[HIGH COURT OF AUSTRALIA.]

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

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

(INDUSTRIAL LIGHTING REGULATIONS.)

H. C. OF A. 1943.

MELBOURNE, *June* 24.

SYDNEY, *Aug.* 16.

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

Constitutional Law—Defence—National security—Industrial lighting—Regulations—Validity—Reading down—Judicial power—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*vi.*), 71—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 46 (*b*)—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *s.* 5 (1)—*National Security* (*Industrial Lighting*) *Regulations* (*S.R.* 1942 *No.* 302).

The *National Security* (*Industrial Lighting*) *Regulations* are not authorized by the *National Security Act* 1939-1940 and are beyond the defence power of the Commonwealth Parliament. *Per Latham* C.J., *McTiernan* and *Williams* JJ.: It is impossible to apply s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 to these Regulations.

Per Latham C.J. (*semble*) and *Starke* J.: Reg. 7 of the *National Security* (*Industrial Lighting*) *Regulations* contravenes s. 71 of the Constitution.

DEMURRER.

The Victorian Chamber of Manufactures (which was incorporated in Victoria as a company limited by guarantee and the members of which included upwards of 2,800 owners and/or occupiers of industrial premises as defined by the *National Security* (*Industrial Lighting*) *Regulations*) and two proprietary companies which were such owners and occupiers and the premises of which were specified in the order of the Minister referred to hereunder brought an action in the High Court against the Commonwealth and the Minister for Labour and National Service. In their statement of claim the plaintiffs referred to an order of the Minister published in the Commonwealth *Gazette* on 21st December 1942 purporting, in pursuance of reg. 5

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of the *Industrial Lighting Regulations*, to prescribe the standards set out in the Schedule to the Regulations as the interior artificial lighting standards for the industrial premises set out in the Order and requiring the occupiers to bring the premises into conformity with those standards within three months from the date of the Order. They alleged that among the industrial premises set out in the Order were, in addition to those of the two plaintiff proprietary companies, the premises occupied by a number of members of the Victorian Chamber of Manufactures. They alleged, further, that the Regulations and the Order of the Minister were unreasonable and were not authorized by any power conferred upon the Governor-General by the *National Security Act* 1939-1940 and that s. 5 of the Act, if and so far as it did authorize the making of the Regulations or the Order, was not authorized by any power conferred on the Commonwealth Parliament by the Constitution; and they claimed declarations accordingly.

The defendants demurred to the statement of claim.

Ham K.C. (with him *P. D. Phillips*), for the defendants. The Regulations provide for a scheme of industrial lighting to ensure the efficiency of industry, useful and necessary at any time, but more particularly necessary in time of war. They show that it was considered that improper lighting impaired industrial efficiency, which is necessary in the proper conduct of the war and war industries. Comparison may be made with the regulations relating to Christmas, &c., advertising dealt with in *Ferguson* v. *The Commonwealth* (1). The Court held that the regulations in question there were designed to save wasteful expenditure and that they had a sufficient connection with the war to be a war measure. Those regulations were quite general, and on the principles laid down in that case the Regulations now in question can much more readily be said to be within the defence power. There is no room for an argument on the ground of "unreasonableness" in relation to regulations which have been laid before Parliament and not disallowed (See *Jones* v. *Metropolitan Meat Industry Board* (2)); this distinction is recognized in *Kruse* v. *Johnson* (3)—See also *Sparks* v. *Edward Ash Ltd.* (4). If the language of the Regulations is too wide to be within power, they should be so construed as to be within power (*Acts Interpretation Act* 1901-1941, s. 46 (*b*); *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (5); *Andrews* v. *Howell* (6)). They should be read down so that they will apply

(1) (1943) 66 C.L.R. 432.
(2) (1925) 37 C.L.R. 252, at pp. 257, 259, 261.
(3) (1898) 2 Q.B. 91.
(4) (1943) 1 All E.R. 1, at p. 6.
(5) (1939) 61 C.L.R. 634, at pp. 652, 653.
(6) (1941) 65 C.L.R. 255, at pp. 280, 281.

to all premises in relation to which the defence power can operate. The defendants are not called upon to say precisely how the Regulations should be read down: that is a matter for the court to determine, the onus being on the plaintiffs to establish that they are outside the valid operation of the Regulations.

Fullagar K.C. (with him *C. K. Lucas*), for the plaintiffs. The Regulations are invalid because they have no connection whatever with the defence of the Commonwealth or any circumstances or condition arising out of the war or its impact on the community. They ignore the war completely and are founded on the supposition that the Commonwealth can do anything at all in war-time. Section 46 (*b*) of the *Acts Interpretation Act* is of no assistance at all in this case (See *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (1)), and the Regulations fail as a whole. As soon as it is conceded that all sorts of different limitations might be applied, it becomes apparent that the Court cannot apply them. It is not possible to say what limitation the legislature would have applied if it had been conscious of the necessity of a limitation.

Ham K.C., in reply, referred to *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (2).

Cur. adv. vult.

Aug. 16.

The following written judgments were delivered:—

LATHAM C.J. This is a demurrer to a statement of claim which raises the question of the validity of the *National Security* (*Industrial Lighting*) *Regulations*, Statutory Rules 1942 No. 302.

Reg. 3 defines industrial premises as meaning "any premises on which two or more persons are employed in manual labour in any process for or incidental to—

(*a*) the making of any article or of part of any article;

(*b*) the altering, repairing, ornamenting, finishing, cleaning or washing or the breaking up or demolition of any article; or

(*c*) the adapting for sale of any article,

being premises on which work is carried on by way of trade or for purposes of gain and to or over which the employer of any person employed therein has the right of access or control, and includes any offices on any such premises, but does not include any shop, residence or showroom; and 'lighting equipment' means all equipment on industrial premises which is necessary for, or is connected with, the provision or control of artificial light on those premises."

(1) (1939) 61 C.L.R., at pp. 656-658. (2) (1921) 29 C.L.R. 357, at p. 369.

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Reg. 4 applies to industrial premises, whether in existence at the commencement of the Regulations or not, and requires the owner or occupier of them, if he installs any lighting equipment in the premises, or alters or extends such equipment, to comply with the relevant provisions of the Schedule to the Regulations. The Schedule is both comprehensive and detailed. It relates to every kind of work which may be performed in industrial premises and contains specific provisions dealing with more than fifty classes of industrial establishments.

Reg. 5 is as follows :—

"5. The Minister may, from time to time, by order published in the *Gazette*, prescribe interior artificial lighting standards for all or any industrial premises, or for any class of industrial premises, and may require the owners or occupiers of those premises, or of premises included in that class, to bring those premises into conformity with those standards within a period specified in the order."

Under this regulation the Minister may prescribe any standards which commend themselves to him. The Minister made an order under this regulation applying to some 300 industrial establishments in Australia, requiring the occupiers within three months to bring the interior artificial lighting in their premises into conformity with the standards prescribed in the schedule.

Reg. 6 enables the Minister to exempt either individual owners or occupiers, or classes of them, from the application of the Regulations.

Reg. 7 provides that, in addition to, or in lieu of, any proceedings which may be taken for a contravention of the Regulations, the Minister may "if, in his opinion, there has been any such contravention" direct that premises shall not be used until the lighting equipment conforms with the Schedule, or with an order made under reg. 5. Under this regulation the Minister, without any charge being made, and without the hearing of any charge in a court or elsewhere, may form the opinion that the Regulations have been broken in respect of particular premises, and may then, at his will, close the premises until the requirements of the Regulations are satisfied. In practice it would be for the Minister to determine whether those requirements had been satisfied or not, because if he were still of opinion that, notwithstanding action taken with the intention of complying with the Regulations, there was still a contravention of the Regulations, he could still insist upon the premises remaining closed. This regulation assumes to empower a Minister to form an opinion that a person has committed an offence by contravening the Regulations and to impose a penalty by closing his premises

in respect of such contravention. Such a regulation appears to me to involve the vesting of judicial power in a Minister and to constitute an infringement of s. 71 of the Constitution, which requires that the judicial power of the Commonwealth shall be exercised only by courts. But I do not propose to determine this demurrer upon this ground.

The plaintiff the Victorian Chamber of Manufactures is a company the members of which include some 2,800 owners or occupiers of industrial premises as defined by the Regulations, and the plaintiff companies are both owners and occupiers of industrial premises. I am unable to see that the Chamber of Manufactures has any right of action. The order which the Minister has made under reg. 5 applies to the premises of the plaintiff companies and they plainly have an interest entitling them to bring this action.

The Regulations were made under the provisions of the *National Security Act* 1939-1940, s. 5, which authorizes the Governor-General to make regulations for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged. It is contended by the plaintiffs that this provision does not authorize the making of the Regulations.

Under the Regulations the Minister is given complete control of artificial lighting in industrial premises. No doubt good lighting is conducive to industrial efficiency and industrial efficiency is important for the purpose of the effective prosecution of the war. But the same thing might be said of any prescription of standards in factory conditions, or in almost any other conditions affecting human life and well-being. For example, the provision of food, clothing, housing and recreation for workers is required for full industrial efficiency. But, in my opinion, the existence of war does not result in handing over to the Commonwealth general control of these subjects. The existence of war enables the Commonwealth, in my opinion, to deal with war problems and with war-created problems, but it does not produce the result that the Commonwealth Parliament is empowered to legislate upon all subjects whatever. I repeat what I said in *Victoria* v. *The Commonwealth* (1) :—" A court will be most cautious and indeed reluctant before it decides that measures which are promulgated under the defence power are not really defence measures, but that they exceed the limits of that power. But the most complete recognition of the power and responsibility of Parliament and of the Government in relation to defence does not involve the conclusion that the defence power is without any limits whatever. The existence of the defence power of the Commonwealth

(1) (1942) 66 C.L.R. 488, at pp. 506, 507.

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Parliament and the exercise of that power do not mean that all governmental power in Australia may, by the action of the Commonwealth Parliament, be concentrated in Commonwealth authorities. The Constitution cannot be made to disappear because a particular power conferred by the Constitution upon the Commonwealth Parliament is exercised by that Parliament. Indeed, the grant of the power to legislate with respect to defence is made expressly 'subject to the Constitution'—see opening words of s. 51." I added that, in my opinion, the defence power should be regarded as enabling the Commonwealth Parliament to make such laws as have a real connection with defence. In my opinion the *Industrial Lighting Regulations* do not have a real connection with defence. They do not deal with a subject which has any specific relation to the subject of defence, except in so far as all matters affecting the well-being of the community have such a relation, and that is a general and not a specific relation. For this reason the Regulations are, in my opinion, invalid.

It therefore becomes unnecessary to consider the objection raised in the statement of claim that the Regulations are unreasonable. Before holding that any regulations made in pursuance of a Commonwealth statute are invalid because, in the opinion of the court, they were unreasonable, I would require to consider very carefully the principles laid down in *Jones* v. *Metropolitan Meat Industry Board* (1), the decision in which appears to me (as at present advised) to exclude any consideration of reasonableness (however defined) when a question of *ultra vires* arises in relation to regulations which have been laid before Parliament, and which can be disallowed by either House. My view that the Regulations are invalid is based upon the opinion that they are beyond the power conferred upon the Governor-General by the *National Security Act*, and not upon any view that they are unreasonable, either in the ordinary sense of that term, or in the sense in which it has been used in some connections since the case of *Kruse* v. *Johnson* (2).

Similarly, it is unnecessary for me to consider particular objections to reg. 7, which authorizes the Minister to close premises if, in his opinion, there has been a contravention of the Regulations.

It was urged that if the Court is of opinion that the Regulations in their present form were invalid, they should be read down in some manner, so as to bring them within power (*Acts Interpretation Act* 1901-1941, s. 46 (*b*)). The Regulations would be within power if, under an appropriate statute, they were limited in their application to premises owned by the Commonwealth. Similarly the

(1) (1925) 37 C.L.R. 252.

(2) (1898) 2 Q.B. 91.

Commonwealth Parliament could, by statute or by regulations authorized by statute, prescribe conditions which were to be included in contracts made by the Commonwealth for work to be done for the Commonwealth, either in war industries or otherwise. Other limitations which would bring such provisions within power might also be suggested. But, if the Court were to select and adopt some particular one of these various suggestions, the Court would be re-writing the Regulations, and would in effect be engaging in legislation. Section 46 (*b*) of the *Acts Interpretation Act* does not authorize such a procedure.

In my opinion the demurrer should be disallowed. The plaintiffs are entitled to a declaration that the Regulations and the Order made under them are void and of no effect, and to an injunction restraining the Minister from enforcing the Order made under the Regulations, and from exercising the powers which the Regulations purport to confer upon him. Judgment in the action should be given accordingly for the plaintiff companies with costs.

RICH J. The Regulations attacked by this demurrer are the *National Security* (*Industrial Lighting*) *Regulations*, Statutory Rules 1942 No. 302. They purport to have been made pursuant to s. 5 of the *National Security Act* 1939-1940. That section authorizes the Governor-General to make regulations for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged.

The plaintiffs, of whom the proprietary companies are competent plaintiffs as owners and occupiers of industrial premises within the definition of the Regulations, contend that the Regulations are invalid as being beyond the power conferred on the Governor-General by this Act. It was enacted by virtue of a power—defence—with respect to which the Parliament was authorized to make laws. In considering the Regulations I lay aside the question of unreasonableness. In *Footscray Corporation* v. *Maize Products Pty. Ltd.* (1) I suggested in another connection that tests such as "unreasonable," "capricious" and "arbitrary" resolve into one, namely, validity. Gauged then by the standard of defence these Regulations, in my opinion, fail. It appears to me as if the authors of the Regulations, which are published from time to time, consider that the power of the Federal Parliament is co-extensive with that of the British Parliament instead of being confined to the enumerated powers conferred upon it. The Regulations in the present case

(1) *Ante*, p. 301.

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illustrate what I have said. They purport to empower the Minister to control artificial lighting in all Australian industries. Regs. 3, 4 and 5 are expressed in such wide terms as to take them out of the scope and limit of the defence power. Their far-reaching effect is such as to bring them within the boundaries of State legislation and State control.

The demurrer should be overruled.

STARKE J. This is a demurrer, open to objection in point of form, which raises for determination the question whether the *National Security* (*Industrial Lighting*) *Regulations* (Statutory Rules 1942 No. 302) are authorized by the *National Security Act* 1939-1940.

The Victorian Chamber of Manufactures is not, I think, a competent plaintiff for reasons which I gave in connection with the *Prices Regulations* (1), but the other plaintiffs have sufficient interest to maintain the action.

The Constitution confers power upon the Parliament of the Commonwealth to make laws with respect to the defence of the Commonwealth, and pursuant to this power the *National Security Act* 1939-1940 was enacted, which authorizes the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth. Under this Act the Governor-General made the Regulations which are attacked in this action.

These Regulations provide that the owner or occupier of any industrial premises shall not install in those premises any lighting equipment or alter or extend any portion of the lighting equipment in those premises unless the equipment conforms to the lighting standards set forth in the Schedule to the Regulations. And also that the Minister may by order prescribe interior artificial lighting standards for all or any industrial premises and may require the owners or occupiers of those premises to bring the premises into conformity with those standards within a period specified in the order.

Under these Regulations the Minister prescribed the lighting standards set out in the Schedule to the Regulations as the interior artificial lighting standards for the industrial premises of a large number of persons, firms and companies, including the plaintiffs who are competent to maintain this action.

The Commonwealth Parliament could not exceed its constitutional powers in the authority conferred upon the Governor-General by the *National Security Act* 1939-1940. And it has no general authority to regulate the conditions of industry, though the power

(1) *Ante* p. 335, at p. 343.

to make laws with respect to trade and commerce with other countries and among the States (See *Australian Steamships Ltd.* v. *Malcolm* (1); *Huddart Parker Ltd.* v. *The Commonwealth* (2); *Joyce* v. *Australian United Steam Navigation Co. Ltd.* (3)) and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State and with respect to its own employees gives it such authority within limits. But the *Industrial Lighting Regulations* cannot be justified under these powers and indeed do not purport to be so authorized, but to be made under the *National Security Act* 1939-1940, which depends upon the defence power of the Commonwealth.

The question is therefore whether the *Industrial Lighting Regulations* are regulations for securing the public safety and the defence of the Commonwealth or regulations for regulating industrial conditions in relation to industrial lighting beyond the powers conferred by the *National Security Act* 1939-1940 or the Constitution itself.

In terms the Regulations apply to any premises throughout Australia other than a shop, residence or showroom on which work is carried on by way of trade or for purposes of gain and to or over which the employer of any person employed therein has the right of access or control and includes any offices on any such premises. The Regulations were said to aim at industrial efficiency and therefore conceivably, if only incidentally, to the power of defence. I had hoped that this rhetorical proposition had been laid to rest by the Chief Justice in the case of *Victoria* v. *The Commonwealth* (4).

Industrial efficiency is desirable both in war-time and in peace-time, though perhaps more important in war-time. Conceivably therefore, it was said, the Regulations aid the effectuation of the defence power. But war and industrial efficiency in time of war does not enable the Commonwealth or the Governor-General to seize control of industrial relations, and of industrial lighting in particular, and prescribe such conditions as seem proper. The question does not depend upon the vividness of our imaginations or conceptions, but upon the law or the regulation being in substance a law or regulation with respect to the public safety and the defence of the Commonwealth. The regulation must be scrutinized in its entirety and its operation and its effect gathered from its terms. It must secure or aid or tend to secure or aid the defence of the Commonwealth and the States (*Farey* v. *Burvett* (5); *Andrews* v. *Howell* (6)).

(1) (1914) 19 C.L.R. 298.
(2) (1931) 44 C.L.R. 492.
(3) (1939) 62 C.L.R. 160.
(4) (1942) 66 C.L.R. 488.
(5) (1916) 21 C.L.R. 433, at p. 460.
(6) (1941) 65 C.L.R. 255, at p. 271.

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In the present case the Regulations are wholly unrelated to and unconnected with the public safety and the defence of the Commonwealth. The duty is imposed upon all owners or occupiers of industrial premises carrying on work by way of trade or for the purposes of gain in which two or more persons are employed in manual labour in any process for or incidental to the making, alteration, or adapting any article, without any regard to any purpose whatever but the carrying on of a trade or the acquisition of gain. The Regulations in terms go far beyond any purpose of defence and necessarily operate as a general regulation of industrial lighting conditions beyond the power of the Commonwealth. The standards set up by the Regulations may be desirable, but it is for the States to regulate the matter and not the Commonwealth.

Further, reg. 7 should be noticed. The Minister may, if, in his opinion, there has been any contravention of or failure to comply with the Regulations by an owner or occupier of industrial premises, direct that the premises or any part thereof shall not be used until such time as the lighting equipment therein conforms to the Regulations. But this arbitrary power cannot be sustained. The Constitution remits to the judicial power of the Commonwealth the jurisdiction and authority to determine whether a subject has or has not contravened a law or regulation of the Commonwealth.

The demurrer, such as it is, should be overruled.

McTIERNAN J. The question to be decided is whether the *National Security* (*Industrial Lighting*) *Regulations* are *ultra vires* and void. The Regulations purport to be an exercise of the powers conferred on the Governor-General by s. 5 of the *National Security Act* 1939-1940. This section is within the constitutional powers of the Commonwealth. Hence if the Regulations are within the powers conferred by s. 5 of this Act on the Governor-General they are valid. The Regulations are not within those powers unless, to adopt the language of s. 5, they are regulations for securing the public safety and the defence of the Commonwealth or its territories or they prescribe matters which, by the foregoing Act, are required or permitted to be prescribed for the more effectual prosecution of the war or for carrying out or giving effect to the Act. The criteria for determining this question have been explained in the line of cases beginning with *Farey* v. *Burvett* (1), in which the question arose whether the Commonwealth exceeded the defence power.

The Regulations impose duties on the owners and occupiers of industrial premises as defined in the Regulations relating to the installation of new equipment and the altering of existing equipment for the

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

lighting of such premises. According to the definition of industrial premises, the Regulations apply to all premises which fulfil the following conditions: (1) Two or more persons are employed therein in manual labour in any process for or incidental to work of the kind next to be mentioned. (2) The making, altering, repairing, ornamenting, finishing, cleaning, washing, breaking up or demolition of any article or the adaptation of any article for sale. (3) Work of the foregoing description is carried on by way of trade or for the purposes of gain. (4) The employer has the right of access to or control of the premises. (5) The premises are not a shop, residence or showroom.

It is clear that these conditions, which govern the applicability of the Regulations to any premises, are based upon considerations other than the use of the premises for a purpose connected with defence or the prosecution of the war. The Regulations are capable of applying to premises used for that purpose. But they would apply to such premises only because they fall within a category the extent and nature of which is not in any way relevant to the preparation of the country for defence or to any war-time emergency. The Regulations are not a law for providing for the efficient equipment of premises used for defence purposes, but they are in substance a law regulating the lighting of any industrial premises which satisfies the foregoing conditions. It is not apparent to me that the Regulations could produce any condition which would be likely to assist, or could remove any condition that would be likely to impair, the war effort or the organization of the country for defence.

Reading and construing the language of the Regulations in the ordinary way, the conclusion which should be reached is that they are beyond the powers conferred on the Governor-General by s. 5 of the *National Security Act* 1939-1940. It is necessary to determine whether, if the Regulations are read and construed according to the special rule of construction contained in s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941, they are to any extent valid. This provision was explained in *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (1), and also in *Andrews* v. *Howell* (2). Section 46 (*b*) says that the intention of the provision is that an instrument to which it applies made under power conferred by an Act should be valid "to the extent to which it is not in excess of that power." This provision applies to regulations, which, construed in the ordinary way, are to a certain extent within the power under which they were made and to a certain

(1) (1939) 61 C.L.R., at pp. 652, 653, 656, 657.
(2) (1941) 65 C.L.R., at pp. 280, 281.

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extent beyond it. The object is to save the regulations to the extent to which they are within the power. It is necessary for the application of s. 46 (*b*) that the present Regulations should be to some extent within the power conferred by s. 5 of the *National Security Act* 1939-1940. These Regulations do not exhibit the intention of imposing duties in respect of premises which it is within the Governor-General's power to make subject to the scheme contained in the Regulations, while at the same time purporting to impose the duties in respect of premises to which it is not within the power to apply the scheme. If the Regulations exhibited that intention the rule in s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 could be applied. Upon their proper construction the Regulations purport to impose duties on the owners and occupiers of all premises within the definition of " industrial premises " in the Regulations. They impose duties on all those persons as one class, irrespective of the relation of the work done on the premises to the war: the only condition is that work is of the kind mentioned in the Regulations. In my opinion the Regulations are not to any extent within the powers conferred on the Governor-General. They are not a law with respect to defence, or any matter falling within s. 5 of the *National Security Act* 1939-1940.

The demurrer should be disallowed.

WILLIAMS J. The *National Security* (*Industrial Lighting*) *Regulations* came into force on 8th July 1942.

On 18th December 1942 the Minister of State for Labour and National Service, the Honourable Edward John Ward, in pursuance of reg. 5, made an order published in the Commonwealth *Gazette* on 21st December 1942 whereby he purported to prescribe the standards set out in the Schedule to the Regulations as the interior artificial lighting standards for the industrial premises set out in the Order and to require the occupiers of these premises to bring them into conformity with these standards within three months from the date of the Order.

Among the industrial premises set out in the Order are the premises occupied by a number of members of the plaintiff, The Victorian Chamber of Manufactures; the premises occupied by the plaintiff H. V. McKay Massey-Harris Pty. Ltd. at Sunshine in the State of Victoria; and the premises occupied by the plaintiff Daniel Scott Pty. Ltd. at Williamstown Road, Port Melbourne, in that State.

The amended statement of claim, par. 9A, alleges that the existing lighting at the premises of the plaintiffs H. V. McKay

Massey-Harris Pty. Ltd. and Daniel Scott Pty. Ltd. is adequate and sufficient for their buildings and for all operations carried on therein; that compliance with the order would involve these plaintiffs in very heavy expense; and that it is not possible to obtain the necessary skilled labour therefor. But these allegations are, in my opinion, irrelevant, because, if the Order of 18th December 1942 is valid, the Court cannot inquire whether it is reasonable to apply it in any particular case (*Minister of Agriculture and Fisheries* v. *Price* (1); *Horton* v. *Owen* (2); my own decision in *Skupinski* v. *The Commonwealth* (3)).

It is not contended that reg. 5 does not in terms authorize the making of the Order, so that the question upon which the fate of the demurrer depends is whether the *Industrial Lighting Regulations* are a valid exercise by the Executive of the powers delegated to it by the *National Security Act* 1939-1940. The purpose of the Act is to delegate to the Governor-General while the Commonwealth is engaged in war and for six months thereafter (s. 19) the power to make laws for the peace, order and good government of the Commonwealth conferred upon the Commonwealth Parliament by the Constitution, s. 51 (vi.). But as the Commonwealth Parliament could not confer upon its delegate ampler powers of legislation than are conferred upon the Parliament, it follows that if the Parliament could not validly pass an Act in the same terms as the *Industrial Lighting Regulations*, the Regulations cannot be valid.

Regs. 3, 4 and 5 are in the following terms:—

3. In these Regulations, unless the contrary intention appears "industrial premises" means any premises on which two or more persons are employed in manual labour in any process for or incidental to—

(*a*) the making of any article or of part of any article;

(*b*) the altering, repairing, ornamenting, finishing, cleaning or washing or the breaking up or demolition of any article; or

(*c*) the adapting for sale of any article,

being premises on which work is carried on by way of trade or for purposes of gain and to or over which the employer of any person employed therein has the right of access or control, and includes any offices on any such premises, but does not include any shop, residence or showroom; and

"lighting equipment" means all equipment on industrial premises which is necessary for, or is connected with, the provision or control of artificial light on those premises.

(1) (1941) 2 K.B. 116. (2) (1942) 59 T.L.R. 36.
(3) 17th February 1943. Unreported.

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4. The owner or occupier of any industrial premises, whether or not the premises are in existence at the commencement of these Regulations, shall not install, or cause to be installed, in those premises any lighting equipment, or alter or extend, or cause to be altered or extended, any portion of the lighting equipment in those premises, unless the lighting equipment to be installed, or the portion thereof, as so altered or extended, conforms, as the case may be, with the relevant provisions of the Schedule to these Regulations.

5. The Minister may, from time to time, by order published in the *Gazette*, prescribe interior artificial lighting standards for all or any industrial premises, or for any class of industrial premises, and may require the owners or occupiers of those premises, or of premises included in that class, to bring those premises into conformity with those standards within a period specified in the order.

Reg. 4 does not impose upon the owner or occupier of existing industrial premises any obligation to install lighting equipment equal to the standards prescribed in the Schedule unless he proceeds to alter or extend the existing lighting equipment; but reg. 5 enables the Minister to compel the owners or occupiers of industrial premises to alter their premises from time to time so as to bring them into conformity with such standards of lighting as he may prescribe from time to time. The standards the Minister may adopt need not be the same as those prescribed by the Schedule.

The Regulations are in substance a law relating to public health in industrial premises. Apart from the power to make laws for the peace, order and good government of the Commonwealth with respect to quarantine and matters incidental thereto, there is no enumerated power specifically conferred upon the Commonwealth by s. 51 of the Constitution to make laws on this subject. It is therefore a subject with respect to which the power to legislate is reserved to the States by ss. 106 and 107 of the Constitution.

A glance at the statute books of the States shows that the States have freely exercised their legislative powers to safeguard public health, including the control of the erection and alteration of buildings and their equipment, including industrial premises. It is in factories which conform to these laws that the industries of the Commonwealth have been carried on prior to the war; and in which, whilst the Constitution remains unaltered, such industries will continue to be carried on upon the conclusion of peace.

It is urged that the manufacture of many kinds of munitions entails considerable precision; that this requires a high standard of artificial illumination and that the purpose of the Regulations is to promote an increase in the accuracy and speed of work in factories,

to avoid waste due to spoilt work, and to reduce eyestrain. But the Regulations are wide enough to include industrial premises carrying on every sort of activity. Types of industrial premises and tasks enumerated in the Schedule include, to take a few examples, ice-making, bakeries, garages, laundries, dry cleaning and soap manufacturing. It is difficult to associate eyestrain with washing, breaking up or demolishing articles. Eyestrain can be caused by defective lighting in places of amusement and private houses as well as in factories.

Environment can affect health in many other ways, for instance by defective ventilation or sanitation. Any class of building may be defective in these respects; so that, if the provision of a uniform standard of lighting in industrial premises throughout the Commonwealth is a subject matter which is incidental to defence, it must necessarily follow that in time of war the Commonwealth has complete constitutional power to legislate upon the subject of public health, the extent to which the power is exercised being purely a matter of political expediency. As States, like individuals, are within the ambit of the defence power, the Commonwealth could compel the States to alter or abolish their buildings.

As I have pointed out in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1), and in *R.* v. *University of Sydney*; *Ex parte Drummond* (2), it is in my opinion essential to bear in mind that the emergencies which war creates are of an abnormal and temporary character, so that the validity of legislation which invades a domain normally reserved to the States must be judged on the basis that it can only be justified so far as it can conceivably be required to meet an abnormal and temporary crisis. The defence power is not a paramount power, and the Constitution does not become in time of war a unitary Constitution. To apply the words of Lord *Haldane* when delivering the judgment of the Privy Council in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (3): "It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with." To this extent it is plain that the Commonwealth can legislate in time of war to control the erection, alteration and equipment of buildings. An example of this kind of legislation would be legislation relating to the black-out or brown-out of buildings in such areas as the military authorities should think proper. But it is impossible to conceive that in time of war the industries of the Commonwealth cannot be satisfactorily carried on in factories which satisfy the requirements of State laws upon matters which

(1) *Ante*, p. 116. (2) *Ante*, p. 95. (3) (1923) A.C. 695, at p. 704.

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are likely to affect the health and well-being of employees. If the Commonwealth considers that the provision of a particular standard of artificial light is necessary to ensure that certain kinds of munitions shall be manufactured with precision, it can undertake the manufacture of these goods in factories of its own construction or incorporate a clause in its forms of tenders requiring contractors to provide the necessary illumination.

For these reasons I am unable to conceive that the Regulations are required even incidentally for the defence of the Commonwealth. Their whole substance and purpose is to legislate upon a social subject which does not present any features in time of war not present in normal times. To cite from the judgment of *Duff* J., who delivered the judgment of the Privy Council in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) : " The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States."

The Regulations are therefore beyond the powers conferred upon the Commonwealth Parliament by the Constitution.

Mr. *Ham* contended that if the Regulations upon their literal construction are beyond the defence power they can be saved to some extent by the application of the *Acts Interpretation Act* 1901-1941, s. 46 (*b*). But since the Regulations are, in my opinion, entirely in excess of the defence power it is impossible to read them down by construction so that they will not exceed that power.

The demurrer should be overruled.

Demurrer overruled. Declare that the National Security (Industrial Lighting) Regulations and the Order referred to in the statement of claim are void. Liberty to apply. Commonwealth to pay plaintiffs' costs.

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

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

E. F. H.

(1) (1924) A.C. 328, at p. 339.