[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN WOOLLEN MILLS LIMITED AND OTHERS . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

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MELBOURNE, *Oct.* 13, 16.

SYDNEY, *Dec.* 11.

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

Constitutional Law—Defence—National security—Regulations—Validity—Control of industry—Organization and distribution of man power—Increase of rates of pay of females in industry—Comparison with other industries—Fairness—National interest—National Security (Female Minimum Rates) Regulations (*S.R.* 1944 *No.* 108).

The *National Security* (*Female Minimum Rates*) *Regulations* make provision whereby the Governor-General may declare any industry to be a vital industry and the Minister may then refer to the Commonwealth Court of Conciliation and Arbitration the question whether the minimum rates of pay for females employed in that industry are unreasonably low in comparison with the minimum rates of pay for females employed in industries which are vitally necessary during the war. The Court is required to consider whether it is in the national interest, and fair and just, to increase minimum rates of pay declared by it to be unreasonably low, and to determine what minimum rates, or amounts in addition to existing prescribed rates, should be paid.

Held, by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that the Regulations are within the defence power of the Commonwealth Parliament; by *Latham* C.J. and *McTiernan* J. on the ground that they are a measure for the organization and distribution of man power and the control of industry; by *Rich* and *Williams* JJ. on the ground that the control of employment in industry is at present within the defence power.

DEMURRER.

Australian Woollen Mills Ltd., a company incorporated in New South Wales, and other companies, some of which were incorporated in that State and others in other States of the Commonwealth, brought an action in the High Court against the Commonwealth and the Minister of State for Labour and National Service. From the plaintiffs' statement of claim it appeared that each of the plaintiffs carried on business in some one or more of the industries described in par. 15 of the statement of claim as set out hereunder. The statement of claim proceeded substantially as follows:—

11. Each of the plaintiffs in the course of carrying on its business in the industry or industries ascribed to it in the preceding paragraphs of the statement of claim employs and intends to employ large numbers of females.

12. The rates of pay and conditions of labour of the said females are in each case governed by awards, orders or determinations of an industrial authority or industrial authorities within the meaning of the *National Security* (*Economic Organization*) *Regulations*.

13. On 19th July 1944 the Governor-General purported to make under the *National Security Act* 1939-1943 the *National Security* (*Female Minimum Rates*) *Regulations*, which were published in the Commonwealth *Gazette* on the same day.

14. On 28th July 1944 the Minister of State for Labour and National Service purported to refer in pursuance of reg. 5 of the *National Security* (*Female Minimum Rates*) *Regulations* to the Commonwealth Court of Conciliation and Arbitration constituted of the Chief Judge and at least two other judges for inquiry and determination in respect of certain industries and occupations described as "vital industries and occupations within a vital industry" and specified in a schedule to the reference the following questions :—

"(*a*) The question as to whether under awards, orders, determinations and industrial agreements in force at the date of this reference the minimum rates of pay for females employed in those industries and occupations are unreasonably low in comparison with the minimum rates of pay for females employed in other industries or parts thereof which are vitally necessary during the war ; and

(*b*) If so, the question as to whether it is in the national interest, and fair and just, to increase the minimum rates of pay so determined to be unreasonably low ; and

(*c*) If so, the question as to what minimum rate or rates of pay for females shall be paid in those industries and occupations, or what amount or amounts shall be paid in addition to the rates prescribed by the awards, orders, determinations or industrial agreements in force at the date of the determination ; and

(*d*) The question as to the period (not extending beyond six months after the termination of the present war) in respect of which the rate or rates or amount or amounts shall be paid."

15. The industries and occupations specified in the schedule to the said reference were :—

The woollen and worsted textile manufacturing industry.

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The cotton textile manufacturing industry.
The knitting and hosiery manufacturing industry.
The fruit and vegetable preserving, pickle and jam-making, fruit juices and cordials preparation industry.
The meat preserving industry.
The milk processing, butter, cheese and margarine making industry.
The egg processing and packing industry.
The boot and shoe making industry.
The aircraft manufacturing and assembling industry.
The industries carried on in motor body, coach or carriage-building establishments.
The occupations of the domestic staffs of hospitals, asylums and institutions of a like nature.
The munitions manufacturing industry.

16. By notice published in the Commonwealth *Gazette* on 11th August 1944 the Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration gave public notice of the said reference and required employers or organizations of employers or of employees desiring to obtain leave to appear in pursuance of reg. 7 of the *National Security* (*Female Minimum Rates*) *Regulations* to file in the Registry of the said Court on or before 2nd September 1944 six copies of a submission in writing setting out certain particulars.

17. The said *National Security* (*Female Minimum Rates*) *Regulations* and the said reference to the said Court and the determination by the said Court of the questions aforesaid or any of them are not authorized by the *National Security Act* 1939-1943.

18. The *National Security Act* 1939-1943, if and so far as upon its true construction it authorizes the making of the said Regulations or any of them or the said reference or the determination by the said Court of the said questions or any of them, is not authorized by any power conferred by the Constitution of the Commonwealth.

And the plaintiffs claim :—

(*a*) A declaration that the said *National Security* (*Female Minimum Rates*) *Regulations* and each of them and the said reference are beyond the powers conferred upon the Governor-General by the *National Security Act* 1939-1943 and are void and of no effect.

(*b*) A declaration that the said Act to the extent, if at all, to which it purports to authorize the making of the said Regulations or of the said reference is beyond the powers of the Commonwealth Parliament and is void and of no effect and that the said Regulations and the said reference are void and of no effect accordingly.

The defendants demurred to the statement of claim.

Grounds of the demurrer were that :—

(1) The *National Security* (*Female Minimum Rates*) *Regulations* are within the powers to make regulations conferred upon the Governor-General by the *National Security Act* 1939-1943 and are valid.

(2) The references mentioned in par. 14 of the statement of claim are authorized by the said *National Security* (*Female Minimum Rates*) *Regulations* and are valid and effective.

(3) The *National Security Act* 1939-1943, including such parts thereof as authorize the making of the Regulations above mentioned, is a valid and effective exercise of the legislative powers of the Parliament of the Commonwealth.

The relevant regulations are set out in the judgments hereunder.

It was agreed that counsel for the plaintiffs should begin.

Fullagar K.C., *Stanley Lewis* and *Tait*, for the plaintiffs.

Fullagar K.C. The Regulations in question are not within the defence power, and the Commonwealth has no other power that could support them. The Regulations present some difficulties of construction. The meaning of reg. 8 (*c*), in particular, is obscure. Moreover, it is not clear whether the words of reg. 5 are confined to industries declared by the Governor-General within the definition of " vital industry " in reg. 4 : in reg. 5 (*a*) the phrase " vitally necessary " appears to be used independently of any declaration by the Governor-General ; under reg. 5 (*a*) it seems that the Court (as defined in reg. 4) may for purposes of comparison consider whether industries are " vitally necessary " even if they have not been declared by the Governor-General. However, any industry whatever —whether or not it has any connection with the war—may be declared a " vital industry " for the purposes of the Regulations, and the purport of the Regulations is to bring about a general regulation of wages in such industries. The mere general regulation of wages as such without reference to anything connected with the war is not within the defence power. The Regulations are really a piece of general social legislation directed to raising the wages of women in pursuance of the idea of " equal pay for equal work." They are much more far-reaching than any Regulations which have previously been upheld under the defence power : they are rather of the kind held invalid in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (1). The *Female*

(1) (1943) 67 C.L.R. 413.

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Minimum Rates Regulations cannot be supported by any supposed analogy with the Regulations upheld in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1). That was an entirely different type of case; the connection with defence which was there found cannot be found in the present Regulations. The Federal power over industry in war-time extends, no doubt, to anything which can assist in the prosecution of the war or the defence of the Commonwealth; but the mere regulation of industrial conditions as such is not within the power. The question to be resolved in respect of any particular regulation is: "Where is the connection between this particular law and the defence of the Commonwealth?" The necessary connection does not exist in the present Regulations. [He referred to *Pidoto* v. *Victoria* (2); *Reid* v. *Sinderberry* (3); *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (4); *R.* v. *University of Sydney*; *Ex parte Drummond* (5).]

Tait. Reg. 3, purporting to state the objects of the *Female Minimum Rates Regulations*, is not connected up in any way with the rest of the Regulations; it is not repeated or reflected in any other of the regulations. The language of the other regulations cannot, on any reasonable construction, be limited by reference to reg. 3. For instance, the inquiry and determination of the question under reg. 5 (*a*) whether certain rates of wages are "unreasonably low" are left quite at large. The Regulations supply no standard of "unreasonableness", nor do they link up the question at all with the war effort. The use in reg. 5 (*b*) of the phrase "in the national interest" is significant; it shows that the power conferred on "the Court" (as defined in reg. 4) was not meant to be limited by reference to "national security" or defence at all. Legislation (by Parliament or its delegate) of such a kind, leaving a matter to be determined by another body, cannot be described as an exercise of the defence power unless it in some way indicates that the power to determine is to be exercised only for purposes within the defence power. There is no such indication in the present Regulations; on the contrary, they are expressed to confer a much wider power, one which has no necessary relation to defence or national security. Of course, if the Court is prepared to decide that the defence power gives the Commonwealth during war complete control of all industry

(1) (1943) 67 C.L.R. 347: See, per *Latham* C.J., at p. 358; per *Rich* J., at p. 375; per *Starke* J., at p. 380; per *McTiernan* J., at p. 386; per *Williams* J., at pp. 403, 404.

(2) (1943) 68 C.L.R. 87.
(3) (1944) 68 C.L.R. 504.
(4) (1943) 67 C.L.R. 116.
(5) (1943) 67 C.L.R. 95.

so that it may legislate in any way it thinks fit with regard to it, the plaintiffs must fail; but it would be difficult to reconcile such a decision with previous decisions of the Court. [He referred to *Pidoto's Case* (1).]

Barry K.C. (with him *P. D. Phillips*), for the defendants. The *Female Minimum Rates Regulations* in reality are concerned with the war problem of the mobilization of female labour. The Regulations may be construed either (1) as being capable of application to any industry by order of the Governor-General; or (2) as being capable of application only to war industries, industries which are necessary for the effective prosecution of the war. On either construction they are valid. They must be considered in the light of the present war situation. (1) The Government has established a Food Control Organization; (2) production of food, textiles and the like to meet commitments is now an urgent war task. Labour has to be directed into industries which have always employed female labour and which have developed a new importance and which must therefore be expanded. The Regulations are declared to have as their object the effective transfer of female labour. If an examination of their terms shows them capable conceivably of achieving that object, they are valid as the law mobilizing the residents of Australia for its defence (*Reid* v. *Sinderberry* (2)). On the first construction, "vital industry" is merely a designation which means "such industry as the Governor-General orders." The purpose of the insertion of "vital industry" is to supply a basis for the machinery of the Regulations. The machinery is to require Cabinet consideration before any industry can be made the subject of a reference by the Minister. This is to enable all relevant Government Departments through their respective Ministers to agree in Cabinet before any order is made. A check is thus created so that the need for a stable war economy can be served. If the object be as declared, the Regulations are within power. They are concerned with the mobilization of labour for production purposes, and are complementary to manpower control. They thus fall within the conception expressed in *Reid* v. *Sinderberry* (3); *Pidoto's Case* (4); *Victoria* v. *Foster* (5); *Women's Employment Regulations Case* (6). The

(1) (1943) 68 C.L.R., at p. 100.
(2) (1944) 68 C.L.R. 504.
(3) (1944) 68 C.L.R., per *Latham* C.J. and *McTiernan* J., at pp. 512, 513; per *Starke* J., at p. 515; per *Williams* J., at pp. 522, 523.
(4) (1943) 68 C.L.R., per *Latham* C.J., at pp. 102, 104; per *Williams* J., at pp. 127, 128.
(5) (1944) 68 C.L.R. 485, per *Latham* C.J., at pp. 494, 495; per *McTiernan* J., at p. 499; per *Williams* J., at p. 502.
(6) (1943) 67 C.L.R., per *Latham* C.J., at p. 357; per *Williams* J., at p. 403.

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effective transfer of labour is part of a flexible economy. The fewer the obstacles to the transfer, the more flexible and therefore productive for war purposes the economy, and the more flexible the economy, the more adaptable it is. The transfer of labour involves (1) introduction of labour into the particular industry; (2) causing labour to remain in the industry. The administrative problem is thus transfer plus industrial stability. The transfer may be achieved by persuasion, by compulsion, by threat of compulsion. It is legitimate for the Government to see that conditions under which persons are directed to labour are fair and just. The removal of wage disparities, if determined by the Court, will or may (1) facilitate transfer because it will assist to minimize compulsion to go into the industry; (2) lessen absenteeism, minimize industrial dissatisfaction and promote efficiency and therefore productivity in the industry. The Regulations are complementary to the scheme of wage pegging introduced by the *Economic Organization Regulations* because they permit of careful adjustments to obviate or remove causes of dissatisfaction that may lead to industrial unrest. The Regulations have the object declared in reg. 3: See regs. 5, 8 (*b*) and (*c*). "Fair and just" relates to individuals; "national interest" to economic stability. On the second construction, "for war purposes" must be supplied as part of the definition of vital industry. The definition is incomplete, because "vitally necessary" must relate to some purpose. There is a presumption in favour of validity, and the Governor-General's power to order must be presumed not to exceed the defence power. The Regulations must be construed as a whole, and the purpose to which the phrase "vitally necessary" relates must be found in the purpose recited in the objects clause, reg. 3. Regulations relating to the effective transfer of labour are within power as they relate to war industries. If the Governor-General were to declare an industry vitally necessary when in fact it was not, the declaration would be bad and outside the defence power and could be challenged by appropriate proceedings (*Reid* v. *Sinderberry* (1)).

Gowans, for certain trade unions and the members thereof (intervening by leave granted on the condition that the interveners bear their own costs in any event), adopted the argument submitted on behalf of the defendants and added:—The expression "vitally necessary" must be construed by reference to the objects stated in reg. 3; it relates to the maintenance of supplies and services essential to the life of the community. Whether an industry is "vitally necessary" in that sense is a matter which the Court may examine

(1) (1944) 68 C.L.R., per *Rich* J., at p. 514; per *Starke* J., at p. 516.

notwithstanding a declaration by the Governor-General. Although the Regulations do not in so many words confer on the Governor-General a power to declare a "vital industry", such a power must be inferred from the definition of "vital industry" in reg. 4, and it is open to the Court to determine whether a declaration is a valid exercise of the power. The power under reg. 5 to "inquire and determine" is limited to vital industries validly declared by the Governor in Council, and the comparison in reg. 5 (*a*) is between such a declared industry and other industries which, whether declared or not, are in fact bound to be "vitally necessary during the war."

Fullagar K.C., in reply. The definition of "vital industry" does not in any relevant legal sense confer a power, and a declaration of an industry could not be challenged as could a purported exercise of a power. As to the narrower construction of the Regulations suggested on behalf of the defendants, the determination to be made under reg. 5 is not, even on that construction, a determination with reference to war-time necessities or conditions, but is a matter of general social policy.

Cur. adv. vult.

Dec. 11.

The following written judgments were delivered :—

LATHAM C.J. Demurrer to a statement of claim in which the plaintiffs challenge the validity of the *National Security* (*Female Minimum Rates*) *Regulations*, Statutory Rules 1944 No. 108, made under the *National Security Act* 1939-1943. Reg. 3 is as follows :— "The objects of these Regulations are, for the purposes of the defence of the Commonwealth and the more effectual prosecution of the war, to facilitate the effective transfer of females from the work in which they are ordinarily engaged to work which may, from time to time, be more necessary during the war, by reducing disparities in the minimum rates of pay for females under existing awards, orders, determinations or industrial agreements." There is no express provision (as in the case of other Regulations—e.g., those considered in *R.* v. *University of Sydney*; *Ex parte Drummond* (1)), that the Regulations shall be "administered and construed accordingly." But even if there were such a provision it would not be decisive when the question of the constitutional validity of the Regulations arose for decision : Cf. *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (2).

Reg. 4 defines "vital industry" as meaning "any industry which is declared by the Governor-General, by order, to be vitally

(1) (1943) 67 C.L.R. 95.

(2) (1942) 65 C.L.R. 373, at p. 432.

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necessary." I agree with the contention on behalf of the plaintiffs that under this provision the Governor-General may declare any industry at all to be vitally necessary. Where any action taken under the Regulations depends upon the existence and validity of such a declaration, it would not, in my opinion, be within the province of a court to consider and determine whether the phrase "vitally necessary" should be construed as meaning essential to the life or welfare of the community as a whole or as meaning essential in relation to some war purpose or object—or whether the industry in question was in either sense vitally necessary in fact. An order of the Governor-General could make any industry a vital industry for all the purposes of the Regulations.

Reg. 5 is in the following terms :—

"The Minister may, in respect of any vital industry or part of a vital industry or occupation within a vital industry, refer to the Court for inquiry and determination—

(*a*) the question as to whether under awards, orders, determinations and industrial agreements in force at the date of the reference the minimum rates of pay for females employed in the industry, part or occupation are unreasonably low in comparison with the minimum rates of pay for females employed in other industries or parts thereof which are vitally necessary during the war ; and

(*b*) if so, the question as to whether it is in the national interest, and fair and just, to increase the minimum rates of pay so determined to be unreasonably low ; and

(*c*) if so, the question as to what minimum rate or rates of pay for females shall be paid in the industry, part or occupation, or what amount or amounts shall be paid in addition to the rates prescribed by the awards, orders, determinations or industrial agreements in force at the date of the determination ; and

(*d*) the question as to the period (not extending beyond six months after the termination of the present war) in respect of which the rate or rates or amount or amounts shall be paid."

Reg. 6 provides that the Court shall, upon receipt of a reference from the Minister, proceed to inquire into and determine the questions specified in the reference and that for that purpose the Court shall have the powers of the Court of Conciliation and Arbitration.

Reg. 7 provides that interested parties may be allowed to appear.

Reg. 8 (*a*) provides that, in making its inquiry and determination, the Court shall not be bound by any of the provisions of Part V. of

the *National Security (Economic Organization) Regulations*—the Regulations which provide for the " pegging " of wages. Reg. 8 (*b*) provides that, in making its inquiry and determination on a reference, the Court " shall not have regard to any submission that it is necessary to offer a differential monetary inducement or attraction to promote the recruitment of female labour for vital industries."

Reg. 9 provides that rates of pay fixed by a determination shall be paid by the employers in accordance with the determination as the minimum rates in respect of females employed by them in the relevant industry. The proviso to this regulation prevents the reduction of any wages by a determination made under the Regulations.

Under these provisions the Governor-General may declare any industry to be a vital industry, and the Minister may then refer to the Court the question whether the minimum rates of pay for females employed in the industry are unreasonably low in comparison with the minimum rates of pay for females employed in industries which are vitally necessary during the war. The reference in this provision to " vitally necessary " industries must be construed as a reference to industries which are in fact vitally necessary during the war, as distinct from industries which become " vital industries " by reason of a declaration by the Governor-General that they are vitally necessary.

In considering the questions referred the Court is required to determine whether it is in the national interest or fair and just that the minimum rates should be increased. It was urged in argument that this reference to the national interest and to fairness and justice shows that the Regulations are concerned with the general subjects of national interest and fairness and justice, and that they therefore assume that the Commonwealth Parliament has a general power to legislate with respect to all matters of national interest or of fairness and justice. This, however, is not a true interpretation of the provision. The provision means only that these matters are to be taken into account by the Court in reaching a determination. The *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 25, provides that in the hearing and determination of every industrial dispute, and in exercising any duties or powers under or by virtue of the Act, the Court shall act according to equity, good conscience, and the substantial merits of the case. This provision does not mean that the Commonwealth Parliament has assumed a right to legislate on the requirements of equity and good conscience generally. The direction to the Court which is contained in the regulation now under consideration is of the same character.

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In the argument on behalf of the plaintiffs much attention was devoted to reg. 8 (*b*), which excludes any consideration by the Court of what has been called an attraction wage for the purpose of promoting the recruitment of female labour for vital industries. It was contended that this provision, prohibiting the Court from doing anything to attract female labour into vital industries, shows that the Regulations are not directed towards providing female labour for such industries, and that therefore the Regulations cannot be regarded as concerned with any object associated with defence, even if the phrase "vital industry" is construed as meaning vital in relation to defence purposes. It was urged that this provision excludes from the consideration of the Court a matter which might possibly have supported the Regulations under the defence power.

The provision in question does show that it is not the object of the Regulations to attract female labour into any particular industries. Reg. 3 declares that it is the object of the Regulations to facilitate the effective transfer of females from the work in which they are ordinarily engaged to work which may, from time to time, be more necessary during the war, by reducing disparities in minimum rates of pay for females under existing awards, &c. This provision states in express terms what might have been inferred from the Regulations as a whole, and particularly from reg. 8 (*b*). The object of the Regulations is not to increase the number of females employed in vital industries, but to facilitate effective transfers of females between industries from time to time as changes in industrial requirements (necessarily largely determined by the war) may be thought to render it wise to redistribute female labour power. In order to achieve this object reg. 5 enables the Minister to refer to the Court the question whether rates of wages in declared industries (which may be competing for a limited available amount of female labour) are unreasonably low.

Under the *National Security* (*Man Power*) *Regulations*, Statutory Rules 1942 No. 34 as amended, there is power to direct any person resident in Australia to engage in any employment under the direction and control of any employer specified in the direction, or to perform any work or services specified in the direction. The practical working of those Regulations will, so far as female labour is concerned, be facilitated by removing disparities in rates of pay in the various industries in which female labour is employed. Redistributions of such labour thought to be wise will be facilitated by the absence of such disparities, whether the powers of compulsion conferred by the *Man Power Regulations* are actually utilized, or whether they are only held in reserve, reliance being placed upon inducement or persuasion rather than upon compulsion.

In my opinion the scheme set up by the Regulations in question provides a method of utilizing to the maximum the female labour of the country under conditions determined by the Arbitration Court to be reasonable in the national interest and fair and just. It has already been held in *Reid* v. *Sinderberry* (1) that the *Man Power Regulations* are within the defence power of the Commonwealth. It was so held upon the ground that in time of war the organization of the working power of the community was a subject directly connected with the defence of the Commonwealth. Upon this ground, in my opinion, the Regulations now challenged should be held to be valid.

It has, however, been argued that past decisions of the Court prevent the Court from now holding that these regulations, assuming, as in my opinion they do, a power to fix rates of wages for female labour in any industry whatever, are valid. Several decisions have been given by the Court with reference to the defence power in relation to industry. Each decision was given with respect to some particular regulations and it was not necessary in any of the cases to decide whether the Commonwealth Parliament had in time of war a general power to control wages in industrial employment. (In referring to these cases I do not examine those relating to employees of the States engaged in governmental services, as distinct from industrial employment. In such cases there are special circumstances which distinguish them from cases of ordinary industrial employment.)

In *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (2), the Court upheld the validity of the *Women's Employment Act*, which gave large powers of regulating the employment of women who were engaged in work which had theretofore or usually been performed by males. In that case the Court was dealing with a particular problem arising from the substitution of women for men in industry, and it was held that this particular matter was sufficiently connected with considerations of defence to justify the regulations under the defence power. In *Pidoto* v. *Victoria* (3), the regulations which were under consideration dealt with industrial disputes and industrial unrest in wartime, and it was held that the Commonwealth Parliament had power to legislate with respect to such matters, notwithstanding the limitation of the power conferred by s. 51 (xxxv.) of the Constitution to inter-State industrial disputes. This case did not formally decide that the Commonwealth Parliament in time of war had a general

(1) (1944) 68 C.L.R. 504. (2) (1943) 67 C.L.R. 347.
(3) (1943) 68 C.L.R. 87.

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power of dealing with all industrial matters, but the reasons for judgment show that the continuity of industrial production in time of war was regarded as a matter which had a direct connection with defence. The actual decision, however, related only to industrial disputes and industrial unrest. In *Reid* v. *Sinderberry* (1) the Court upheld the validity of the *Man Power Regulations* for reasons which, as I have already said, I regard as applying to this case. The basis of that decision was that the organization of the resources, including the man power, of the community, was a function which the Government of the Commonwealth could validly exercise in time of war. The organization and effective utilization of man power under modern conditions must include provision for securing the payment of fair wages to all the classes of labour concerned.

The plaintiffs relied strongly upon *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (2). In that case it was declared that the fact that legislation might promote the general welfare of the community was not in itself sufficient to bring the legislation within the defence power: See also *Victoria* v. *The Commonwealth* (*Public Service Case*) (3). It has been stated more than once with reference to the *Industrial Lighting Case* (2) that the interpretation of the defence power sometimes raises questions of degree: See, for example, *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (4); *Reid* v. *Sinderberry* (5). In the *Industrial Lighting Case* (2) the subject matter of the Regulations was considered by the Court to be remote from considerations of defence. But, for reasons which I have stated, the rates of wages payable in industry have in my opinion not only a real, but a particularly close and important, connection with defence.

I find it difficult even to think of a modern State conducting a large-scale war without the power of controlling the industry of the country. In the organization of the working capacity of the people and the provision of conditions which will make that working capacity available with a minimum of friction and of economic and industrial disturbance the Commonwealth Parliament is, in my opinion, exercising a power in relation to a subject which is most directly connected with defence.

In my opinion the demurrer should be allowed. As this decision determines the whole case, there should be judgment in the action for the defendants.

(1) (1944) 68 C.L.R. 504.
(2) (1943) 67 C.L.R. 413.
(3) (1942) 66 C.L.R. 488, at p. 509.
(4) (1944) 68 C.L.R. 485, at p. 492.
(5) (1944) 68 C.L.R. 504, at p. 514.

RICH J. The question raised by this demurrer whether the *National Security* (*Female Minimum Rates*) *Regulations* are a valid exercise by the Executive of the power delegated to it by the *National Security Act* 1939-1943 to exercise the defence power conferred by s. 51 (vi.) of the Constitution upon the Commonwealth Parliament can, I think, be briefly answered. In my opinion these Regulations have some bearing on the distribution of female labour in industry, in that they tend to remove disparities in the rates of pay for females working under various orders, awards, determinations and industrial agreements and as a consequence they facilitate the transfer of female labour from industries at present necessary to the war effort to industries which are becoming more necessary as the war proceeds. Although it is a matter of degree upon which opinions may differ, Regulations such as those under consideration here have, in my opinion, some nexus between their subject matter and the defence power of the Commonwealth, and these Regulations, therefore, should be regarded as a valid exercise of the power conferred upon the Executive by the Act in question.

The demurrer should be allowed and judgment entered for the defendants.

STARKE J. The statement of claim in this action challenges the validity of the *National Security* (*Female Minimum Rates*) *Regulations* and a reference made by the Minister of State for Labour pursuant thereto and also the Act itself in so far as it purports to authorize the Regulations and reference. And the defendants have demurred to the statement of claim.

The substantial question is whether the constitutional power of the Parliament of the Commonwealth to make laws with respect to the naval and military defence of the Commonwealth and the several States authorizes the Regulations. We live in perilous times, and war creates many problems, political, financial, economic, industrial and so forth, and this Court has supported much remarkable legislation and regulation under this power. Thus we have the *National Security Act* authorizing the Governor-General to make regulations for securing the public safety and defence of the Commonwealth (*Wishart* v. *Fraser* (1)), regulations for mobilizing the man power of Australia (*Reid* v. *Sinderberry* (2)), for controlling the prices of commodities (*Farey* v. *Burvett* (3)), for controlling the relation of landlord and tenant and of rents (*Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (4)), the marketing of commodities

(1) (1941) 64 C.L.R. 470.
(2) (1944) 68 C.L.R. 504.
(3) (1916) 21 C.L.R. 433.
(4) (1943) 67 C.L.R. 1.

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(*Andrews* v. *Howell* (1)), the settlement of industrial, including coal-mining, disputes (*Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (2) ; *Pidoto* v. *Victoria* (3)), the employment of women in industry (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (4)), and, most remarkable of all, legislation for the establishment of a uniform system of taxation in relation to income tax and the taking over from the States their administrative departments of income tax (*South Australia* v. *The Commonwealth* (5)). The application of these decisions must raise difficult questions when it becomes clear that the circumstances which called them forth have passed and there is no justification for the continued exercise of so exceptional an interference on the part of the Commonwealth with matters normally within the constitutional powers of the States : Cf. *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co. Ltd.* (6). But that time has not yet arrived. The decisions of this Court, however, are so far-reaching that the Commonwealth now claims almost plenary authority under the defence power ; in any case, that in time of war the constitutional power of the Commonwealth with respect to defence extends to the regulation of wages of employees and conditions of employment in all industries whatever. The argument is based upon such generalities as that the regulations deal with problems which have arisen from the war ; or that the regulations are sufficiently connected with defence and the war because they provide methods of dealing with industrial matters that may lead to industrial unrest or that the regulations conceivably, even if incidentally, aid the effectuation of the defence power. No doubt passages may be cited from the cases to this effect, but the defence power is not without any limits whatever (*Victoria* v. *The Commonwealth* (7)). And, extensive as is the defence power, it does not, as I said in the *Women's Employment Case* (8), enable the Commonwealth " to seize control of the whole social, industrial and economic conditions of Australia and legislate for them as it thinks proper." Consequently, the particular legislation or regulation must be examined in the light of any relevant surrounding facts, the true nature and character of the legislation and its operation and legal effect considered. The legislation or regulation 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. But I have stated the authorities for

(1) (1941) 65 C.L.R. 255.
(2) (1942) 66 C.L.R. 161.
(3) (1943) 68 C.L.R. 87.
(4) (1943) 67 C.L.R. 347.
(5) (1942) 65 C.L.R. 373.
(6) (1923) A.C. 695, at p. 706.
(7) (1942) 66 C.L.R. 488, at pp. 514, 515.
(8) (1943) 67 C.L.R. 347, at p. 380.

these propositions on other occasions (*Victoria* v. *The Commonwealth* (1); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (2); *Reid* v. *Sinderberry* (3)). And it is from this point of view that I examine the present Regulations. They are called *Female Minimum Rates Regulations*, and their objects as stated in clause 3 (though this is not conclusive (*South Australia* v. *The Commonwealth* (4); *R.* v. *University of Sydney*; *Ex parte Drummond* (5))) are for the purposes of the defence of the Commonwealth and the more effectual prosecution of the war, to facilitate the effective transfer of females from work in which they are ordinarily engaged to work which may be more necessary during the war, by reducing disparities in the minimum rates of pay for females under existing awards, orders, determinations and industrial agreements.

Clause 5 of the Regulations raises the real question in this case. That clause enables the Minister in respect of an industry declared vital or a part of that industry or an occupation within that industry to refer to the Commonwealth Court of Conciliation and Arbitration for inquiry and determination :—

(*a*) The question as to whether under awards, orders, determinations and industrial agreements in force at the date of the reference the minimum rates of pay for females employed in the industry, part or occupation are unreasonably low in comparison with the minimum rates of pay for females employed in other industries or parts thereof which are vitally necessary during the war; and

(*b*) if so, the question as to whether it is in the national interest, and fair and just, to increase the minimum rates of pay so determined to be unreasonably low; and

(*c*) if so, the question as to what minimum rate or rates of pay for females shall be paid in the industry, part or occupation, or what amount or amounts shall be paid in addition to the rates prescribed by the awards, orders, determinations or industrial agreements in force at the date of the determination; and

(*d*) the question as to the period (not extending beyond six months after the termination of the present war) in respect of which the rate or rates or amount or amounts shall be paid.

Clause 4 provides: A "vital industry" under the Regulations "means any industry which is declared by the Governor-General . . . to be vitally necessary", but the regulation does not in

(1) (1942) 66 C.L.R., at pp. 513, 514.
(2) (1943) 67 C.L.R. 413, at p. 421.
(3) (1944) 68 C.L.R., at p. 515.
(4) (1942) 65 C.L.R. 373, at p. 432.
(5) (1943) 67 C.L.R. 95, at p. 102.

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terms state for what purpose the industry is vitally necessary; but a reasonable implication from the character and other provisions of the Regulations is that the industry is vitally necessary for the purposes of defence and the more effectual prosecution of the war. Standing alone, clause 4 is innocuous. But it is not the declaration so much as the powers dependent upon the declaration that require consideration. The declaration itself is an act essentially of statesmanship, which courts of law cannot or at least are loath to consider: Cf. *Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (1).

Still it is for the courts of law to determine whether the powers actually conferred by the Regulations transcend the Constitution notwithstanding a declaration by the Governor-General that they are "vitally necessary" for the defence of the Commonwealth. Thus I cannot accept the proposition that the defence power enables the Commonwealth to assume control in time of war over all industry whatever in Australia. It may of course pay its own employees such wages and prescribe for their benefit such conditions of employment as have constitutional sanction, but it cannot regulate the rates of wages and the conditions of employment generally merely because of the existence of a state of war. Accordingly, in my opinion, a regulation authorizing the control of Australian industry generally or the regulation of wages, conditions of employment and so forth in industry generally transcends the Constitution notwithstanding a declaration by the Governor-General that all industries are vitally necessary. The declaration is a preliminary step and the basis of the grant of powers contained in the Regulations (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (2)). But it is the function of the courts of law to determine whether those powers do or do not transcend the Constitution. In this case neither the Governor-General's declaration nor the Minister's reference covers all industries whatever in Australia, but they are confined to certain specified industries or occupations within an industry. Still they are very extensive:

The woollen and worsted textile manufacturing industry.
The cotton textile manufacturing industry.
The knitting and hosiery manufacturing industry.
The fruit and vegetable preserving, pickle and jam-making, fruit juices and cordials preparation industry.
The meat preserving industry.
The milk processing, butter, cheese and margarine making industry.

(1) (1923) A.C 695, at p. 706.

(2) (1943) 67 C.L.R. 335, at p. 344.

The egg processing and packing industry.
The boot and shoe making industry.
The aircraft manufacturing and assembling industry.
The industries carried on in motor body, coach or carriage-building establishments.
The occupations of the domestic staffs of hospitals, asylums and institutions of a like nature.
The munitions manufacturing industry.

Some question may arise whether the occupations of the domestic staffs of hospitals, asylums and institutions of a like nature are occupations within an industry, but, if not, the whole declaration and reference would not thereby be avoided, though it would not make that which is not an occupation within an industry such an occupation.

Reference to the *Women's Employment Regulations*, the *Economic Organization Regulations* and the *Man Power Regulations* (which I take to be relevant surrounding facts) is desirable before considering the Regulations now attacked. By the *Women's Employment Regulations* it was provided that the rate of payment to be made to any adult female in certain categories should not be less than 60 per cent nor more than 100 per cent of the rate of payment made to adult males employed on work of a substantially similar character, and by the *Economic Organization Regulations* industrial authorities were precluded from altering in respect of any employment the rate of remuneration applicable to that employment on 10th February 1942, and by the *Man Power Regulations* any person resident in Australia might be directed to engage in any employment specified in the direction. The provision in the *Women's Employment Regulations* led to a considerable increase in the wages of women within the categories covered by those Regulations, and naturally women who were bound by State or Federal awards, orders or determinations or by industrial agreements which provided lower rates of pay sought or desired the higher rates. And the *Economic Organization Regulations*, which pegged wages, prevented as a general rule any increase in wages. An object of the Regulations is to facilitate the effective transfer of females engaged in work during war by reducing disparities in the minimum rates of females under existing awards, orders, determinations or industrial agreements. All these awards, orders and determinations, it should be understood, have the sanction of Federal or State legislation, and industrial agreements are probably in the same position. A real disparity, however, was created by the Commonwealth itself by the *Women's Employment Regulations*. And, disparities or no disparities, the *Man Power Regulations* conferred authority to transfer females from one employment to another

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if so directed by the proper authority. But the *Female Minimum Rates Regulations* provide that the Arbitration Court should not be bound by the provisions of the *Economic Organization Regulations* and give it practically a free hand in fixing the rates of pay in industries covered by the Regulations, subject only to this, that the Court should not have regard to any submission that it is necessary to offer a differential monetary inducement or attraction to promote the recruitment of female labour for vital industries and that it should not express its determination so as to increase the rate of remuneration of any female employment for which the basic rate, together with any margin or other allowance, immediately prior to the date of its determination, is equal to or exceeds the total amount payable as the minimum rate under the Court's determination. Minimum rates of remuneration under awards, orders and determinations, I may observe, tend in Australia to become the normal and the maximum rates of remuneration. But from all this it appears that the *Female Minimum Rates Regulations* operate to reduce disparities in industries which in fact " are vitally necessary during the war " and those which are not vitally necessary but are simply declared by the Governor-General to be vitally necessary ; further that attraction wages for " vital industries " are forbidden ; that the purpose of the Regulations is not to increase the rates of pay for the purpose of attracting females to industries declared to be " vital " whether those industries were in fact vitally necessary during war or not, but because those wages are unreasonably low, although all such rates had been fixed pursuant to Federal or State laws ; further still, that disparities had been created in the minimum rates of pay for females not owing to war conditions but by reason of the exercise by the Commonwealth of the defence power and its pegging regulations ; and finally that the industries covered by the declaration and reference are with two exceptions industries in which females had been employed long before the war at rates fixed under Federal and State laws or industrial agreements operating under those laws ; though no doubt those industries are now largely engaged in war work.

The result of this examination satisfies me that the *Female Minimum Rates Regulations* do not fall within the category of laws with respect to naval or military defence, but within the category of laws for the improvement and betterment of the social and industrial conditions of females engaged in certain specified industries, which is a subject matter within the constitutional power of the States.

The demurrer should be disallowed.

McTIERNAN J. In my opinion the demurrer should be allowed. I have read the reasons for judgment of his Honour the Chief Justice and agree entirely with them. In my opinion the case could not be decided in the plaintiffs' favour without deserting the reasoning upon which the *Women's Employment Case* (1), *Pidoto* v. *Victoria* (2), and *Reid* v. *Sinderberry* (3) were decided.

WILLIAMS J. This demurrer raises the question whether the *National Security* (*Female Minimum Rates*) *Regulations* are a valid exercise by the Executive of the power delegated to it by the *National Security Act* 1939-1943 to exercise the defence power conferred upon the Commonwealth Parliament by s. 51 (vi.) of the Constitution.

Reg. 4 defines " vital industry " to mean any industry which is declared by the Governor-General to be vitally necessary. The *National Security Act* is entituled an Act to make provision for the safety and defence of the Commonwealth and its Territories during any war in which His Majesty is or may be engaged ; s. 19 of that Act provides that the Act shall continue in operation until a date to be fixed by proclamation, and no longer, but in any event not longer than six months after His Majesty ceases to be engaged in war. Reg. 3 states that : " The objects of these Regulations are, for the purposes of the defence of the Commonwealth and the more effectual prosecution of the war, to facilitate the effective transfer of females from the work in which they are ordinarily engaged to work which may, from time to time, be more necessary during the war, by reducing disparities in the minimum rates of pay for females under existing awards, orders, determinations or industrial agreements ".

The Court was therefore invited by counsel for the Commonwealth, if it was necessary to do so in order to uphold the validity of the Regulations, to construe the words " vitally necessary " in this context to mean vitally necessary for the defence of the Commonwealth and the more effectual prosecution of the war. But I am unable to place this restricted meaning on the words. They were intended, I think, to confer upon the Governor-General, that is, upon the Federal Executive Council, power to declare any industry to be a vitally necessary industry and not to leave the question whether any particular industry was in fact a vitally necessary industry for these purposes open to review by the court. But I think it is apparent from reg. 3 that the Regulations only intend that any industry which is or becomes necessary for these purposes

(1) (1943) 67 C.L.R. 347. (2) (1944) 68 C.L.R. 87.
(3) (1944) 68 C.L.R. 504.

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should be declared to be a vital industry so that a declaration which declared an industry to be vital which had no connection with these purposes would not be a bona fide exercise of the power.

In view of the objects stated in reg. 3, counsel for the Commonwealth contended that the Regulations were intended to assist the effective administration of the *Man Power Regulations* which were held to be valid by this Court in *Reid* v. *Sinderberry* (1). The Court, in deciding upon the constitutional validity of legislation, and particularly of legislation under the defence power during the war, the ambit of which from time to time depends so greatly upon the conditions which exist from time to time, is entitled to take into consideration relevant facts that are common knowledge. The challenged Regulations were gazetted on 19th July 1944, and at that time it was common knowledge, as counsel said, that Australia was becoming more and more a base of supply for the armed forces of the allies engaged in the war against Japan. It follows from this that industries which were less important in the earlier stages of the prosecution of the war in the Pacific, when Australia was in danger of invasion and the major emphasis had to be placed on the production of munitions, have become more important now that the major emphasis may have to be placed on the production of food supplies. It is also common knowledge, and the awards can speak for themselves if necessary, that in many of the industries producing munitions the wages of women have been fixed at 90 per cent of men's wages by the Women's Employment Board. The purpose of the present Regulations is to enable the Commonwealth Court of Conciliation and Arbitration to raise the minimum rates of pay of females in vital industries or parts of vital industries or occupations where they are unreasonably low in comparison with the minimum rates of pay for females employed in other industries or parts thereof which are vitally necessary during the war. The Regulations do not place an exact limit upon the extent to which the minimum rates may be raised. This is left to the discretion of the Court. But the Court is given certain general directions in the matter, the general trend of which is to require the Court to bring the new minimum rates, where it is in the national interest and fair and just to do so, into reasonable conformity with the rates with which they are to be compared.

The validity of the Regulations has been attacked on the ground that they are simply general social legislation and have no sufficient connection with the war, whatever test of what is a sufficient connection is adopted. I have indicated in several previous judgments, the

(1) (1944) 68 C.L.R. 504.

latest being *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*; *Victoria* v. *Foster* (1), what I consider to be a sufficient connection. Particular reliance was placed by counsel for the plaintiffs upon reg. 8 (*b*), which provides that in making its inquiry and determination upon a reference the Court shall not have regard to any submission that it is necessary to offer a differential monetary inducement or attraction to promote the recruitment of female labour for vital industries. It was submitted that this provision indicated that the Regulations in their scope and purpose went far beyond the objects stated in reg. 3 and showed that these were not the real objects of the Regulations at all. But I cannot agree with this submission. The purpose of reg. 8 (*b*) is, to my mind, to make it clear that it is not the function of the Court under the Regulations to fix a minimum rate so attractive that women will be induced thereby to seek to change from one occupation to another. Such a diversion of woman power falls within the province of the *Man Power Regulations*. The general object of the Regulations is to keep the minimum rates in all industries considered from time to time to be vitally necessary in the changing course of the war on a reasonably level basis, so that work in any of these industries will be equally attractive, and thereby, to apply the words of reg. 3, to facilitate the effective transfer of females from the work in which they are ordinarily engaged to work which may from time to time be more necessary during the war. Reading the Regulations as a whole it can be said, I think, if I might venture to adapt in substance the words used by Lord *Atkin* in delivering the judgment of the Privy Council in *Abitibi Power and Paper Co.* v. *Montreal Trust Co.* (2) to the present case, that there is no reason to reject the statement of the Executive, contained in reg. 3, that the power is given to the Court for the objects therein mentioned. The increase in the rates will, of course, enure for the benefit of those women already employed in industries declared to be vitally necessary as well as for those who are transferred to them from other industries either voluntarily or under compulsion or the threat of compulsion, but this is inevitable and is indeed only fair and just, because the former class of women could not possibly be expected to work for less than the latter class. I agree with the contention of counsel for the plaintiffs that there must be some specific and not a mere general connection between the particular legislation and the prosecution of the war, but in the present case such a connection does arise, in my opinion, from the objects stated in reg. 3. Apart from reg. 3, there is also a sufficient connection because the Regulations are an exercise of the power to

(1) (1944) 68 C.L.R. 485, at pp. 500, 501. (2) (1943) A.C. 536, at p. 548.

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fix the terms and conditions of employment in industry. While it is true that in the *Women's Employment Regulations Case* (1) and in *Pidoto's Case* (2) the Court was dealing with particular aspects of that employment, it seems to me that the effect of these decisions, and particularly of that in *Pidoto's Case* (2) is, as I said in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*; *Victoria* v. *Foster* (3), that it is within the ambit of the defence power for the Commonwealth in time of war to regulate the terms and conditions of work undertaken by women in all industry. I can only repeat the views expressed in *Pidoto's Case* (4), applied *mutatis mutandis* in *Reid* v. *Sinderberry* (5), that: "The amount of industry which possibly has no connection with the war must be so small when compared with industry which has some connection that, in view of the general interlocking, it is, in my opinion, reasonably capable of aiding the war effort for the Commonwealth to legislate to maintain industrial peace in the whole of industry, even if it is open to dispute in the case of some industries whether they have any connection with the prosecution of the war." That line of reasoning is entirely consistent with the unanimous decisions of this Court relating to the *Landlord and Tenant Regulations* (*Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (6)) and the *Prices Regulations* (*Victorian Chamber of Manufactures* v. *The Commonwealth* (7)) and with the joint judgment of the Chief Justice and *McTiernan* J. in the subsequent case of *Reid* v. *Sinderberry* (8). Further, the judgments in two recent decisions of the Supreme Court of the United States of America, *Bowles* v. *Willingham* (9) and *Yakus* v. *United States* (10) relating to the *Emergency Prices Control Act* of that country, contain general statements relating to the ambit of what is there called the war power under the Constitution of the United States of America which are just as wide as the widest construction placed upon the defence power under the Australian Constitution by any member of this Court, and in particular statements which not only strongly support the views expressed in these judgments in *Pidoto's Case* (2) and in *Reid* v. *Sinderberry* (11) that in time of war practical questions such as the feasibility of separating industries which are in fact associated with the prosecution of the war from those which are not and the

(1) (1943) 67 C.L.R. 347.
(2) (1943) 68 C.L.R. 87.
(3) (1944) 68 C.L.R., at p. 502.
(4) (1943) 68 C.L.R., at p. 128.
(5) (1944) 68 C.L.R., at p. 523.
(6) (1943) 67 C.L.R. 1.
(7) (1943) 67 C.L.R. 335.
(8) (1944) 68 C.L.R., at pp. 513, 514.
(9) (1943) 88 Law. Ed. (U.S.) (Advance Opinions) 626.
(10) (1943) 88 Law. Ed. (U.S.) (Advance Opinions) 653.
(11) (1944) 68 C.L.R. 504.

delay caused by litigation to determine whether such an association exists are circumstances which should be taken into account in determining whether legislation is within the ambit of the defence power: See particularly (1). The suggestion made in the *Prices Regulations Case* (2) that the power given to the Minister to declare any goods or services could be valid not because the general control of the prices of goods or services during war is within the ambit of the defence power, but because, although the Minister has this power, nevertheless if the Minister declares all goods and services, the Prices Commissioner can only fix prices for those goods or services which are related to the prosecution of the war, will not, in my opinion, bear examination. If it is a valid exercise of the defence power to authorize the Minister to declare all goods and services so as to make them liable to have their prices fixed, then it must be within the ambit of the power for the Prices Commissioner to fix the prices of all goods and services without any examination of their separate and distinct connection with the prosecution of the war. If there was any substance in the suggestion it could be applied to the present Regulations by holding that, although the Executive could declare any industry to be vitally necessary, the Minister could only refer to the Court those industries which were connected with the prosecution of the war. But it was submitted during the argument, and it has been submitted before, that the decision in the *Industrial Lighting Regulations Case* (3) is inconsistent with the view that the Commonwealth can control employment in industry in war time. I am unable to follow this submission. The *Industrial Lighting Regulations* did not relate to the terms and conditions of employment in industry. They were in substance a law relating to public health in industrial premises. The present Regulations concern a matter of a temporary character, whereas legislation designed to control and alter the construction and equipment of buildings is legislation to achieve a purpose of a permanent character. It is legislation upon a social subject which does not present any features in time of war which are not present in normal times.

But as I propose to uphold the demurrer, I desire to say a few words with respect to the provisions of reg. 5 (*d*) which authorize the Minister to refer to the Court, *inter alia*, the question as to the period (not extending beyond six months after the termination of the present war) in respect of which the rate or rates or amount or amounts shall be paid. This provision is obviously founded on s. 19 of the *National Security Act*. The words " ceases to be engaged in war "

(1) (1943) 88 Law. Ed. (U.S.) (Advance Opinions), at pp. 634-636, 639, 664, 679, 680.

(2) (1943) 67 C.L.R. 355.

(3) (1943) 67 C.L.R. 413.

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in that section have not yet been construed by a court and I do not propose to express any opinion upon their meaning. Assuming, however, that they mean until six months after the signing of treaties of peace with all the nations with which His Majesty is at war, it may well be that long before that date the ambit of the defence power, which has been stretched to an unprecedented extent as the war has extended and increased in gravity, will commence to shrink. As my brother *Dixon* said in *Andrews* v. *Howell* (1): "The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto." So in *Pidoto's Case* (2), I said that: "The regulations must be within the power to make regulations conferred upon the Executive by the *National Security Act*. This is a power to make regulations for securing the public safety and defence of the Commonwealth and for the effectual prosecution of the war. But this power which, as I have already said, corresponds to s. 51 (vi.) of the Constitution, is a power of an indefinite ambit." The conclusion of hostilities may well have the effect of causing a considerable contraction in the ambit of the power, and consequently of the power conferred upon the Executive by the *National Security Act*, so that upon the conclusion of hostilities the ambit of the latter power will no longer be sufficient to authorize many regulations which can only be justified by the state of gravity existing during actual hostilities. A determination, therefore, that the increased rates should be paid until six months after His Majesty ceases to be engaged in war may possibly cease to become effective prior to that date because the power conferred upon the Executive by the *National Security Act* has ceased to be sufficiently wide to support reg. 5 (*d*).

For these reasons I would allow the demurrer.

Demurrer allowed. Judgment for defendants with costs.

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

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

Solicitors for the interveners, *Slater & Gordon.*

E. F. H.

(1) (1941) 65 C.L.R. 255, at p. 278. (2) (1944) 68 C.L.R., at p. 131.