[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;
INFORMANT,

AND

SINDERBERRY . . . . . RESPONDENT.
DEFENDANT,

REID . . . . . APPELLANT;
INFORMANT,

AND

McGRATH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1944.

MELBOURNE, *June* 1, 2, 8.

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

Constitutional Law—Defence—National security—Man power—Validity of regulation—Regulation empowering Director-General to direct any person resident in Australia to engage in employment of employer specified—National Security Act 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *ss.* 5 (7), 13A—*National Security* (*Man Power*) *Regulations* (*S.R.* 1942 *No.* 34—1943 *No.* 209), *reg.* 15.

Reg. 15 of the *National Security* (*Man Power*) *Regulations* is authorized by s. 13A of the *National Security Act* 1939-1943 and is within the defence power of the Commonwealth.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Sinderberry, Re Reid*; *Ex parte McGrath, Re Reid*, (1944) 44 S.R. (N.S.W.) 263; 61 W.N. 139, reversed.

APPEALS from the Supreme Court of New South Wales.

In a Court of Petty Sessions at Sydney, on the information of William David Reid, William Robert Sinderberry was charged with an offence against the *National Security Act* 1939-1943 in that he

contravened reg. 15 of the *National Security* (*Man Power*) *Regulations* by failing to comply with a direction made under that regulation directing him to engage in employment under the direction and control of the employer specified in the direction, which was a proprietary company.

May Kathleen McGrath was similarly charged, and the two informations were heard together.

The defendants were convicted and fined, and each of them obtained from the Supreme Court of New South Wales an order nisi for statutory prohibition. The Full Court of the Supreme Court made the orders absolute on the ground that reg. 15 was beyond the powers conferred by the *National Security Act*: *Ex parte Sinderberry, Re Reid*; *Ex parte McGrath, Re Reid* (1).

From these decisions the informant, by special leave, appealed to the High Court.

The relevant provisions of the *National Security Act* 1939-1943 and the *National Security* (*Man Power*) *Regulations* are set out in the judgment hereunder.

Fullagar K.C. and *P. D. Phillips*, for the appellant.

Fullagar K.C. The Commonwealth legislation follows the English legislation closely. The original *National Security Act* followed the English *Emergency Powers* (*Defence*) *Act* 1939, and s. 13A of our Act is substantially the same as the provision contained in the English *Emergency Powers* (*Defence*) *Act* 1940. Also our reg. 15 of the *Man Power Regulations* is substantially the same as reg. 58A of the English *Defence* (*General*) *Regulations*. Section 13A is a valid exercise of the defence power, and it is wide enough to support reg. 15. The power given by s. 13A cannot be limited to requiring persons to enter into the service of the Commonwealth itself, but must extend to requiring persons to serve other employers. The words "place themselves . . . at the disposal" are words as wide as could be used. The opening words of s. 13A, "Notwithstanding anything contained in this Act," enable the first part of s. 5 (7) to be disregarded. Although it was suggested in the Supreme Court that reg. 15 could be read down, the appellant does not now ask that it be read down, but contends that it is valid as it stands and does not need to be read down in order to be validated. Reg. 15, read literally, is within the defence power. Its validity cannot be tested by reference to reg. 3, or by the consideration that the power it confers might be abused. The regulation is necessary to enable the whole man power of the country to be mobilized for the purpose

(1) (1944) 44 S.R. (N.S.W.) 263; 61 W.N. 139.

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of the war; no narrower power would be effective for the purpose. At any rate it is covered by the phrase "necessary or expedient" in s. 13A. The power is not vitiated because a discretion is conferred (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1); *Noble and Bear* v. *The Commonwealth* (2)). [He referred to *Horton* v. *Owen* (3); *Minister for Agriculture and Fisheries* v. *Price* (4); *Point of Ayr Collieries Ltd.* v. *Lloyd-George* (5); *Carltona Ltd.* v. *Commissioners of Works* (6); *The "Zamora"* (7); *Farey* v. *Burvett* (8); *South Australia* v. *The Commonwealth* (*Uniform Taxation Case*) (9).]

P. D. Phillips. The control of man power cannot be divided or limited except by saying that it must be within the constitutional limits. The power is not to be tested by isolating a particular instance and saying that because that instance would be within the exercise of the power and has no relation to defence the power is bad: Cf. *Hirabayashi* v. *United States* (10). It is not possible to say in advance what instances may call for the exercise of the power, and it would not be practicable to legislate for the exclusion of particular instances or categories.

Barwick K.C. (with him *Smyth*), for the respondents. The question is whether the *Man Power Regulations*, having regard to their ambit and their plain intent, come within the class of regulations requiring persons to place themselves at the disposal of the Commonwealth for securing the public safety or the defence of the Commonwealth. Reg. 15 is directed to all persons, without limit as to age or capacity. It may be contrasted with reg. 9 (3) of the *Allied Works Regulations*, which prescribes age limits, eighteen to sixty years of age, and with reg. 24 of the *Man Power Regulations* themselves, where, in the provision for registration, a commencing age of fourteen years is set, with no upward limit. As to capacity, where it is intended to exclude people who are mentally incapable, the Regulations expressly say so: See the *Man Power Regulations*, regs. 21 (definition of "incapable person"), 24, 28 (3). Reg. 15 omits the provision in the English reg. 58A to the effect that regard should be had to the capacity of the directed person to do work.

(1) (1943) 67 C.L.R. 116: See particularly pp 135, 136.
(2) Unreported. High Court (*Starke* J.), 13th September 1943. Noted, 17 A.L.J. 184.
(3) (1943) 1 K.B. 111.
(4) (1941) 2 K.B. 116.
(5) (1943) 2 All E.R. 546, at p. 547.
(6) (1943) 2 All E.R. 560.
(7) (1916) 2 A.C. 107.
(8) (1916) 21 C.L.R. 433.
(9) (1942) 65 C.L.R. 373.
(10) (1943) 320 U.S. 81 [87 Law. Ed. 1774].

Reg. 15, therefore, when it says "any person," means what it says in its full width, irrespective of mental, physical or vocational capacity. Further, it purports to deal with all persons "resident" in Australia. In reg. 6A (*b*) the phrase "ordinarily resident" is used. In reg. 15, therefore, the unqualified word "resident" must mean "resident however temporarily." It necessarily applies to persons whether or not they are already employed, and is wide enough to include the servants of State Governments performing purely administrative functions. It is not contended that under a properly limited man power regulation the Commonwealth might not take a State employee, but all the considerations mentioned show the undue width of reg. 15. The persons directed may be directed into the employment of any person at all, irrespective of the nature of his business; it is not limited to employment in industry, but extends to all employment. The employer is bound to employ the person directed, whether he has work for him to do or not, and the employee is bound to work for that employer, whether he is solvent or not. The regulation is not in substance a provision for marshalling man power into defence channels, but is an endeavour to control all employment—to redistribute labour throughout the community—on some theory, no doubt, that the community will be made more efficient and this in some way will aid the war effort. There is not a sufficiently specific connection to support the regulation. It is not correct to say that to find reg. 15 invalid is to denude the Commonwealth of any real power. It does not lie on the respondents to define what would be a good regulation. It is sufficient for them to say that reg. 15 purports to regulate all employment and that, unless it can be said that all employment bears on defence, there is plainly an area within reg. 15 which has no sufficient relation to defence. Nevertheless, it may be pointed out that power to declare protected undertakings and to divert man power into those undertakings is a practical solution of the problems which have a real connection with defence. As to the expression in s. 13A, "at the disposal of the Commonwealth," the provision in s. 5 (7) prohibiting industrial conscription is material. In so far as the two provisions are inconsistent, s. 13A must prevail, but s. 5 (7) is not repealed, and, read together, the two provisions have this effect: There shall be no industrial conscription; a person shall not be required to work for A or B or C, but the Commonwealth itself may take his services and use them for war purposes. The reference in s. 13A to placing property at the disposal of the Commonwealth means that the Commonwealth is to acquire the

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property, and the provision as to services must have a similar meaning. The *Allied Works Regulations* show how services can be utilized by the Commonwealth in a manner which is in keeping with s. 13A.

Fullagar K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. AND McTIERNAN J. The respondents were each convicted of an offence against the *National Security Act* 1939-1943 in that they failed to comply with a direction given under reg. 15 of the *National Security* (*Man Power*) *Regulations*—Statutory Rules 1942 No. 34 as amended. The direction given in each case was a direction to engage in employment under the direction and control of a company, in the case of Sinderberry as a factory hand in the establishment of Kellogg (Australia) Pty. Ltd., and in the case of McGrath as stenographer-secretary to the production manager of De Havilland Aircraft Co. Pty. Ltd. Upon proceedings by way of statutory prohibition in the Supreme Court of New South Wales the convictions were set aside upon the ground that reg. 15 was invalid as not being authorized by the *National Security Act*. Special leave was granted to appeal to this Court.

Reg. 15 (1) is as follows :—

" The Director-General may direct any person resident in Australia to engage in employment under the direction and control of the employer specified in the direction, or to perform work or services (whether for a specified employer or not) specified in the direction."

Reg. 13 (1) may also be quoted :—

" Subject to this regulation, a person shall not seek to engage or engage a person except after obtaining a permit from the Director-General or from a person authorized by him, or through a National Service Office."

The appellant relied upon s. 13A of the *National Security Act* 1939-1943 in order to support reg. 15. Section 13A is as follows :—

" Notwithstanding anything contained in this Act, the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth, as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged :

Provided that nothing in this section shall authorize the imposition of any form of compulsory service beyond the limits of Australia."

In the first place, it was argued for the defendants before the Supreme Court that s. 13A should, notwithstanding its introductory words be read as limited by the provisions contained in s. 5 (7)— "Nothing in this section shall authorize the imposition of . . . any form of industrial conscription." It is clear that reg. 15 imposes a very wide form of industrial conscription. But it is equally clear that the words at the beginning of s. 13A, "Notwithstanding anything contained in this Act," contained in a section which was added to the Act in 1940, make it impossible to limit the operation of s. 13A by any reference to the words of s. 5 (7), enacted in 1939. Even if the sections had been enacted simultaneously, the restriction contained in s. 5 (7), applying as it does only in the case of regulations made under that particular section, could not be used to restrict the power of making regulations under s. 13A. The argument for the defendants based upon s. 5 (7) was rightly rejected by the Supreme Court.

In the second place it was argued in the Supreme Court and in this Court that the words "requiring persons to place themselves, their services and their property at the disposal of the Commonwealth" were not wide enough, in relation to the subject of services, to authorize regulations requiring persons to serve private employers. It was contended that the services of a person could be said to be placed at the disposal of the Commonwealth when the person was used or employed by the Commonwealth, but not when he was directed to work for any other person than the Government. The majority in the Supreme Court rejected this argument. There is no reason in the words themselves, in their context, or in the nature of the subject matter, to justify the narrow interpretation suggested. Services are placed at the disposal of a person when that person is given the power to utilize those services in such a way, at such a time, at such a place, for such purposes, and under such control as he thinks proper.

In the third place the Supreme Court was of opinion that if reg. 15, construed according to its terms, was invalid, it could not be read down under the provisions of the *Acts Interpretation Act* 1901-1941, s. 46 (*b*), by introducing some qualification which would result in a valid regulation. In this Court the appellant has disclaimed any contention that it is either necessary or possible to introduce any such qualification, and has supported the regulation as it stands. In the view which we take it is not necessary to consider this question.

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The attack upon the regulation succeeded in the Supreme Court upon the ground that it was so wide and so far-reaching as to be beyond the defence power. Mr. *Barwick* for the respondents pointed out that it was applicable to all employers and all employees, and to the latter whether they were already in employment or not: that it applied to all persons, of whatever age or capacity and irrespective of their wishes: and that under reg. 15 (7) and (8) neither employers nor employees were at liberty to terminate or change employment undertaken in accordance with a direction given under reg. 15 (1). *Davidson* J. accurately described the wide application of the regulation when he said: "If the regulation be valid, persons may be compelled under process of law and without any form of appeal to become the servants, against their will, of employers to whom they may object, and to undertake duties which are disagreeable to them or for the performance of which they may consider themselves incapable or unsuitable." *Jordan* C.J. said in the course of his judgment: "Regs. 13 and 15, read according to their natural construction, would, if valid, reduce the population of Australia to a state of serfdom more abject than any which obtained in the middle ages." It is not out of place to mention the fact that the provisions of Australian law which are described as amounting to serfdom find a parallel which is much more recent than the middle ages. They are in fact based upon and actually copied from provisions contained in English legislation passed when Great Britain was in danger of invasion: See the *Emergency Powers* (*Defence*) *Act* (Imp.), s. 1, and reg. 58A of the *Defence* (*General*) *Regulations* promulgated thereunder. The generally willing subjection of the people as a whole in a time of grave national crisis to control in respect of their occupations by public authorities acting under laws authorized by the Commonwealth Parliament is not, in our opinion, properly characterized as amounting to a condition of serfdom or villeinage. It is true, however, that a power so far-reaching is capable of great abuse. If such a power exists, there rests upon the Commonwealth Government and its administrative officers an obligation of the highest degree to exercise it honestly and sensibly. Such a power may be abused. It may be necessary that the exercise of such a power should be watched critically in order to prevent the establishment of an arbitrary tyranny. These circumstances will make a court cautious before it holds that such a power exists. But they do not help to establish a contention that the power is non-existent.

The question which the Court has to decide is whether reg. 15, wide and far-reaching as it is, is within the powers conferred by

s. 13A of the *National Security Act*. The regulation requires persons to place their services at the disposal of the Commonwealth, and, in this respect, falls within the limits of the power granted by the section. But a regulation making such a provision is not authorized by the section unless it appears to the Governor-General that the regulation is " necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged." The fact that the opinion of the Governor-General is an element in the conditions which must be satisfied before a regulation can be made under the section is not an objection to the validity of the regulation: See *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1) and cases cited therein (2).

If s. 13A were construed as authorizing the making of any regulation which appeared to the Governor-General to be necessary or expedient for securing the public safety, &c., irrespective of whether or not the regulation had any real relation to the public safety, &c., then the section would be invalid as purporting to authorize the making, not only of regulations which fell within the limits of the defence power, but also of regulations which exceeded those limits. It could be held to be valid only if it could be " read down " in some way. When the powers of a legislative authority are limited by law the opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority, unless, indeed, the power was conferred by the law creating the power (in this case the Constitution of the Commonwealth) in terms which provided that the opinion of the authority should be so decisive. But there is no such provision relating to defence in the Constitution. The power of the Commonwealth Parliament is a power to make laws with respect to naval and military defence—see Constitution, s. 51 (vi.)—not a power to make laws with respect to any matter which, in the opinion of the Parliament, or of an authority to which Parliament may confide a power of subordinate legislation, is naval or military defence.

But the section need not be construed as expressing an intention of Parliament that the Governor-General should have authority to make any regulation whatever of the kind mentioned in the section—i.e., any regulation requiring persons to place themselves and their services and property at the disposal of the Commonwealth—provided only that the Governor-General was of opinion that the regula-

(1) (1943) 67 C.L.R. 116.

(2) (1943) 67 C.L.R., at pp. 135, 136.

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tion was necessary for defence purposes. It is not necessary to construe the section as intended to provide that the opinion of the Governor-General should be made a criterion of constitutional validity. Regulations made under s. 13A cannot be valid unless they appear in the opinion of the Governor-General to be necessary or expedient for what may be described as purposes of defence. But the fact that the Governor-General has such an opinion still leaves open all questions of constitutional validity. A regulation, though complying in terms with the section as being necessary for defence purposes in the opinion of the Governor-General, could nevertheless not be held to be valid if it was shown that the Governor-General could not reasonably be of opinion that the regulation was necessary or expedient for such purposes. It was not the intention of Parliament when it enacted s. 13A to authorize the making of regulations upon the basis of an opinion which no reasonable man could hold. Accordingly the question which the Court has to determine is that which has so frequently arisen in this Court during the present war—"Is the regulation really a law with respect to securing the public safety, the defence of the Commonwealth, or the efficient prosecution of the war?" These words, taken from s. 13A, are also to be found in s. 5, in relation to which many decisions have been given.

Reg. 15 enables the Commonwealth, through its officers, to direct any person to work for any employer, under pain of a penalty if he refuses. It enables the Commonwealth to determine how, in time of war, the people of Australia shall employ their working power. It is conceded that Federal laws are valid under which men and women may be compelled, against their will, to serve in any capacity in the armed forces. So also it is admitted that men and women may be compelled to work in the production of munitions of war—which to-day is a very comprehensive category. So also it would be conceded that anyone in Australia could be compelled to work in the production of food for the armed forces, and it probably would not be denied that appropriate Commonwealth authorities could determine what kind of food and how much of it should be produced by such compulsory labour. But it would perhaps be argued that the production of food or other things for civilians was not sufficiently connected with defence to enable the Commonwealth to control food production and food consumption generally. It is not difficult to find the reply to such an argument. A starving and disordered army cannot fight. A starving and disordered civilian population cannot supply or support any army. In a war in which all our

resources are engaged, the Government which has the responsibility of protecting those resources has also the responsibility and should be held to have the power of organizing and controlling them. Thus the general control of the man power of the Australian people is a subject which falls within the power of the Commonwealth Parliament to make laws with respect to defence.

It is urged as against this view that there must be some work, there must be some occupations, which have no relation to defence. In one sense this may be so—so far as a direct and immediate relation to defence by way of assisting defence is concerned. But if it be granted that cases may exist when the work which is being done has no direct relation to defence in the way of assisting defence, it must also be recognized that the defence of the country may be very really assisted by the withdrawal of persons from such work, by the limitation of the number of persons who can be employed in such work, and even by the assignment to such work of persons whose employment therein may, with as little economic and social upset as is practicable, release persons for actual military service or for work directly related to the provision of military stores and equipment.

Difficulties do arise when a power applying to a general subject matter is exercised in marginal cases or where a general provision applies to some circumstances which, considered separately in themselves, would not be within the ambit of the power. Such a case was dealt with by the Supreme Court of the United States in *Hirabayashi* v. *United States* (1). The question which arose was that of the validity of an executive order ratified by Congress requiring all persons of Japanese ancestry residing within an area on the west coast of the United States to be within their place of residence daily between the hours of 8 p.m. and 6 a.m. This curfew order applied even to persons of Japanese ancestry who were perfectly loyal to the United States. It was argued that the restriction of the movements of such persons could have no relation to national defence by way of preventing espionage or sabotage. The Supreme Court rejected this argument, pointing out that a wide discretion must be allowed to the executive authorities in time of war, and stating that military necessities within the knowledge of those charged with the responsibility for maintaining national defence afforded a rational basis for the decision which they had made, even if in particular cases it was in fact unnecessary to impose the restrictions in question. The subject matter was such that it was

(1) (1943) 320 U.S. 81 [87 Law. Ed. 1774].

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proper to deal with it upon a general basis, even if in some particular cases the application of the provision in question did not have an immediate and apparent relation to war requirements.

For these reasons the appeals should be allowed, the orders of the Supreme Court set aside and in lieu thereof the orders nisi should be discharged with costs. The appellant, in accordance with the undertaking given when special leave to appeal was granted, must pay the respondents' costs of the appeals.

RICH J. I realize that it is very advisable to deliver judgment on these appeals immediately, so that all that I shall say now is that I have considered them carefully and am satisfied that they should succeed. I may deliver reasons later but for the present I am content to say that I am strongly influenced by the English legislation on the same subject. Generally I find myself in substantial agreement with the judgment of my brother *Williams*.

Subsequently his Honour added:—At the time judgment was delivered I was unable to state my reasons, but as the subject is one of great importance I shall now do so briefly. I would add that I have consistently upheld the validity of all regulations under the *National Security Act* where the nexus between the subject of the regulations and the defence power is fully established (*Gonzwa* v. *The Commonwealth* (1)), but not if the regulations are expressed in such wide terms as to take them out of the scope and limit of the defence power (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (2)). I venture to adapt to reg. 15 here under consideration what I said in *South Australia* v. *The Commonwealth* (3)—that the powers conferred by the regulation are capable of being used for necessary purposes incidental to the defence of the Commonwealth. If at any time an attempt should be made to use them for what may be suggested to be some other and unjustifiable purpose the validity of the suggestion can be determined in proceedings to frustrate the attempt. In other words, the power may be "exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power" (*Vatcher* v. *Paull* (4)). It is a question of fact whether the donee of the power, though professing to exercise his powers for the statutory purpose, is not in fact employing them in furtherance of such purpose but for some ulterior object (*Sydney Municipal Council* v. *Campbell* (5)).

(1) *Ante*, p. 469.
(2) (1943) 67 C.L.R. 413, at p. 420.
(3) (1942) 65 C.L.R. 373, at p. 438.
(4) (1915) A.C. 372, at p. 378.
(5) (1925) A.C. 338, at p. 343.

STARKE J. Appeals from judgments of the Supreme Court of New South Wales which made absolute rules nisi for statutory prohibition restraining further proceedings upon conviction of the respondents Sinderberry and McGrath upon a charge that they failed to comply with a direction made in pursuance of reg. 15 of the *National Security* (*Man Power*) *Regulations* directing them to engage in employment under the direction and control of a specified employer.

The learned judges of the Supreme Court held that reg. 15 was ultra vires.

The regulation was made in pursuance of the powers contained in the *National Security Act* 1939-1943. Originally the Act prohibited the imposition of any form of industrial conscription (s. 5 (7)), but an amendment of the Act was made in 1940 (1940 No. 44, s. 8), which provided that notwithstanding anything contained in the Act the Governor-General might make such regulations requiring persons to place themselves, their services and their property at the disposal of the Commonwealth as appeared to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth or the efficient prosecution of any war in which His Majesty was or might be engaged. The Act is in much the same terms as the English *Emergency Powers* (*Defence*) *Act* 1940, and reg. 15 follows in much the same terms the English *Defence* (*General*) *Regulations*, reg. 58A, made under the English Act. So reg. 15 contains nothing peculiar to Australia. One must remember, however, that the English provisions are the acts of a plenary authority, whilst the *National Security Act* 1939-1943 and the regulations made thereunder are founded on the power of the Commonwealth to make laws with respect to the naval and military defence of the Commonwealth and of the several States (Constitution, s. 51 (vi.)). But the defence power is not confined to legislation respecting military operations. It authorizes any law which mobilizes the residents of Australia for its defence. It extends to any laws which tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war or to distress the enemy or diminish his resources. Nevertheless it is for the courts of law to determine whether the particular law or regulation is one with respect to defence.

The law must be examined and its operation and effect considered. It must have some real connection with defence, afford some reasonable and substantial basis for the conclusion that the law is one with respect to defence (*Farey* v. *Burvett* (1) ; *Hirabayashi* v. *United*

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

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States (1)). The *National Security Act* 1939-1943 satisfies these requirements (*Wishart* v. *Fraser* (2) ; *Lloyd* v. *Wallach* (3)). But it is contended that reg. 15 is not authorized by that Act. In the first place it was suggested that s. 13A only authorizes regulations requiring persons to place themselves at the disposal of the Commonwealth, that is, as employees of the Commonwealth. The construction suggested is untenable : the words of the section give the Commonwealth power to direct the utilization of the services and property placed at its disposal for any purpose that appears to the Governor-General necessary or expedient for the defence of the Commonwealth or the efficient prosecution of the war.

Next it is suggested that the regulation is discretionary in character and empowers the Director-General to call up any person resident in Australia whom he selects to perform work or services, related or not to the defence of the Commonwealth. But, if the Commonwealth has power to mobilize the residents of Australia for defence, some discretionary power must necessarily be conferred upon some authority to select the persons required and to direct them to the work or services required. It may be that the power conferred by the regulation will be abused, but that cannot affect the validity of the regulation. If the power be abused and not used in good faith for the defence of Australia, for instance, if a person were directed to work or serve in some manner without any relation whatever to the defence of Australia or the efficient prosecution of the war, it may well be that the direction would be bad and not binding upon the person so directed. But that is not so in the present cases, and I need not further discuss a position that may and ought never to arise.

The appeals should be allowed.

WILLIAMS J. These are two appeals by special leave which have been heard together because they raise the same questions.

The appeals were brought to the Supreme Court of New South Wales by way of statutory prohibition under s. 112 of the *Justices Act* 1902-1940 (N.S.W.) to restrain further proceedings on a conviction, in the one case of the respondent Sinderberry, and in the other of the respondent Reid, upon a charge that they failed to comply with a direction made in pursuance of reg. 15 of the *National Security* (*Man Power*) *Regulations* directing them to engage in employment under the direction and control of a specified private employer.

(1) (1943) 320 U.S. 81 [87 Law. Ed. 1774].

(2) (1941) 64 C.L.R. 470.

(3) (1915) 20 C.L.R. 299.

It was contended before the Supreme Court that the convictions were bad upon two grounds, one, that s. 13A of the *National Security Act* 1939-1943 as amended did not authorize the Executive to make regulations requiring that persons should serve private employers; and, two, that, if this contention failed, reg. 15 was invalid because it purported to enable the Commonwealth to direct any person to engage in employment with any employer, without limitation as to the nature of the employer's business, and that the regulation was incapable of being validated by reading it down under s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941.

The Supreme Court held that the regulation was invalid, and in each case made an order absolute for a statutory prohibition.

The grounds upon which the appellant relies on the appeal to this Court are that the Supreme Court was wrong in holding that the making of the *National Security* (*Man Power*) *Regulations* or reg. 15 of such Regulations was not authorized by the *National Security Act*, and in holding that the Regulations were not valid Regulations, or that reg. 15 was not a valid regulation.

The *National Security Act* 1939-1943, s. 5 (1), authorizes the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth, and in particular for certain specified purposes which are enumerated in pars. *a* to *j* inclusive, and for prescribing all matters which, by the Act, are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for the more effectual prosecution of the war or for carrying out or giving effect to the Act.

This sub-section is in substance the same as s. 1 (1) of the Imperial *Emergency Powers* (*Defence*) *Act* 1939, except that the Governor-General in the Commonwealth Act is substituted for His Majesty in the Imperial Act, that the Imperial Act contains the words "as appear to him" (that is, to His Majesty) "to be necessary or expedient," and that the words are added "for maintaining supplies and services essential to the life of the community."

Section 5 (7) (*a*) of the *National Security Act* provides that nothing in the section shall authorize the imposition of any form of compulsory naval, military or air-force service, or any form of industrial conscription, or the extension of any existing obligation to render compulsory naval, military or air-force service.

By an amendment inserted on 21st June 1940 by 1940 No. 44, s. 8, the following section numbered 13A was added to the Act: "Notwithstanding anything contained in this Act, the Governor-General may make such regulations making provision for requiring

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persons to place themselves, their services and their property at the disposal of the Commonwealth, as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged: Provided that nothing in this section shall authorize the imposition of any form of compulsory service beyond the limits of Australia." The effect of the section is, in my opinion, to repeal s. 5 (7) (*a*) by implication to the extent to which the two sections are inconsistent, but it still leaves regulations made under s. 13A subject to the requirements of s. 5 (3), (4), (5) and (6) of the Act.

Section 13A, which was inserted in the *National Security Act* when the danger to the British Empire, including Australia, had been gravely intensified by the collapse of France, is the same in substance as the amendment made on 22nd May 1940 to the Imperial *Emergency Powers* (*Defence*) *Act* 1939 by the Imperial *Emergency Powers Defence Act* 1940, except that the Imperial Act again includes the additional words " or for maintaining supplies or services essential to the life of the community."

Reg. 58A, passed under the power to make regulations conferred by the Imperial Act, provides, sub-reg. 1, that the Minister of Labour and National Service may direct any person in the United Kingdom to perform such services in the United Kingdom as may be specified by the direction, being services which that person is, in the opinion of the Minister, capable of performing.

Further, while referring to Imperial legislation, it is interesting to note that the Imperial *National Service* (*No.* 2) *Act* 1941, which was passed on 18th December 1941, and therefore after the declaration of war by Japan on 7th December 1941, when the war had become more widespread than ever and very menacing for Australia, s. 1, declares that all persons of either sex for the time being in Great Britain are liable to national service, whether under the Crown or not, and whether in the armed forces of the Crown, in civil defence, in industry or otherwise.

Reg. 15 of the *National Security* (*Man Power*) *Regulations*, which came into force on 29th January 1943, provides, *inter alia*, that :—

(1) The Director-General may direct any person resident in Australia to engage in employment under the direction and control of the employer specified in the direction, or to perform work or services (whether for a specified employer or not) specified in the direction. (2) Any such direction may be restricted to a particular

class of employment, work or services or may be in general terms, and may specify the period within which, or the time at which, the person directed shall commence to engage in the employment or to perform the work or services. (3) Any such direction may be given so as to apply—(*a*) to any particular person; (*b*) to all or any persons in a particular area; or (*c*) to all persons included in a particular class of persons. (5) Every person to whom any such direction is applicable shall comply with the direction and with all proper instructions given to him, in relation to the employment, work or services which he is directed to engage in or perform, by the employer or by such person as is specified in the direction. (8) A person who has engaged in employment or commenced to perform work or services in accordance with a direction under sub-regulation (1) of this regulation shall not change or terminate his employment or cease to perform that work or those services except in accordance with the terms of the direction or with the permission in writing of the Director-General or a person authorized by him to give permission in such cases.

Reg. 3 of the *National Security* (*Man Power*) *Regulations* provides that the objects of the Regulations are to secure that the resources of man power and woman power in Australia shall be organized and applied in the best possible way to meet the requirements of the Defence Force and the needs of industry in the production of munitions and the maintenance of supplies and services essential to the life of the community, and that these Regulations shall be administered and construed accordingly.

Before the Supreme Court and on this appeal it was contended that the words in s. 13A of the *National Security Act* "to place . . . their services . . . at the disposal of the Commonwealth" only empower the Governor-General in Council to make regulations for requiring persons to become servants of the Commonwealth, so that it does not empower the Executive to require persons to enter the service of private employers, and this contention found favour with *Davidson* J. in the Court below; but I agree with the opinion of the learned Chief Justice (with whom *Halse Rogers* J. agreed) that in exercising its powers under the section the Executive is entitled to take the industrial organization of the community as it finds it, so that, in a community such as Australia, where the great bulk of the work is done by, for and through the medium of private employers, a most effective way of requiring persons to place themselves and their services at the disposal of the Commonwealth is to enable the Executive to dispose of their

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services by requiring them to do work for private employers. Mr. *Barwick* pointed out by way of illustration that, if an employee was compelled to work for a private employer, the employer might become bankrupt, and the employee, in spite of the preferential provisions of the *Bankruptcy Act*, might not be paid. But supposing this might happen, it would not be the first bad debt that had ever been contracted, and the risk of the loss of payment in this way would be small compared to the risk of the loss of his life by a member of the armed forces.

But I am unable to agree with the Chief Justice that there is nothing in s. 13A of the *National Security Act* which authorizes the making of reg. 15. As I have pointed out, this section and regulation have their origin in Imperial legislation, and the English courts have always proceeded upon the footing that reg. 58A is authorized by the Imperial *Emergency Powers (Defence) Act*, and that that regulation authorizes the Minister to direct employees to work for private employers. The English courts have also always proceeded upon the footing that, although reg. 58A provides that the work which a person may be directed to do must be work which in the opinion of the Minister that person is capable of performing, the question of the reasonableness of the direction is for the Minister and not for the court: See generally *Horton* v. *Owen* (1); *George* v. *Mitchell & King Ltd.* (2); *Hodge* v. *Ultra Electric Ltd.* (3); *Jackson* v. *Fisher's Foils Ltd.* (4); *Cummins* v. *Holloway Bros. (London) Ltd.* (5).

The constitutional validity of s. 13A was not directly challenged before the Supreme Court or on this appeal, but as I have so often expressed the opinion that the effect of the *National Security Act* is to delegate to the Executive the power to legislate for the defence of the Commonwealth conferred upon the Parliament by s. 51 (vi.) of the Constitution, subject of course to any limitations imposed by the Act, I feel that I should state that I have no doubt that the section is valid. The section provides that the Governor-General may make such regulations as appear to him to be necessary or expedient for the purposes stated, so that, if the section had been passed by a parliament which, like the Imperial Parliament, has untrammelled powers, the position would be that, as *Farwell* J. said in *Progressive Supply Co. Ltd.* v. *Dalton* (6):—" If the Crown, acting through its proper servant, makes a regulation, it must be taken

(1) (1943) 1 K.B. 111.
(2) (1943) 59 T.L.R. 153.
(3) (1943) 1 K.B. 462.
(4) (1944) 60 T.L.R. 212.
(5) (1944) 60 T.L.R. 240.
(6) (1943) Ch. 54, at p. 57.

to be a regulation which the Crown considers to be necessary for the defence of the realm and the other reasons mentioned. It is not for this court to consider whether there is evidence of any necessity for the making of such an order. That, I think, appears quite clear from the decision of the Court of Appeal in *R.* v. *Comptroller General of Patents*; *Ex parte Bayer Products Ltd.* (1)." But in a federal system of government the position is different. The defence power is not a paramount power, and the Constitution does not become in time of war a unitary constitution. There is no constitutional objection to Parliament delegating to the Governor-General the power to make such regulations as he considers necessary or expedient for the defence of the Commonwealth; but when such regulations are made in the exercise of the power, they can only be valid if, supposing the Commonwealth Parliament in the exercise of the powers conferred upon it by s. 51 (vi.) of the Constitution passed an Act in the same terms, that Act would be a valid exercise of the defence power.

Before the Supreme Court it appears to have been conceded that the operation of the regulation is so wide that it extends beyond anything that could be considered to be reasonably necessary for the efficient prosecution of the war, so that, unless it could be read down by construction by applying s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 or reg. 3 of the *Man Power Regulations*, it was not authorized by s. 13A and was therefore invalid. In this Court counsel for the appellant did not ask the Court, wisely in my opinion, to attempt to read down the regulation in either of these ways, but asked the Court to give the regulation its full scope and effect and to hold that it is valid. Mr. *Barwick* was careful to point out the far-reaching operation of the regulation, the only persons exempted being those mentioned in reg. 15A; otherwise, since, by reg. 24, subject to the exceptions contained in reg. 26, all persons over the age of fourteen years are required to register, it would appear that the regulation extends to almost all persons over that age without any qualification on account of old age or mental or physical incapacity. It therefore gives the Commonwealth complete power to control the distribution of all employment throughout the Commonwealth, and enables the Commonwealth to decide in what capacity everyone in the Commonwealth shall work and whether any contract of employment shall or shall not be terminated. In *George* v. *Mitchell & King Ltd.* (2) *MacKinnon* L.J., referring to the vesting of the right finally to decide whether an employee should be dismissed

(1) (1941) 2 K.B. 306.

(2) (1943) 59 T.L.R., at p. 156.

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in the Minister, said :—" For these reasons, as they seem to affect this case, I find the provisions of this order disconcerting if not alarming. If the employers, who, presumably, know their own business, want to replace a man they regard as incompetent by one who is more efficient, and are forbidden to do so in seven or fourteen days by those who cannot have been able to form a reasonable judgment on the merits of their claim, I cannot imagine anything less calculated to conduce to the smooth and effective conduct of an essential business 'for the efficient prosecution of the war, or maintaining supplies or services essential to the life of the community.'" But nevertheless it would appear that in Great Britain, which has to an unprecedented extent borne the brunt of the war and has organized herself to overcome all her initial disasters and proceed towards victory, it has been found necessary to impose this rigid control in order to meet the competing claims on the man and woman power of the country of the armed forces of the Crown, the civil defence forces, the war industries and the services necessary to maintain the life of the nation. In *Butterworth's Emergency Legislative Service*, to which we were referred, supplement No. 12, the learned author states that " the complete and effective mobilization of man power and woman power—with, as the Minister for Labour has said, its inherently difficult questions of selection and choice . . . has only been possible in proportion as non-essential and luxury trades and industries have gradually been required to give way to, or to merge themselves with, those trades and industries which are regarded as essential." In Australia, on account of the Federal system, the Commonwealth can, under the defence power, only exercise this control so far as it is capable even incidentally of aiding the effectuation of that power. But it is plain that it would be within the ambit of the power for the Commonwealth to require such men and women as it thought necessary to serve in the armed forces of the Commonwealth and in the services ancillary thereto, and it follows, I think, from the application by analogy of the reasoning by which this Court upheld the validity of the *Women's Employment Act* in the case of *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1), and of the *Industrial Peace Regulations* in *Pidoto* v. *Victoria* (2), that it would also be within the ambit of the power to direct what men and women should work in industry, to distribute them amongst industries whether carried on by the Commonwealth itself or by a State or by a private employer, and to exercise this control so as to divert labour

(1) (1943) 67 C.L.R. 347.

(2) *Ante*, p. 87.

from one class of industries to another as particular industrial activities become from time to time more or less important in the changing course of the war. But, after satisfying as far as possible the purposes already mentioned, there would still be more labour required to maintain essential services outside these purposes, of which I need only mention as an instance medical services, so that the control of the distribution of employment would necessarily extend beyond that of providing for the armed forces and for industry. Further, I agree with counsel for the appellant that, in a war of this magnitude, the power must be indivisible, because it is impossible to see at what stage complete control of the distribution of all labour should cease. Assuming that many cases can be cited, as, for instance, most cases of domestic employment, in which the work would have no apparent connection with the prosecution of the war, it must often happen that, on account of ill-health or other family reasons, young women and sometimes men capable of working in some essential industry cannot be spared from the home unless they are replaced by other persons incapable of doing more important work. If it is expedient in the interests of defence to compel these young men and women to work in an essential industry, then it must be at least incidental to defence to compel other less capable persons to do the domestic work that they were doing before in order to enable them to do so. On this aspect of the matter I venture to repeat *mutatis mutandis* what I said in *Pidoto's Case* (1).

The power, if completely and efficiently executed, would simply compel every citizen to serve where he was best suited, thereby bringing about that complete mobilization which is required in order to fight a modern total war of the dimensions of the present conflict. But the powers conferred by reg. 15 are powers which must be used honestly in order to attain the purposes for which they have been given, and it is in this respect that reg. 3, which contains a direction to those who are chosen to administer the Regulations, is important. On the constitutional aspect the direction that the Regulations are to be construed in the manner stated is entitled to respect, but it is in no way conclusive (*South Australia* v. *The Commonwealth* (2); *R.* v. *University of Sydney*; *Ex parte Drummond* (3); *Abitibi Power and Paper Co.* v. *Montreal Trust Co.* (4)). It is not a regulation which can be used to control the construction of reg. 15, any more

(1) *Ante*, at pp. 127, 128.
(2) (1942) 65 C.L.R. 373, at p. 432.
(3) (1943) 67 C.L.R. 95, at p. 113.
(4) (1943) A.C. 536, at p. 548.

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than a preamble can control the construction of an Act, or a recital an operative provision of a deed which is clear and unambiguous.

For these reasons I am of opinion that reg. 15 is valid and that both appeals should be allowed.

Appeals allowed. Orders of Supreme Court set aside. Orders nisi discharged with costs. Appellant to pay respondents' costs of appeal to High Court.

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

Solicitors for the respondents, *H. J. Bartier, A. W. Perry & B. P. Purcell*, Sydney, by *Molomby & Astley*.

E. F. H.