can acquire new relations which they do not present in normal times which have to be dealt with, and that such relations, which affect Canada as an entirety, fall within s. 91, because in their fullness they extend beyond what s. 92 can really cover. Similar circumstances to those which in times of war enable the Parliament of Canada to encroach upon matters which in normal times are exclusively reserved to the States enlarge the operation of the defence power of the Commonwealth Parliament to enable it to legislate so as to affect rights which in normal times are within the domain reserved to the States (*South Australia* v. *The Commonwealth* (6)).

The authority of the Imperial Parliament is absolute and untrammelled, but the authority to make regulations under the Imperial *Defence of the Realm Act* was confined to legislation for, *inter alia*, the public safety and the defence of the realm. In *R.* v. *Halliday* (7) Lord *Atkinson*, referring to regulations made under that Act, said :—" Two conditions are, however, imposed : First, the regulations can only be issued during the war, and, second, whatever they purport to do must be done for the purpose of securing the public safety and the defence

(1) (1926) 39 C.L.R. 1, at pp. 9, 10.
(2) (1916) 21 C.L.R., at p. 456.
(3) (1916) 2 A.C. 77.
(4) (1923) A.C. 695.
(5) (1922) 1 A.C. 191.
(6) (1942) 65 C.L.R., at p. 468.
(7) (1917) A.C. 260, at p. 272.

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of the realm. It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises." In *Peacock's Case* (1) I cited English decisions which showed that in order to determine whether regulations made under the Imperial *Defence of the Realm Act* were valid the court had to inquire whether the regulations were " conceivably capable " or " reasonably capable " of aiding in securing the defence of the realm. The judgment of *Greer* J., as he then was, in *Hudson's Bay Co.* v. *Maclay* (2), to which I referred, was approved by *Bankes* L.J. in *John Robinson & Co. Ltd.* v. *The King* (3). In *Halsbury's Laws of England*, 2nd ed., vol. 6, in the chapter on constitutional law, p. 533, note *d*, the learned author, Sir *William Holdsworth*, said :—" Under this legislation, and other war-time Acts the Crown attained almost unlimited powers of government. It was held, on more than one occasion, that no regulation which was made with the honest intention of securing the public safety and defence of the realm could be treated by the courts as invalid, unless it was clear, upon the face of it, that it could not possibly aid in securing the public safety or the defence of the realm." This statement is in close accord with that of *Higgins* J. in *Farey* v. *Burvett* (4) that it is enough that it is capable of being an Act to aid defence.

In order to determine whether legislation is within the defence power it is necessary to examine the substance and purpose of the legislation in order to ascertain what it is that the legislature is really doing. But if the real substance and purpose is such that the legislation is capable even incidentally of aiding the effectuation of the power then it is in my opinion within the ambit of the power (*South Australia* v. *The Commonwealth* (5)). As I also said in *Peacock's Case* (1), it appears to be almost immaterial whether the word " capable " is used alone or is prefixed by " reasonably " or " conceivably." It is to be noted that in the *Board of Commerce Case* (6) and in the *Fort Frances Case* (7) the Privy Council, like *Isaacs* J., used the word " conceivably." But it is important to bear in mind that a state of war creates a situation that is abnormal and temporary, so that, since legislation of the Commonwealth Parliament, including legislation under the defence power, can only be valid if

(1) *Ante*, at pp. 48, 49.
(2) (1920) 36 T.L.R. 469.
(3) (1921) 3 K.B. 183, at p. 197.
(4) (1916) 21 C.L.R., at p. 460.
(5) (1942) 65 C.L.R., at pp. 467, 468.
(6) (1922) 1 A.C., at pp. 200, 201.
(7) (1923) A.C., at p. 706.

and in so far as it falls within the ambit of an enumerated power, laws which can only be justified by the enlarged operation of the defence power which occurs in an emergency must not extend beyond what is reasonably required to cope with such abnormal and temporary conditions (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)).

It is conceivable to my mind that the regulation by Commonwealth legislation of the terms and conditions of employment of these " new women," as they were called during the argument, can aid in the prosecution of the war. The industries in which they may in some instances become employed may be industries which are not associated with the prosecution of the war, but it is employment in industry which in the case of the first two classes has become vacant because of the war and in the third class has been created by the war. The only express power to control industry conferred upon the Commonwealth Parliament by the Constitution is that contained in s. 51, placitum xxxv., to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. As *Isaacs* and *Rich* JJ. pointed out in their joint judgment in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2), this power is limited to legislation with respect to a particular method of dealing with such disputes ; that is to say, it presupposes a dispute, a hearing or investigation and a decision. Parliament " cannot form an *a priori* code, and say that shall be obeyed by disputants. . . . It can say . . . that an arbitrator shall have power to inquire into the circumstances of each particular dispute, and say what in his opinion ought to be the respective rights and liabilities with respect to the matters in dispute, and that when so declared those shall be their mutual rights and liabilities." A power which can only be exercised in this way and which is confined to industrial disputes extending beyond the limits of any one State would not give the Commonwealth Parliament sufficient control over industry in time of war. The operation of the ambit of the defence power in time of war must therefore be enlarged to enable the Parliament to exercise more control over industry than it is able to exercise in time of peace. It is unnecessary in the present case to decide the difficult problem whether this operation should be enlarged to control all industry, because the *Women's Employment Act* seeks only to control a particular aspect of industry. A sudden transfer of males due to the war from certain industries and the substitution

(1) *Ante*, at pp. 161-163. (2) (1918) 25 C.L.R. 434, at pp. 462 et seq.

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of females in their place can obviously create new industrial conditions which ought to be controlled by legislation. These conditions would exist throughout the whole of the Commonwealth and could only be effectively and expeditiously dealt with by the Commonwealth Parliament. As the Act has the character of a law with respect to defence, it is a matter for the Commonwealth Parliament to decide the nature of the legislation by which these conditions shall be controlled, including the question as to what work in the three defined cases is suitable for the employment of the "new women" (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1)).

On 23rd December 1942 the Regulations in the schedule to the Act were amended by Statutory Rules 1942 No. 548. By reg. 4 of these rules reg. 6 of the *Women's Employment Regulations* was repealed and new regulations, of which I need only refer to reg. 6, were inserted in its stead. The new reg. 6, so far as is material, provides as follows :—

6. (1) Where an employer is employing or proposes to employ females on work—

(*a*) which is usually performed by males ;

(*b*) which was, during the period from 3rd September 1939 to the date of the employment of, or proposal to employ, females, performed by males in the establishment of the employer ; or

(*c*) which was not, during that period, performed in Australia by any person,

the employer shall, unless an application under these Regulations (including an application within the meaning of sub-section (2) of section 4 of the Act) in relation to that employment has already been made or the Board has given a decision in respect of that work under these Regulations, or a decision in respect of that work is in force by virtue of the Act, forthwith make application to the Board for a decision in accordance with this regulation.

The rest of the regulation, so far as is material, is substantially the same as the repealed regulation.

Statutory Rules 1942 No. 548 were disallowed by the Senate on 16th March 1943 under the provisions of the *Acts Interpretation Act*, s. 48, sub-ss. 4, 5 and 6.

Statutory Rules 1943 No. 75 came into force on 25th March 1943. They contain the three following regulations, intituled "*Women's Employment Regulations* (*No.* 2)."

1. These Regulations may be cited as the *Women's Employment Regulations* (*No.* 2).

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

2. The *Women's Employment Regulations*, as existing prior to the date on which Statutory Rules 1942 No. 548 came into operation, shall have full force and effect.

3. All decisions, variations and interpretations of the Women's Employment Board given or made between the commencement of the *Women's Employment Act* 1942 and the date of disallowance of Statutory Rules 1942 No. 548, shall have full force and effect.

Statutory Rules 1943 No. 92 came into force on 8th April 1943. Reg. 4 provides that reg. 6 of the *Women's Employment Regulations* is amended by substituting for sub-reg. 1 the following sub-regulation :—

(1.) Where an employer proposes to employ, is employing, or has at any time since the second day of March 1942 employed, females on work—

(*a*) which is usually performed by males ;

(*b*) which within the establishment of that employer, was performed by males at any time since the outbreak of the present war ; or

(*c*) which prior to the outbreak of the present war, was not performed in Australia by any person,

the employer shall, unless an application in relation to that employment has already been made (whether before or after the commencement of this sub-regulation), or a decision of the Board in respect of that work is in force, or a decision in respect of that work is in force by virtue of the Act, forthwith make application to the Board for a decision in accordance with this regulation.

Section 49 (1) of the *Acts Interpretation Act* provides that, subject to certain exceptions which are not material, where either House of the Parliament disallows any regulation, no regulation, being the same in substance as the regulation so disallowed, shall be made within six months after the date of the disallowance, and (2) that any regulation made in contravention of the section shall be void and of no effect. Questions arise as to the operation of this section in relation to the disallowance by the Senate of Statutory Rules 1942 No. 548 on 16th March 1943, and the purported re-enactment of reg. 6 of the Regulations in the schedule by Statutory Rules 1943 No. 75 and the substitution of a new reg. 6 (1) by Statutory Rules 1943 No. 92.

The first question is whether reg. 6 in the schedule is the same in substance as reg. 6 in Statutory Rules 1942 No. 548. If it is, it is void.

The section refers to a regulation which is the same in substance as a regulation which has been disallowed. It therefore requires

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that each regulation forming part of a set of regulations which has been disallowed shall be contrasted with the regulation which replaces it. The meaning of a regulation must be ascertained in the context of the whole set of regulations of which it forms a part just as a section must be construed in the context of the whole Act. It requires the court to go behind the mere form of regulations and ascertain their real purpose and effect. If this is in substance the same the subsequent regulation is void. It is impossible to define the meaning of the section with any precision. As the Privy Council said in another connection, each case must be determined as it arises, "for no general test applicable to all cases can safely be laid down": See *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). Both regs. 6 divide the work to be done by females into the same three classes. In reg. 6 in the schedule no period is fixed for determining whether the work was usually performed by males in a particular establishment or whether the work was work which was not being performed in Australia. In reg. 6 in Statutory Rules 1942 No. 548 the period is fixed as a period commencing on 3rd September 1939, the date of the outbreak of war with Germany. But as the Act is intended to regulate the conditions of employment of women who have taken the place of men who have left their ordinary civil employment on account of the war this difference is one of form and the two provisions are in substance the same. Reg. 6 in the schedule refers to an employer who has since 2nd March 1942 employed or is employing or proposes to employ females in any of the three classes of work, whereas reg. 6 in Statutory Rules 1942 No. 548 only refers to an employer who is employing or proposes to employ females on such work. It therefore omits an employer who has employed females since 2nd March 1942 but is not employing them at the date of the statutory rule and does not propose to employ them in the future. But this is also a matter of form and not of substance. In the first place, it is difficult to believe that there could be any applications in this class that had not been disposed of; in the second place, the provision would infringe s. 48 (2) of the *Acts Interpretation Act* and would be void; and, in the third place, the real substance and purpose of the Act is to compel an employer to make an application not in respect of past but in respect of present and future employment, so that this difference is in any real sense mere surplusage. The conclusion is that reg. 6 in the schedule is the same in substance as reg. 6 in the Statutory Rules 1942 No. 548.

(1) (1939) A.C. 117, at p. 129.

Applying the same reasoning *mutatis mutandis* to reg. 6 (1) in Statutory Rules 1943 No. 92 the conclusion is that this sub-regulation is the same in substance as reg. 6 (1) in Statutory Rules 1942 No. 548.

The result is that since 16th March 1943 the schedule to the Act has not contained any reg. 6.

It is not material to this judgment to consider whether reg. 7 in the schedule is the same in substance as reg. 7 in Statutory Rules 1942 No. 548 because, assuming that it is, the avoidance of the re-enactment of reg. 7 in the schedule by Statutory Rules 1943 No. 75 would not add anything to the effect of the avoidance of the re-enactment of reg. 6 in Statutory Rules 1943 Nos. 75 and 92.

It follows, therefore, that from 16th March 1943 there has been no valid regulation under which an employer could be compelled to make an application or the Board could entertain any application. In these proceedings, the only question is what effect this has on decisions, variations and interpretations of the Board existing on that date. There are four material periods. (1) The period prior to 23rd September 1942, the date referred to in s. 4 of the Act.—It is not suggested that any decisions, variations and interpretations of the Board made during this period would be invalidated. (2) The period between 23rd September 1942 and 23rd December 1942.—It is not suggested that any decisions, variations and interpretations of the Board made between these two dates would not be valid up to the latter date. (3) The period 23rd December 1942 to 16th March 1943.—Statutory Rules 1942 No. 548 do not contain any express clause saving decisions of the Board after the repeal of reg. 6 in the schedule, but the new reg. 6 contains the following words: "the employer shall, unless an application under these Regulations . . . in relation to that employment has already been made or the Board has given a decision in respect of that work under these regulations, or a decision in respect of that work is in force by virtue of the Act, forthwith make application to the Board." Assuming that the repeal of reg. 6 of the Regulations in the schedule would cause decisions of the Board made under this regulation to lapse, these words are, in my opinion, a sufficient manifestation of an intention to preserve applications which were pending and decisions which had been made under the repealed regulation: See *Bird* v. *John Sharp & Sons Pty. Ltd.* (1). (4) The period subsequent to 16th March 1943.—The *Acts Interpretation Act*, s. 48 (3), provides that the disallowance of a regulation shall have the same effect as a repeal of the regulation. Statutory Rules 1942 No. 548 must therefore be

(1) (1942) 66 C.L.R. 233.

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considered to have operated from 23rd December 1942 to 16th March 1943 and to have been then repealed. The repeal of Statutory Rules 1942 No. 548 on this date did not revive regs. 6 and 7 in the schedule: See the *Acts Interpretation Act*, ss. 7 and 46 (*a*). The repeal therefore left the Act and all the Regulations in the schedule except regs. 6 and 7 in force. But the repeal of reg. 6 destroyed the whole foundation of the Regulations, because they no longer contained any definition of the classes of work with respect to which the Board could regulate the employment of females, or any powers for the Board to deal with applications, or any limits within which the Board could fix the rate of payment. Reg. 8, under which the Board has power to vary, interpret and set aside decisions, remained in force. But the Board was left without any directions as to how it should exercise its power under this regulation. Applying the principles enunciated in *Bird's Case* (1), the effect of the disallowance was, in my opinion, to destroy the future operation of all decisions, variations and interpretations of the Board made between 6th October 1942 and 16th March 1943. But reg. 3 of Statutory Rules 1943 No. 75 provided that all decisions, variations and interpretations of the Board made between these dates should have full force and effect. This regulation is not made dependent upon the validity of reg. 2. It is a similar enactment to s. 4 of the Act. The Commonwealth Parliament could have determined all matters left to the Board by direct legislation. Section 4 and reg. 3 are both cases of such direct legislation. The regulation is open to the construction that it intended to restore decisions, variations and interpretations from the date they were made. If and in so far as it purports to legislate prior to 25th March 1943 it would be void under the *Acts Interpretation Act*, s. 48 (2), but it would be effective with respect to the future.

The purpose and effect of Statutory Rules 1943 No. 75 (or, in other words, their substance) was (1) to restore to the Board the same power to entertain fresh applications and to give fresh decisions as though reg. 6 and Statutory Rules 1942 No. 548 had not been repealed, and (2) to re-enact the decisions of the Board which had perished upon the repeal. At the date of Statutory Rules 1943 No. 75, the Act, the decisions saved by s. 4, and the whole of the Regulations in the schedule except regs. 6 and 7, were still in force. The Act, s. 6 (*a*), gave the Executive power to make regulations prescribing all matters that were necessary or convenient to encourage and regulate the employment of the "new women." Reg. 6 in the schedule, which received the approval of Parliament,

(2) (1942) 66 C.L.R. 233.

prescribed the classes of work in which the employment of women could be regulated and the principles upon which their conditions, including their wages, were to be fixed. The question is whether the repeal of Statutory Rules 1942 No. 548 had such a wide effect that regulations made by the Executive with respect to these classes of work and fixing wages in accordance with these principles in cases dealt with by the Board would be the same in substance as previous decisions of the Board made under the repealed Regulations, so that the Executive could not deal with any case covered by a decision of the Board made between 6th October 1942 and 16th March 1943 without infringing the *Acts Interpretation Act*, s. 49; or whether it had a narrower effect, so that while to restore the authority of the Board to entertain fresh applications in accordance with these principles would be to enact legislation the same in substance as that which had been repealed, it would not be the same in substance for the Executive to regulate such classes of work in accordance with such principles by direct legislation. If the section has the wider operation, then, for six months after the repeal, in the absence of a new statute or rescission of the motion by the Senate under s. 49, the Executive would not be able to regulate wages within the limits of sixty per cent to one hundred per cent of the wages of males for any of the establishments covered by these decisions of the Board, although there were decisions of the Board based on these limits regulating employment in respect of other establishments, and the Executive could have legislated either directly or by some other delegate for any other establishments. The narrower operation avoids such an anomalous result. There is a real difference in substance to my mind between the Executive itself regulating the conditions of employment of the " new women " and delegating the responsibility for doing so to a Board. If this is correct, then it is a matter of form and not of substance for the Executive itself to regulate these conditions where they have been dealt with by the Board by enacting a regulation that the decisions of the Board made between 6th October 1942 and 16th March 1943 shall have full force and effect instead of setting out the details of these decisions at length in the regulations. As I have said, each case under s. 49 must depend upon its own circumstances. Where an Act dealing with a particular subject matter gives power to make regulations on that subject matter it would be difficult to draft two sets of regulations within the power which would not be, in many respects, similar in substance. But s. 6 of the *Women's Employment Act* appears expressly to contemplate that the Regulations in the schedule constituting the Board might be repealed and the conditions

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of employment regulated by direct legislation. The Act contains a clear indication in the schedule that Parliament considered that to give effect to the Act it would be proper that the wages of females should be fixed at some rate between sixty per cent and one hundred per cent of that of males, and that the Regulations in the schedule could be repealed and their employment regulated by direct enactment. The repeal of Statutory Rules 1942 No. 548 destroyed the power of the Board to administer the Act and thereby in effect repealed the schedule for a period of six months, but it did not in my opinion prevent the Executive directly enacting that the conditions of employment of the " new women " should be fixed on the basis laid down in reg. 6.

For these reasons I am of opinion that this regulation is not the same in substance as any regulation contained in Statutory Rules 1942 No. 548 and is within the power to make regulations delegated to the Executive by s. 6 (*a*) of the Act. The decisions to which it refers are not dependent for their validity upon the Regulations in the schedule continuing to include a valid reg. 6, because they are not made pursuant to the powers contained in such a regulation, but derive an independent legislative force from reg. 3. It follows that all decisions, variations and interpretations of the Board made between 6th October 1942 and 16th March 1943 have been in force since the date they were made except for the period 16th to 25th March 1943.

It was contended that decisions made by the Board were of a legislative and not an executive character within the meaning of s. 5 (4) of the *National Security Act*; and that, as they were not laid before each House of Parliament in accordance with the *Acts Interpretation Act*, s. 48, they are void. As this contention, if upheld, would not apply to decisions of the Board validated by s. 4 of the *Women's Employment Act* and by reg. 3 of Statutory Rules 1943 No. 75, it could only avoid decisions made between 6th October 1942 and 16th March 1943 during this period. After 25th March 1943 they would be validated by Statutory Rules 1943 No. 75. There are statements in the judgments of this Court to the effect that awards made under the *Commonwealth Conciliation and Arbitration Act* 1904-1934 are of a legislative character: see *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1); *Clyde Engineering Co. Ltd.* v. *Cowburn* (2). But the judgments in *Ex parte McLean* (3) make it clear that, although an award made by the Commonwealth Court of

(1) (1920) 28 C.L.R. 456, at pp. 475, 476.

(2) (1926) 37 C.L.R. 466, at pp. 495, 496.

(3) (1930) 43 C.L.R. 472.

Conciliation and Arbitration prescribes both the obligation to make an agreement and to observe it (see *per Isaacs* C.J. and *Starke* J. (1)), the award is not a law but merely a factum and that it is the Act which brings the terms of the award into force as part of the law of the Commonwealth. Moreover, these statements are referable to the exercise of the powers conferred upon the Parliament by the Constitution, s. 51, placitum xxxv., which require that disputes shall be settled and that rules of conduct for that purpose shall be prescribed not by the Parliament but by arbitrators. In the case of the *Women's Employment Act* the Parliament was legislating under the defence power. Under that power it could have determined in detail the industries in which it was suitable to employ the " new women " and the terms and conditions upon which they were to be employed. It preferred to give general directions with respect to these matters, leaving it to the Board to complete the details. In *J. W. Hampton Jr. & Co.* v. *United States* (2), cited by my brother *Dixon* in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3), *Taft* C.J. said :—" The true distinction " (between legislative and executive power) " is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done ; to the latter no valid objection can be made." The present case is, in my opinion, a case of the second class. The Regulations confer an authority on the Board to administer a law to be exercised under and in accordance with that law. Its duties are to find certain facts and, in the exercise of a limited discretion, to prescribe certain rules of conduct. Section 5 of the *National Security Act* delegates to the Executive the power to exercise the defence power conferred upon the Commonwealth Parliament by the Constitution. Sub-section 3 of that section authorizes the Executive by regulations to sub-delegate powers to make orders, rules or by-laws for any of the purposes for which regulations are authorized by the Act to be made. Sub-section 4 is directed to cases where the Executive sub-delegates some portion of the power to legislate upon the subject of defence conferred upon it by the section. If the regulation had delegated to the Board a general power to determine in what industries women could be employed and the conditions of their employment, decisions of the Board on these matters might have been of a legislative character.

(1) (1930) 43 C.L.R., at p. 479.
(2) (1928) 276 U.S. 394, at p. 407 [72 Law. Ed. 624, at pp. 629, 630].
(3) (1931) 46 C.L.R., at pp. 92, 93.

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But Parliament has determined the classes of work in which employers must apply for permission to employ women, and the limits within which the Board can regulate the terms and conditions of their employment, including the factors which the Board must take into account in fixing rates of pay. It is the Regulations which prescribe how decisions are to be enforced and which cause them to prevail over any other laws or awards, Commonwealth or State, relating to the same subject matter. It is the Act and Regulations which are an exercise of legislative power. The decisions of the Board, including the making of a common rule, are of an executive quasi-judicial character and need not therefore be tabled before the Houses of Parliament.

In the result the defendants are entitled to succeed on the demurrer, except that Statutory Rules 1943 No. 75, reg. 2, so far as it re-enacts reg. 6 of the schedule, should be declared to be void and decisions, variations and interpretations of the Board given and made between 6th October 1942 and 16th March 1943 should be declared to be inoperative during the period 16th March to 25th March 1943.

Demurrer allowed as to claims a, b and c, except as to reg. 2 of Statutory Rules 1943 *No.* 75, *and overruled as to that regulation: overruled as to claim d: allowed as to claims e, f, g and h. Liberty to plaintiffs to amend statement of claim within* 21 *days. No order as to costs.*

Solicitors for the plaintiffs, *Moule, Hamilton & Derham.*

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

E. F. H.