[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS; Ex parte THE STATE OF VICTORIA.

THE STATE OF VICTORIA . . . . PLAINTIFF;

AND

FOSTER AND OTHERS . . . . . DEFENDANTS.

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MELBOURNE, *May* 22, 23; *June* 8.

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

Constitutional Law — Defence — Women's employment — Regulations — Validity — Application of regulations to females employed by a State—Industry—Governmental activities—Women's Employment Act 1942 (*No.* 55 *of* 1942), *s.* 3, *Schedule*: *regs.* 4, 5A, 6, 7—*S.R.* 1943 *No.* 75—1944 *No.* 70.

Before the repeal of reg. 5A of the *Women's Employment Regulations*, those Regulations applied only to females employed in industry.

So *held* by the whole Court.

In so far as the Regulations, since the repeal of reg. 5A, purport to apply to females employed by a State in purely governmental activities, they are beyond the defence power of the Commonwealth.

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

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

ORDER NISI for prohibition.

In March 1943 the Victorian Public Service Association (an unincorporated body of persons who were employed in the public service of the State of Victoria) applied, by its secretary, Standish Michael Keon, to the Women's Employment Board for a determination of the rate of payment made to and the hours and conditions to be observed in respect of females employed by the State in the preparation and computation of assessments under the *Land Tax Acts* (Vict.), work which had previously been done exclusively by

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males. The application came before the Board for hearing on 19th March 1943; the State of Victoria objected that the Board had no jurisdiction in the matter on the grounds that (1) the *Women's Employment Act* 1942 and the Regulations thereunder were invalid so far as they related to the employment of the females in respect of whom the application was made, and (2) those females were not "employed in industry" within the meaning of reg. 5A of the Regulations contained in the Schedule to the Act.

On 10th November 1943 the Board delivered its decision, which made the determination sought. On 16th February 1944 the decision was filed in the Commonwealth Court of Conciliation and Arbitration under reg. 9 of the *Women's Employment Regulations*.

The State of Victoria obtained an order nisi for a writ of prohibition calling upon the Commonwealth Court of Conciliation and Arbitration and the Chairman and members of the Women's Employment Board to show cause why a writ should not issue prohibiting them from proceeding further upon or with respect to the decision, and, alternatively, for a writ of certiorari.

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MOTION treated as trial of action.

Reg. 5A of the *Women's Employment Regulations* having been repealed by Statutory Rules 1944 No. 70 (21st April 1944), Keon, as secretary of the Victorian Public Service Association, on 17th May 1944 made a further application to the Board in terms similar to those of the prior application. The State of Victoria brought an action in the High Court against his Honour Judge *Foster*, the Chairman of the Women's Employment Board and the members of the Board and Keon claiming, in the statement of claim indorsed on the writ:—

"1. A declaration that the *Women's Employment Act* 1942 and the Regulations thereunder are not authorized by any power conferred upon the Parliament of the Commonwealth of Australia so far as they purport to empower the Women's Employment Board to deal with or give a decision upon an application by the Defendant Standish Michael Keon in respect of female employees of the State of Victoria who are engaged in the preparation and computation of assessments under the *Land Tax Act* 1928.

2. An injunction restraining the Members of the said Board from proceeding to hear and give a decision upon an application lodged with the said Board by the Defendant Standish Michael Keon on or about the 17th day of May 1944 for a determination of the rate of payment made to and the hours and conditions to be observed in respect of females employed by the Plaintiff in the preparation and computation of assessments under the *Land Tax Act* 1928."

On notice to the defendants the plaintiff moved the High Court for an injunction as claimed in the statement of claim indorsed on the writ; no objection was raised on behalf of the defendants that the injunction sought was not expressed in the notice of motion to be interlocutory, and by consent the motion was treated as the trial of the action.

The two matters were heard together.

Fullagar K.C. (with him *Dean* K.C.), for the State of Victoria. It is submitted that the Regulations, whether before or after the repeal of reg. 5A, are, on their proper construction, limited to females employed in industry. As to the position while reg. 5A was in force, the matter was settled by *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1). Apart from reg. 5A, the nature of the Regulations generally suggests that they were not meant to extend to employment otherwise than in industry, and expressions in the Regulations support this view: See, for example, the use of the word "establishment" in reg. 6 (1) (*b*), which is more appropriate to industrial than to non-industrial premises, and the word "productivity" in reg. 6 (8), which is apt in relation to industry but not to non-industrial activity, particularly that of a Department of State. Certainly while reg. 5A was in operation, the Regulations were limited to employment in industry: the opening words of reg. 5A, "Without prejudice to anything contained in these Regulations," were not intended to contradict the other regulations: The Board has other functions than those of fixing remuneration, hours and conditions of employment (See, e.g., regs. 5B, 5C, 8); the object of reg. 5A was to place beyond doubt the scope of the Board's primary functions, and the opening words were intended to ensure that no subsidiary function was excluded. State Treasuries (including taxation officers) are not engaged in industry (*Federated State School Teachers' Association of Australia* v. *Victoria* (2); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (3)). If the Regulations extend to ordinary State Government Departments, they are *pro tanto* invalid (*Public Service Case* (4); *Pidoto* v. *Victoria* (5)).

There was no appearance for the respondents to the order nisi.

(1) (1943) 67 C.L.R. 347: See pp. 357, 358, per *Latham* C.J.; p. 375, per *Rich* J.; pp. 379, 380, per *Starke* J.; pp. 385, 386, per *McTiernan* J.; pp. 398, 399, per *Williams* J.
(2) (1929) 41 C.L.R. 569.
(3) (1942) 66 C.L.R. 488.
(4) (1942) 66 C.L.R. 488, at p. 498, per *Latham* C.J.; p. 510, per *Rich* J.; p. 515, per *Starke* J.; pp. 524, 525, per *McTiernan* J.; p. 533, per *Williams* J.
(5) (1943) 68 C.L.R. 87, at pp. 103, 106.

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P. D. Phillips, for the Commonwealth (intervening) and for the defendants in the action. On the true view of the construction of the Regulations before the repeal of reg. 5A they were not confined to dealing with women in industry but extended to women in work and employment. Legislation with respect to the substitution of women for men in work and employment during the war is within the defence power: there is nothing in the *Public Service Case* (1), properly understood, which limits that view of the defence power, and there is no constitutional bar to the exercise by the Commonwealth of the defence power so as to affect persons employed in the governmental spheres of the States. In the *Women's Employment Regulations Case* (2) three members of the Court, *Rich*, *Starke* and *Williams* JJ., were of opinion that the Regulations were limited to industry, but only *Williams* J. took the view that the validity of the Regulations depended on that interpretation. It is submitted that the Regulations, if valid, must gain their validity from something other than the limitation of women's employment to industry. The organization of the whole of the labour power—whether industrial or not—of the community, so far as that labour power is affected by the war, has that real connection with defence which is necessary to bring it within the defence power of the Commonwealth. So to organize labour power—to remedy dislocation caused by the war—is the intention of the Regulations now in question, and they are therefore within power even if not limited to industry. [He referred to the *Women's Employment Regulations Case* (3), per *Latham* C.J.] The test of the validity of legislation under the defence power is not whether it deals with industry or prices or a matter of such importance as to be related to defence, but whether the problem it solves or attempts to solve—the subject matter of the legislation itself—is a problem arising out of the war and calling for solution as part of the war effort. The *Public Service Case* (1) does not determine the present case. The Regulations there in question dealt with continuity of work, and the case is authority for no more than this, that a law directed to continuity of work must be confined to work of the nature of war work and does not extend to State servants of the normal governmental category. In *Pidoto* v. *Victoria* (4) the problem was again continuity of work, and the decision was that the securing of continuity of work by State servants engaged in industry had a sufficient connection with defence though it was otherwise as to governmental work. That decision does not affect the present case. The decisions do not establish any universal

(1) (1942) 66 C.L.R. 488.
(2) (1943) 67 C.L.R. 347.
(3) (1943) 67 C.L.R., at p. 357.
(4) (1943) 68 C.L.R. 87.

test of the application of the defence power to employees of a State by relation to the question whether they are employed in industry or in governmental work. As to the construction of the Regulations, whatever may have been the position when reg. 5A was in force, now that it is excluded there is nothing in the Regulations which confines them to women in industry. In the *Women's Employment Act* itself there is nothing to suggest that it looks to employment in industry. The Regulations nowhere contain any specific limitation to industry. The words "employment" and "work" are used as general terms. The form of the Regulations was, no doubt, directed by the need to deal with industrial employment, which is the largest portion of the subject matter of employment, but that is no justification for concluding that the Regulations do not go beyond industry. As to the words "establishment" and "productivity," it would be difficult to find words which would be more apt to cover both industrial and non-industrial activities. The definition of "employer" in reg. 4 as including the Crown in right of a State appears to contemplate the whole of the activities of the State and the whole of the employment by the State, whether in industry or otherwise: it is apt to describe the whole field of employment, but is not apt if limited to industrial activities.

Fullagar K.C., in reply.

Cur. adv. vult.

June 8.

The following written judgments were delivered:—

LATHAM C.J. A number of females who are public servants employed in the taxation branch of the Treasury Department of the State of Victoria were typists and stenographers. The work of assessors in that branch was always performed by males exclusively. Some of those males were called up for war service; the female typists and stenographers were then employed as assessors. An application was made to the Women's Employment Board under the *Women's Employment Regulations* for the determination of the question whether females should be employed upon the work of assessors and, if so, upon what terms and conditions: See *Women's Employment Act* 1942, Regulations in schedule. The application was made on 12th March 1943. At that time the Regulations contained reg. 5A in the following terms:—

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

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The Women's Employment Board gave a decision purporting to permit females to be employed upon the work in question and fixing hours, conditions of employment and rates of payment. Reg. 9 provides that decisions of the Board shall be filed in the Commonwealth Court of Conciliation and Arbitration and that they shall thereupon have effect and be enforceable as if they were awards of the Court. The State of Victoria obtained an order nisi for prohibition against the Board and against the Commonwealth Court of Conciliation and Arbitration upon the grounds :—

" 1. That the *Women's Employment Act* 1942 and the Regulations thereunder are not authorized by any power conferred upon the Parliament of the Commonwealth of Australia so far as they purport to empower the Women's Employment Board to make the said decision in respect of the said female employees of the State of Victoria.

2. That the said female employees are not employed in industry."

Reg. 5A was repealed by Statutory Rules 1944 No. 70 gazetted on 21st April 1944. A further application with respect to these female public servants was made to the Board on 17th May 1944. A writ was issued by the State of Victoria claiming a declaration that the *Women's Employment Act* and the Regulations were not authorized by any power conferred upon the Commonwealth Parliament so far as they purport to empower the Board to deal with the application, and claiming also an injunction restraining the members of the Board from further proceeding to hear the application. The plaintiff moved for an injunction, and it has been agreed between the parties that the motion shall be treated as the trial of the action.

Public servants engaged in ordinary governmental activities are not engaged in industry (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (*Public Service Case*) (1)). Reg. 4 provides that the word " employer " includes the Crown, whether in right of the Commonwealth or of a State. But if the Regulations upon their true construction are limited to industrial employment the employees of the State could be affected by the Regulations only in so far as they were engaged in industry. Accordingly the first question to be determined is whether the Regulations upon their true construction are limited to industrial employment.

I have already quoted reg. 5A. Other regulations clearly authorize the Board to fix the remuneration, hours and conditions of employment of certain women. The initial words of reg. 5A, " Without prejudice to anything contained in these Regulations," preserve other functions of the Board, e.g., those referred to in regs. 5B and 5C.

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

Thus reg. 5A defines, and therefore limits, the functions of the Board by reference to industry. Except upon this construction reg. 5A would have no effect whatever. As the women now in question are not employed in industry the order nisi for prohibition relating to the first application made under the Regulations should be made absolute.

Reg. 5A, however, was repealed by statutory rule No. 70 of 1944. The result is that any general limitation of the application of the Regulations to industry arising from the terms of reg. 5A has disappeared, and that the other regulations must be considered in their own terms and in their context as it now stands. Reg. 6 is the principal regulation and it provides that where an employer proposes to employ, or is employing, or has, since 2nd March 1942, employed females on " work " which was usually performed by males, either generally or within that employer's establishment, since the outbreak of the present war, or which, immediately prior to the outbreak of the present war, was not performed in Australia by any person, the employer shall make an application to the Board for a decision in accordance with the regulation, unless an application has already been made, or a decision already given. The other provisions of the regulation refer to " work " without any limitation to industrial as distinguished from other work. I am unable to find in the Regulations since the repeal of reg. 5A any provisions which limit the application of the Regulations to industrial employment. Work in industry falls within the provisions of the Regulations, but the Regulations are not, in my opinion, limited to such work. I therefore proceed to consider whether the Regulations are valid if they apply to employment in all forms of work without any limitation to industrial work.

The distinction between a profession on the one hand and an industry on the other, or between employment in governmental activities on the one hand and industrial employment on the other, is a distinction which is relevant and important in certain cases. For example, if the question for decision was whether a dispute as to the rates of pay, &c., of State school teachers was an industrial dispute within the meaning of the *Arbitration Act*, it was important to consider whether State school teachers were engaged in industry: See *Federated State School Teachers' Association of Australia* v. *Victoria* (1). When the question arose whether holiday pay of State governmental servants could be determined by a Federal authority under the *Industrial Peace Regulations*, which were construed as limited to industrial matters, it was important to determine whether

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

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the employment of the State servants concerned was industrial employment (*Public Service Case* (1)). A similar question arose in *Pidoto* v. *Victoria* (2), where the question was whether the *Industrial Peace Regulations*, construed as limited to industry, were valid in their application to employees of a State. It then became necessary to determine whether certain State employees were engaged in industry so that there could be an industrial dispute, or an industrial matter could arise in relation to their employment. In all these cases the decision of the question depended upon whether certain matters were industrial in character.

In *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (3) the *Women's Employment Regulations* were held to be valid, but in that case no point was taken with respect to State public servants engaged in strictly governmental activities. It is now necessary to decide whether the *Women's Employment Regulations* are valid if they are construed, as in my opinion they should be construed, as applicable to all work, whether industrial or not, and including the work of State public servants engaged in strictly governmental activities.

In the first place, I venture to repeat what I said in *South Australia* v. *The Commonwealth* (*Uniform Taxation Case*) (4), to the effect that the Commonwealth Parliament has no power to legislate with respect to State public servants as such. But valid Commonwealth laws apply to all persons in Australia, whether or not they are State public servants. This is obvious in ordinary cases: e.g., laws as to customs and excise, bills of exchange and taxation are of universal application. The *Defence Act* imposing liability to military service is as applicable to persons in State employment as it is to any other persons. Accordingly, the mere fact that an individual is employed by a State is prima facie irrelevant when a question arises as to the scope of application or the validity of a Commonwealth law.

The military organization of the community is admittedly a matter which falls within the defence power of the Commonwealth Parliament. So also the organization of the whole man power—men and women—of the community is, generally speaking, a matter which falls within the defence power. I have used the words "generally speaking" because questions of degree inevitably arise. There will be marginal cases and some matters may be of a character so remote from considerations of defence that they do not fall within the limits of Commonwealth power. Such a case is to be found in

(1) (1942) 66 C.L.R. 488.
(2) (1943) 68 C.L.R. 87.
(3) (1943) 67 C.L.R. 347.
(4) (1942) 65 C.L.R. 373, at p. 431.

Victorian Chamber of Manufactures v. *The Commonwealth* (*Industrial Lighting Regulations*) (1).

In the case of the military organization of the community, it is not for a court to seek to place limits upon what the Commonwealth Parliament may do. In a war such as this the civilian organization of the community also is or may be closely associated with war requirements. This Court has already held that control of prices, of rents, of the employment of doctors, of advertisements, are within the war power: *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (2); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (3); *Gonzwa* v. *The Commonwealth* (4); *Ferguson* v. *The Commonwealth* (5). I refer to what *Griffith* C.J. said in *Farey* v. *Burvett* (6):—"So far as the attack is made upon the Act as distinct from the regulation the Court is invited to assume the function of determining whether the facts were at the time when the Act was passed such as to warrant the Parliament in exercising the defence power by passing it. Whether it was or was not authorized to do so must, so far as the authority depends upon facts, depend upon the facts as they appeared to it, of which we have not, and cannot have, any knowledge. In my opinion there is no principle, and there is certainly no precedent, which would justify a court in entering upon such an inquiry, if upon any state of facts the exercise of the legislative power in the particular way adopted could be warranted. If it appeared on the face of the Act that it could not be substantially an exercise of the defence power different questions would arise. I am not prepared to say that it" (that is, the provision in question) "may not have some, and some important, influence upon the successful conduct of the war."

Many of the arguments which have been addressed to this Court from time to time for the purpose of supporting a contention that National Security Regulations are invalid appear to me to be based upon either an inability or a refusal to realize the significance of total war. I do not regard "total war" as a vague or merely rhetorical phrase. I regard it as expressing in appropriate terms the true character of the most pressing and urgent reality of the present times.

There is, I think, no doubt that under the war power the Commonwealth can take measures to protect Australia against bombing, to fight hostile bombers, and if, for example, Sydney were bombed,

(1) (1943) 67 C.L.R. 413, at p. 417.
(2) (1943) 67 C.L.R. 335.
(3) (1943) 67 C.L.R. 1.
(4) *Ante*, p. 469.
(5) (1943) 66 C.L.R. 432.
(6) (1916) 21 C.L.R. 433, at p. 443.

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to take charge of all persons and services in the city. But the impact of war does not produce only physical consequences. War produces grave dislocation in the social and economic structure of the community. It affects not only industrial employment but all employment. War requires the full utilization of all the resources of the community. As *Isaacs* J. said in *Farey* v. *Burvett* (1), the defence power enables the Commonwealth "to command, control, organize and regulate, for the purpose of guarding against" (the) "peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory." His Honour added, in words which are even more significant in the circumstances of to-day than when they were spoken in 1916: "In this supreme crisis, we can no more sever the requirements and efforts of the civil population, whose liberties and possessions are at stake, from the movements of our soldiers and sailors, who are defending them, than we can cut away the roots of a living tree and bid it still live and bear fruit, deprived of the sustenance it needs."

The most important of all the resources of the community is to be found in the working capacity of the people—men and women. When the question under consideration is the complete organization of working man power in order to obtain the most efficient results in a time of crisis, no line can be drawn between professional or governmental activities on the one hand, and industrial occupations on the other. Engineers, doctors, lawyers, administrators and clerks are required in the military services themselves, and are also required in civilian capacities in the interests both of the military services and of the civilian community.

Under the *Women's Employment Regulations* the Women's Employment Board is authorized to determine whether women should be allowed to do work which had formerly been done by men and also to fix the terms and conditions under which such work, if permitted, shall be done. It is not for the Court to approve or disapprove such a scheme upon any ground of policy. Some may think that existing tribunals would have dealt with the matter more efficiently than an *ad hoc* body selected and appointed in the manner provided by the Regulations, but any opinions upon such matters are completely irrelevant to the exercise of any judicial function.

The withdrawal of men from employment of all kinds and their replacement by women in such employment has been brought about by the war. The problems connected with the necessity and the desirability of encouraging women to undertake new forms of employment are directly associated with the war. Women have

(1) (1916) 21 C.L.R., at p. 455.

generally received lower rates of pay than men. The replacement of men by women in any kind of employment during a period of war emergency raises social, economic and political problems which may become acute, not only during the war, but also after the war. Control of such replacement may be exercised for the purpose of providing men or women for war service in the fighting forces or in munitions production. It may also, and in my opinion with equal justification, be used for the purpose of using the limited working capacity of the men and women of the country for the production of food or services deemed to be essential by the Government which, in time of war, has the responsibility of protecting the life of the people and therefore of preserving the community in the fullest possible activity as a whole. The terms and conditions upon which such replacement takes place are therefore matters of importance to the Commonwealth Government in relation to its responsibility of conducting military operations and of preventing military necessities from disturbing unduly or destroying the civilian community, upon the maintenance of which the possibility of military operations depends. Accordingly, the provision of means for dealing with the allocation of women to work (whether governmental or other) under a scheme for organizing and utilizing working capacity is closely related to defence in several ways. The extent of such a scheme, and the degree of detail to which it should descend, are matters for the consideration of the legislative authority and of the executive authority, acting under legislative authority and subject to legislative control. They are not matters for the consideration of a court. The Commonwealth might, if it chose, simply take men away from their work and leave things to sort themselves out. But in my opinion the power of the Commonwealth is not so limited in dealing with the man power of the community.

I am therefore of opinion that, if the Regulations are construed as applying to all work, and not as limited to work of an industrial character, they are valid. Accordingly the injunction for which the plaintiff applies should be refused and the action should be dismissed.

RICH J. So much has been said and written about National Security Regulations in general and these Regulations in particular that I am relieved from doing what I consider is a work of supererogation. In *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1), where the Regulations in question contained reg. 5A, my opinion was that the Board was

(1) (1943) 67 C.L.R., at p. 375.

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authorized to regulate the employment of women so long as their work was restricted to industry. Nothing has been said in the first application before us which causes me to resile from that opinion. In the second application, in which reg. 5A has been eliminated from the Regulations, it was contended that, although the Regulations were not now limited to industry, they were justified as Regulations dealing with the employment of women for purposes connected with defence. But I consider that if so construed they would be "expressed in such wide terms as to take them out of the scope and limit of the defence power and their far-reaching effect is such as to bring them within the boundaries of State legislation and State control" (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (1))—Cf. *R.* v. *University of Sydney*; *Ex parte Drummond* (2). It follows that so construed they would be invalid.

In the first application the order nisi should be made absolute and in the second application the injunction should be granted.

STARKE J. Rule nisi for a writ of prohibition calling upon the Commonwealth Court of Conciliation and Arbitration and the Chairman and members of the Women's Employment Board to show cause why a writ of prohibition should not issue prohibiting them from proceeding further upon or with respect to a decision of the Women's Employment Board relating to certain female employees engaged as assessors of land tax in the taxation department of the State of Victoria given on 10th November 1943 and filed in the Commonwealth Court of Conciliation and Arbitration on 16th February 1944 pursuant to the provisions of reg. 9 of the *Women's Employment Regulations*, which thereupon has the effect in all respects and is enforceable as if it were an award of the Court, or, in the alternative, for a writ of certiorari. Also an action, the proceedings before this Court being treated as the trial thereof, by the State of Victoria against the Chairman and members of the Women's Employment Board and one Keon, who was the secretary of the Victorian Public Service Association, an organization of employees, claiming a declaration that the *Women's Employment Act* 1942 and the Regulations thereunder are not authorized by the Constitution in so far as they purport to empower the Women's Employment Board to deal with or give a decision upon an application by Keon in respect of female employees in the State of Victoria who were engaged in the preparation and computation of assessments under the *Land Tax Act* 1928 (Vict.). These females

(1) (1943) 67 C.L.R., at p. 420.

(2) (1943) 67 C.L.R. 95, at p. 105.

are permanent members of the public service of Victoria employed in one of the administrative departments of the State and not in any industrial activity carried on by the State.

The writ of prohibition should go because the Regulations under which the decision of 10th November 1943 of the Women's Employment Board was made relate only to the work of certain females employed in industry, which, as already stated, was not the position of the females employed in the Taxation Department of the State of Victoria (*Women's Employment Regulations Case* (1); *Pidoto* v. *Victoria* (2); *Public Service Case* (3)).

And the declaration claimed in the action should also be made.

It was contended, however, that the repeal of reg. 5A by Statutory Rules 1944 No. 70, coupled with the definition of employer in reg. 4, which includes the Crown whether in right of the Commonwealth or a State, makes it clear that the jurisdiction of the Women's Employment Board is not confined to the employment of females in industry but extends to any work done by females within certain categories set forth in the Regulations. The repealed reg. 5A was as follows:—

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

So it is suggested that reg. 6, upon its proper construction, without the limitation imposed or rendered necessary by the repealed reg. 5A, extends to any work done by females. Reg. 6 provides that where an employer proposes to employ, is employing, or has at any time since 2nd March 1942 employed, females on work within certain categories, then the Board shall have jurisdiction and may give a decision. The words are very wide and I see no sound reason for confining them to work in connection with industry. But, if so, the regulation is bad, for the Constitution does not confer authority upon the Commonwealth under the defence or any other power to control the States in the employment of the public servants engaged in their ordinary governmental departments and not in any industrial activity (*Public Service Case* (3)). "To hold otherwise would," as the Chief Justice said in *Pidoto's Case* (4), "involve the practical abolition of State Governments in any time of war."

These attempts on the part of the Commonwealth and its instrumentalities to bind the States in respect of their governmental

(1) (1943) 67 C.L.R. 347.
(2) (1943) 68 C.L.R. 87.
(3) (1942) 66 C.L.R. 488.
(4) (1943) 68 C.L.R., at p. 106.

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activities serve no purpose of defence or any useful purpose. They are calculated to disorganize State administration and to disorganize it without any responsibility for meeting the obligations arising from the legislation of the Commonwealth or the doings of its instrumentalities. The same disorganization is just as likely to arise in the case of the industrial activities of the States, but, contrary to all constitutional principles, as I think, this Court allows the Commonwealth to control those activities in time of war as an exercise of the defence power and independently of the arbitration power conferred by s. 51 (xxxv.) of the Constitution. But a halt should be called when the Commonwealth seeks to control the employment of the public servants of the States engaged in ordinary governmental administration.

The rule nisi for the writ of prohibition should be absolute and a declaration made in the action in accordance with the terms of claim 1 indorsed upon the writ.

McTIERNAN J. In the case of *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1), the Court decided that the *Women's Employment Act* 1942 was validly enacted under the defence power of the Commonwealth. The reasons which I stated for my conclusion did not depend upon the question whether the scheme embodied in the Act and the *Women's Employment Regulations*, which formed a schedule to the Act, were limited to industry.

I cannot appreciate the distinction that it could aid the prosecution of the war and assist the war effort to control and regulate the flow of women workers into industry and their employment in industry, but it could not conduce to those objects to apply such control and regulation to work generally.

It appears that a majority of the Court in the above-mentioned case read the Regulations as being limited to industry. It was not necessary, in my opinion, to construe the Regulations in that way in order to decide that they were a valid exercise of the defence power. But it is necessary to adopt that construction of the Regulations as they then stood to give effect to reg. 5A.

It cannot be doubted that persons engaged as assessors of land tax in the Taxation Department of a State are not employed in industry, according to the interpretation which that expression has received in this Court. For this reason I think that the order nisi granted by the Chief Justice on 18th February 1944 should be made absolute.

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

The application to the Women's Employment Board which is the subject of the claim for an injunction was made after reg. 5A was deleted from the Regulations. The effect of this deletion is to extend the scope of the Regulations to the classes of work which are described in reg. 6, whether it is industrial work or not.

The Regulations do not exhibit the intention that the Regulations should not apply to a State as an employer. It is within the defence power for the Commonwealth to bring a State as an employer within the scheme which is contained in this Act and these Regulations for encouraging, controlling and regulating the employment of women.

In addition to the reasons which I have stated in this and the previous case, I adopt the reasons of the Chief Justice in the present case for upholding the validity of the Act and the Regulations as they now stand with reg. 5A deleted.

The result in my opinion should be that the action in which an injunction is claimed should be dismissed.

WILLIAMS J. In this matter two applications have been heard together, the only distinction affecting the legal considerations involved being that in the case of the first application reg. 5A of the *Women's Employment Regulations* was still in force, and the Regulations were, so far as material, in the same form as at the time of the *Women's Employment Regulations Case* (1), while at the date of the second application this regulation had been repealed.

The first application is an application by the State of Victoria to make absolute a rule nisi for prohibition directed to the Commonwealth Court of Conciliation and Arbitration and his Honour Judge Foster, Chairman of the Women's Employment Board, and the members of that Board to show cause why a writ of prohibition should not issue prohibiting them from proceeding further upon or with respect to the decision of the Board relating to certain females employed as assessors of land tax in the Taxation Department of the State of Victoria given on 10th November 1943 upon an application dated 12th March 1943 whereby the Board purported to fix the salaries of certain women who were permanently employed in the public service of the State of Victoria under the Victorian *Public Service Acts* in its general division, but who were temporarily employed upon work in connection with the collection of Victorian land tax in the Taxation Department of that State.

The applicant's right to the order asked for in this application is, in my opinion, completely established by the recent decisions of this Court in the *Women's Employment Regulations Case* (1) and in

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

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the *Victorian Public Service Case* (1). In the first of these cases a majority of this Court expressed the opinion that the *Women's Employment Regulations* conferred jurisdiction on the Board to regulate the employment of the "new women," as they were called, in industry. During that case it was and still is my clear opinion that the Regulations in their then form were confined to work in industry, and that if they had not been so confined they would have been beyond the ambit of the defence power. The women in the present case were not employed in industry but in a governmental department of the State. In the *Public Service Case* (1) I expressed a clear opinion that it was beyond the ambit of the defence power for the Commonwealth to attempt to regulate the conditions of employment of civil servants employed in a department of a State which was engaged exclusively in the administration of the governmental functions of the State and not engaged in industry or in any activity associated with the prosecution of the war, and that is still my clear opinion.

Mr. *Phillips* was right in submitting that States, like individuals, are bound by valid Commonwealth legislation, including legislation under the defence power, which is intended to bind both individuals and States. But I cannot agree that Commonwealth legislation is necessarily valid under the defence power if it relates to a problem created by the war. The war creates all sorts of problems the solution of which has nothing to do with defence. We heard an earnest argument by Mr. *Phillips* as to the means by which the Court should determine whether legislation is or is not within the ambit of the defence power. But the proper means appear to have been established by decisions upon the American, Canadian, and our own Constitutions, and by decisions under the Imperial *Defence of the Realm Consolidation Act* in England during the last war. Several of these cases are cited in the *Women's Employment Regulations Case* (2) and in *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No.* 4 *Ltd.* (3). All these cases appear to me to lay down in different language the same test, namely, that you examine the legislation to ascertain its real substance and purpose, and then you ask yourself the question whether, in the light of relevant facts that are common knowledge and keeping in mind that there may be other facts which are within the knowledge of the Executive which is responsible for the safety of the realm, but which it is not in the public interest to disclose, and remembering that to the Commonwealth Parliament and the Executive which it controls

(1) (1942) 66 C.L.R. 488.
(2) (1943) 67 C.L.R., at pp. 400-403.
(3) (1943) 67 C.L.R. 25, at pp. 48, 49.

a wide latitude of discretion must be accorded, it is conceivable that the legislation can be reasonably capable of aiding the prosecution of the war. In the determination of that question, of course, such considerations as that the war creates abnormal but temporary conditions, and the extent to which it can assist the war effort to legislate upon a subject matter which in normal times is within the domain of State legislation, must be borne in mind. And I agree with Mr. *Phillips* that when the legislation is intended to bind a State it " must be carefully scrutinized to see that its real substance and purpose is to assist defence and not under colour of such a purpose to intermeddle in the sovereignty of a State " (*Uniform Taxation Case* (1)).

No doubt the vacation by large numbers of men of their usual civil employment in order to enlist or engage in some work more closely connected with the prosecution of the war has raised a problem created by the war. But that does not, in my opinion, create a sufficient nexus to enable the Commonwealth to control the terms and conditions of employment of all women who fill these vacancies. The Commonwealth is only concerned with the terms and conditions of employment of women in work that has some connection with the prosecution of the war. The Act is entitled an Act to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war, and in the previous case that was submitted on behalf of the Commonwealth to be the purpose of the Act, but we have been assured by Mr. *Phillips* in this case that the purpose of the Act is to encourage men to volunteer to leave their usual civil employment for more important war work by compelling employers who desire to employ women in their places, and who find that women can do the work as well as they can, to pay the women such wages that they will not feel inclined to continue to employ them at the expense of the men after the war. This appears to me to be a strange gloss to put upon the purpose of the Act, which can only be valid if it is limited to the emergency created by the war, so that the decisions of the Board fixing their wages will vanish with the emergency. I must assume that the purpose of the Act is, as stated in its title, to encourage women to take the place of men and to work as hard and produce as much as the men would have done if they had remained in their usual employment. Such a purpose is only capable of aiding the war effort in so far as the work done relates to the successful prosecution of the war. There is a great deal of work previously done by men which has no reasonable

(1) (1942) 65 C.L.R., at p. 469.

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connection with the prosecution of the war. The connection between work in the greater part of industry and the prosecution of the war is reasonably clear. Further, because modern industry is so interlocked, I am satisfied that, for the reasons given in *Pidoto's Case* (1), it is within the ambit of the defence power of the Commonwealth to regulate the terms and conditions of work undertaken by women in all industry, but beyond that I am unable to conceive how, except possibly in some special cases, the regulation of the terms and conditions upon which women work, whether they take the place of men or not, can aid in such prosecution. Certainly the regulation of the terms and conditions of the work of women employed in the administrative governmental departments of a State has no such connection.

The second application is a motion for an injunction which, it has been agreed, shall be treated as the trial of the action. In the action the plaintiff, the State of Victoria, claims a declaration that the *Women's Employment Act* 1942 and the Regulations made thereunder are not authorized by any power conferred upon the Parliament of the Commonwealth of Australia so far as they purport to empower the Women's Employment Board to deal with or give a decision upon an application made in respect of female employees of the State of Victoria who are engaged in the preparation and computation of assessments under the *Land Tax Act* 1928 (Vict.), and an injunction restraining the members of the Board from proceeding to hear and give a decision upon an application lodged with the Board on or about 17th May 1944 for a determination of the rate of payment to be made to and the hours and conditions to be observed in respect of females employed by the plaintiff in the preparation and computation of assessments under that Act.

With respect to this application it follows from what I have said that either the Regulations without reg. 5A are still confined to work in industry, in which event they are still valid but do not apply to the State servants in question; or that they are not so confined, in which event, subject to it being possible (as it well may be) to read them down under s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941, they are beyond the defence power and invalid; so that, whichever is the right construction to be placed on the Regulations in their new form, the plaintiff is entitled to succeed.

For these reasons I am of opinion that on the first application the order should be made absolute and that on the second application the declaration should be made.

(1) (1943) 68 C.L.R., at pp. 127, 128.

LATHAM C.J., when pronouncing the order of the Court, said: The Court does not grant an injunction against the members of the Board but assumes that the Board will act in accordance with the declaration made.

Order absolute. Judgment in action for declaration as asked in statement of claim. No order as to costs. Liberty to apply.

Solicitor for the State of Victoria, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the Commonwealth (intervening) and for the defendants in the action, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.