[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN TEXTILES PROPRIETARY LIMITED AND OTHERS . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

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MELBOURNE, *Oct.* 23, 24

SYDNEY, *Dec.* 3.

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

Constitutional Law (Cth.)—Defence—National security—Female minimum rates—Regulations—Validity—Reduction of disparities—Rehabilitation of servicemen—Cessation of hostilities—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*)—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 5—*National Security* (*Female Minimum Rates*) *Regulations* (*S.R.* 1944 *No.* 108—1945 *No.* 139), *reg.* 4A—*S.R.* 1945 *No.* 139, *Preamble.*

A statutory rule which purported to be made under the *National Security Act* 1939-1943 recited that "it is necessary, pending the re-establishment in civil life of members of the Defence Force and for the purpose of assisting that re-establishment, that the carrying on of certain industries in which females are employed should be facilitated: And . . . with a view to facilitating the carrying on of those industries, it is expedient that disparities in the minimum rates of remuneration for females in respect of various classes of employment should be reduced: Now therefore . . . the following regulations" were made. The regulations which followed amended the *National Security* (*Female Minimum Rates*) *Regulations* by inserting reg. 4A, which provided, in substance, that the rate of remuneration of females employed in occupations to be specified should be not less than seventy-five per cent of the corresponding minimum male rate. The statutory rule was made on 30th August 1945, that is, after Japan had agreed to surrender, but before the actual surrender. After the surrender the Regulations were challenged (in an action begun on 11th September 1945) on the grounds, alternatively that they were invalid *ab initio* and that they had "no present or future validity effect or operation."

Held, by *Latham* C.J., *Rich*, *Dixon*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that the Regulations were valid and effectual as an exercise of the power conferred by s. 5 of the *National Security Act*, notwithstanding the cessation of hostilities.

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DEMURRER.

Statutory Rules 1945 No. 139, made on 30th August 1945, purported to amend the *National Security* (*Female Minimum Rates*) *Regulations* (Statutory Rules 1944 No. 108). The amendments were preceded by the following preamble :—" Whereas it is necessary, pending the re-establishment in civil life of members of the Defence Force and for the purpose of assisting that re-establishment, that the carrying on of certain industries in which females are employed should be facilitated : And whereas, with a view to facilitating the carrying on of those industries, it is expedient that disparities in the minimum rates of remuneration for females in respect of various classes of employment should be reduced." The chief amendment was the insertion in the original Regulations of reg. 4A, the substance of which was that it fixed the minimum rates of wages for females employed " in any occupation within a vital industry " (which was to be specified by the Minister by notice published in the *Government Gazette*), the rate for adult females not remunerated according to experience being seventy-five per cent of " the corresponding minimum male rate," and rates for juniors and those remunerated according to experience being fixed in corresponding proportions. By a notice published in the *Government Gazette* on 4th September 1945 the Minister for Labour and National Service specified certain industries and occupations as " vital industries, parts of vital industries and occupations within the vital industries " for the purposes of reg. 4A.

Australian Textiles Pty. Ltd. and other companies which were engaged in industries included in the Minister's specification joined as plaintiffs in an action in the High Court against the Commonwealth and the Minister. The action was commenced on 11th September 1945. The statement of claim alleged the matters mentioned above and contained a paragraph which was substantially as follows :— (1) During the year 1944 the Kingdom of Italy surrendered unconditionally to the Armed Forces of His Majesty and His Majesty's Allies. (2) On 9th May 1945 Germany surrendered unconditionally to the Armed Forces of His Majesty and His Majesty's Allies. (3) (*a*) On 15th August 1945 the Japanese Government agreed to surrender unconditionally to the Armed Forces of His Majesty and His Majesty's Allies. (*b*) On 2nd September 1945 the Japanese Government unconditionally surrendered at Tokio Bay to the Armed Forces of His Majesty and His Majesty's Allies. It further alleged that the amending regulations and the Minister's specification were invalid *ab initio*, and, alternatively, that they had no present or future validity, effect or operation.

The plaintiffs claimed :—

(*a*) A declaration that the amendments (Statutory Rules 1945 No. 139) to the *National Security* (*Female Minimum Rates*) *Regulations* and each of them 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 amendments to the said Regulations is beyond the powers of the Commonwealth Parliament and is void and of no effect and that the said amendments to the said Regulations are void and of no effect accordingly.

(*c*) A declaration that the said amendments to the said Regulations and the said specification have no present or future validity, effect or operation.

The defendants demurred to the statement of claim.

At the instance of the Court counsel for the plaintiffs began.

Dean K.C. (with him *Stanley Lewis*), for the plaintiffs. The main amendment is the insertion of reg. 4A ; the other amendments are merely consequential. The new Regulation is in reality a piece of social legislation relating to the employment of women. It has no relation to any war purpose ; its expressed purpose is quite otherwise. The power to make regulations under s. 5 of the *National Security Act* is limited to regulations which are directed to the prosecution of the war. That power is not as extensive as the defence power under the Constitution : See *Wishart* v. *Fraser* (1). Such matters as repatriation, although within the defence power, are not within the Act. The Regulation now in question is expressly based on the purpose of re-establishing discharged members of the forces in civil life, and, whatever its position might be in relation to the defence power, it is beyond the purposes of the *National Security Act*. This Regulation has no relation at all to the purpose of the pre-existing Regulations which were held valid in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2). If it were directed to what was to happen to those Regulations at the end of the war so that it might be said to be incidental to the purpose of those Regulations, it might be justified ; but it is something entirely new, having no relation to what has gone before. Although the Regulation professes to have the object of reducing disparities, it in fact has the opposite result ; it leaves all the special cases in which women have already been receiving more than seventy-five per cent of the male

(1) (1941) 64 C.L.R. 470, at pp. 484, 485. (2) (1944) 69 C.L.R. 476.

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rate. There is no real connection between the Regulation and the objects stated in the preamble. It is submitted that the Regulation was beyond power at the time it was made; but, in any event, there is no basis for it since hostilities ceased. It is not contended that all war controls must cease immediately hostilities come to an end. The view has already been expressed on more than one occasion in this Court that the relation of a particular regulation to defence may depend on the existence of a state of war: See *Stenhouse* v. *Coleman* (1), per *Dixon* J.; *Australian Woollen Mills Case* (2), per *Williams* J. The present Regulation has no relation to any purpose of war or defence now that hostilities have ceased. Although the re-establishment of servicemen is within the defence power, the complete control of industry after the war for that purpose is not.

Barwick K.C. (with him *Coppel* K.C. and *Phillips* K.C.), for the defendants. The object of the amending Regulations is to make attractive to female labour such industries as it is important to keep on foot pending the repatriation of the members of the services. It is well known that industry has been largely dependant on female labour during the war, and that position has not changed merely because hostilities have ceased. The Regulations are within the defence power. The argument for the plaintiff gives too narrow a meaning to the expression "prosecution of the war." In any case, the power under s. 5 of the *National Security Act* is to make regulations for securing the public safety and defence of the Commonwealth. That power is as extensive as the defence power itself (*Andrews* v. *Howell* (3), per *Dixon* J.; *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (4), per *Rich* J.; *Pidoto* v. *Victoria* (5), per *Latham* C.J.; *Reid* v. *Sinderberry and McGrath* (6), per *Williams* J.; *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*; *Victoria* v. *Foster* (7), per *Latham* C.J.; *Australian Woollen Mills Case* (8), per *Latham* C.J.; *Stenhouse* v. *Coleman* (9), per *Dixon* J.). If reg. 4A had been included in the earlier Regulations, the reasons given in the *Australian Woollen Mills Case* (10) for upholding the earlier Regulations would have supported it. Looking at the amending Regulations as at the time when they were made, it could not be said that the need for regulation of industry as in wartime had so far passed that its regulation was beyond power.

(1) (1944) 69 C.L.R. 457, at p. 469.
(2) (1944) 69 C.L.R., at pp. 499, 500.
(3) (1941) 65 C.L.R. 255, at p. 278.
(4) (1942) 65 C.L.R. 373, at p. 437.
(5) (1943) 68 C.L.R. 87, at p. 104.
(6) (1944) 68 C.L.R. 504, at pp. 522, 523.
(7) (1944) 68 C.L.R. 485, at pp. 493, 494.
(8) (1944) 69 C.L.R., at p. 488.
(9) (1944) 69 C.L.R., at p. 469.
(10) (1944) 69 C.L.R. 476.

The preamble is relied upon as showing the purpose of the Regulations. That purpose is directed to a period of transition from war to peace, and it has a real relation to defence. The cessation of hostilities does not put an end to the executive power in relation to defence: See *Hamilton* v. *Kentucky Distilleries* (1); *Ruppert* v. *Caffey* (2); *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (3); *Commercial Trust Co.* v. *Miller* (4); *Chastleton Corporation* v. *Sinclair* (5).

Dean K.C., in reply.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered:—

LATHAM C.J. The plaintiffs in this action are companies which employ large numbers of females in various food and clothing industries. Certain amendments of the *National Security* (*Female Minimum Rates*) *Regulations* made by Statutory Rules 1945 No. 139 have been applied to these industries by reason of a "specification" under the Regulations by a Minister of the industries in which the plaintiffs are engaged. The plaintiffs claim a declaration that the Regulations are invalid. The defendants have demurred to the statement of claim on the ground that the Regulations are valid.

The challenged Regulations are amendments of the *National Security* (*Female Minimum Rates*) *Regulations*, Statutory Rules 1944 No. 108. Those Regulations were directed towards facilitating the effective transfer of females from the work in which they were ordinarily engaged to work which might from time to time be more necessary during the war, and the means adopted was that of reducing disparities in the minimum rates of pay for females under existing awards &c. The Regulations provide that the Governor-General may declare industries to be "vital industries," and that the Minister may, in respect of any vital industry, refer to the Commonwealth Court of Conciliation and Arbitration for inquiry and determination the question whether the prevailing rates for females employed in a vital industry are unreasonably low and, if so, the question whether the rates should be increased; and the Court is given power to increase rates if it thinks proper.

Under these Regulations the Governor-General specified the following industries as vital industries:—

"The woollen and worsted textile manufacturing industry.

(1) (1919) 251 U.S. 146, at p. 161 [64 Law. Ed. 194, at p. 201].
(2) (1920) 251 U.S. 264, at p. 282 [64 Law. Ed. 260, at p. 267].
(3) (1923) A.C. 695, at p. 706.
(4) (1923) 262 U.S. 51, at p. 57 [67 Law. Ed. 858, at p. 861].
(5) (1924) 264 U.S. 543, at p. 548 [68 Law. Ed. 841, at p. 844].

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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 munitions manufacturing industry.
The industries carried on in motor body, coach or carriage building establishments.
The industry in which the domestic staffs of hospitals, asylums and institutions of a like nature are employed."

The amending Regulations are introduced by the following preamble :—

" Whereas it is necessary, pending the re-establishment in civil life of members of the Defence Force and for the purpose of assisting that re-establishment, that the carrying on of certain industries in which females are employed should be facilitated :

And whereas, with a view to facilitating the carrying on of those industries, it is expedient that disparities in the minimum rates of remuneration for females in respect of various classes of employment should be reduced ".

Regulation 4A of the amending Regulations provides that, notwithstanding anything contained in any law of the Commonwealth or of any State or Territory of the Commonwealth, or in any award &c., the rate of remuneration to which any female " employed in any occupation within a vital industry " shall be entitled, in respect of the normal weekly hours worked, shall thereafter be, in the case of a female who is paid or entitled to be paid at an adult rate of remuneration not based on experience—not less than seventy-five per cent of the corresponding minimum male rate. There is also a provision for the case of females who are being paid at a " rate-for-age " remuneration or an " experience rate " — expressions which are defined in the Regulation. There is a proviso that nothing in the Regulations shall authorize the reduction of any rate of remuneration to a rate lower than the rate of remuneration immediately prior to the date of commencement of the Regulation. The expression " employed in any occupation within a vital industry " is defined to mean employed in a vital industry or part thereof or in any occupation therein which is specified by the Minister by

notice published in the *Government Gazette*. On 3rd September 1944 the Minister specified in such a notice all the industries which had been declared by the Governor-General to be vital industries. (On 15th October 1945 the aircraft, munitions and motor body &c. industries originally specified were removed from the list.)

It is contended for the plaintiffs that the amending Regulations are invalid. It is argued that they would have been invalid if they had been made during the continuance of hostilities. The plaintiffs further rely upon the facts of the surrender of Italy, Germany and Japan. It is alleged in the statement of claim that on 15th August 1945 the Japanese Government agreed to surrender, and on 2nd September 1945 actually did unconditionally surrender at Tokio to the armed forces of His Majesty and His Majesty's allies. The amending Regulations were made on 30th August, that is, before the actual surrender but after the agreement to surrender, and the specification of certain industries under the Regulations was made by the Minister on 3rd September 1945—after the actual surrender. It is contended that even if the Regulations would have been valid if they had been made while hostilities were actually in progress, the actual surrender of Japan deprived them of any operation or effect.

The object of the principal Regulations, which were upheld as valid in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (1), was to facilitate transfer of female labour to industries which were more necessary during the war by reducing disparities in minimum rates of pay. But it was provided in those Regulations that the Court should not have regard to any submission that it was necessary to offer an attraction to promote the recruitment of female labour for vital industries. The disparities were to be reduced by enabling the Arbitration Court to raise wages where the Court thought wages were unreasonably low, but the objective was to make transfer between industries more easy by making wage rates more even in various industries which might be competing for female labour. Thus the principal Regulations were based upon the fact that transfer of labour would be more easy if rates of pay in industries to which it was desired to transfer females were not unreasonably low.

The amending Regulations also use the means of reduction of wage disparities, but for another purpose—retention of females in specified industries as distinct from transfer between industries. The disparities are reduced by a direct legislative provision, instead of by remitting the question to the determination of the Arbitration Court. The adoption of the method of direct legislation, as distinct

(1) (1944) 69 C.L.R. 476.

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from the utilization of some existing industrial authority, is entirely a matter of policy, with which the Court is not concerned. These Regulations are designed not to promote easy transfer between industries, but to keep females in certain industries and to attract females to them. This is done by raising wages to seventy-five per cent of the male rate in the specified industries, which are, with the exception of the domestic staffs of hospitals, all devoted to the production of food or clothing. An increase of wages is a natural means of keeping and of attracting labour. With the end of the fighting it may become necessary in practice to rely more upon attraction than upon compulsion under man-power regulations relating to transfer of labour.

It was contended for the plaintiffs that the Regulations were not justified by the *National Security Act* 1939-1943 because they were stated to be directed towards assisting the re-establishment of members of the defence forces in civil life. Such an objective, it was said, while doubtless within the defence power in the Constitution, was not within the *National Security Act*, which authorizes the making of regulations only for the particular purposes specified in s. 5 and in some other provisions of the Act (e.g. ss 13A and 13B). Particular attention was called to the provision at the end of s. 5 (1) authorizing the making of regulations for matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed " for the more effectual prosecution of any war in which His Majesty is or may be engaged." It was argued that the re-establishment in civil life of members of the defence forces is not the prosecution of any war. It was also contended that though it may be a desirable objective to carry on industry, such an objective (at least at the present time) had no connection with the prosecution of the war. These arguments were submitted independently of the fact that after the amending Regulations had been made, but before the Minister made his specification of industries, Japan had surrendered. But this latter fact, it was said, was sufficient in itself to deprive the Regulations of operation or validity, even if, when originally made, they were valid. The Regulations could be justified under the Act only while the war was in process of prosecution—and the war was over. Thus the basis of the Regulations, it was argued, had disappeared.

It was held by the Court in *Reid* v. *Sinderberry* (1) that the control of man-power for the purpose of organizing industry so as to make all the resources of the Commonwealth available for war purposes was within the defence power. In *Australian Woollen*

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

Mills Ltd. v. *The Commonwealth* (1) it was held that the defence power enabled the Commonwealth Parliament to regulate wages in industry. If hostilities were still proceeding there could, upon the basis of these decisions, be little doubt that the challenged Regulations should be held to be valid. It is contended, however, that the cessation of actual fighting makes a vital difference. The industries which have been specified by the Minister are industries which produce food and clothing. The only industry included which is not of this character is specified as an "industry in which the domestic staffs of hospitals, asylums and institutions of a like nature are employed." The production of food and clothing and the maintenance of hospitals are all closely associated with the maintenance of the large number of members of the armed services who are still on duty. Food, clothing and nursing are still as necessary as ever they were for soldiers on service, whether at home or abroad. The prosecution of the war does not cease merely because it is believed or hoped that the last shot has been fired. The occupation of enemy countries and the disarmament of hostile troops is part of the prosecution of the war. Paying and supplying the troops, until they can be brought home and discharged, is part of what is necessarily involved in any war.

But in my opinion it is not necessary to determine this case upon the assumption that the *National Security Act* authorizes only the making of regulations which are required for the prosecution of the war. Section 5 (1) provides that the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth.

In *Farey* v. *Burvett* (2) *Griffith* C.J. said :—"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 may not have some, and some important, influence upon the successful conduct of the War."

(1) (1944) 69 C.L.R. 476.

(2) (1916) 21 C.L.R. 433, at p. 443.

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If women in some industries are being paid wages at or above the rate of seventy-five per cent of the male rate, women employed in the food and clothing industries who are receiving less than seventy-five per cent of that rate will naturally tend to leave those industries on account of the disparity in wage rates. If such a state of facts should exist, then the reduction of such disparities may reasonably be regarded as helping to keep the food and clothing industries going in order to assist the re-establishment of servicemen in civil life.

The Regulations, in my opinion, satisfy the test established by the passage quoted from *Farey* v. *Burvett* (1). Provisions for the repatriation of soldiers and their re-establishment in civil life are directly associated with the defence of the Commonwealth. They are directly so associated in two ways. They are a necessary step in a wise scheme of demobilization, and are of great importance as affecting the defence of the Commonwealth in relation to any possible future war. The community has accepted the services of men in the past war. If the community expects the services of men for defence purposes in the future it is plain that it may be thought to be wise policy, as well as to be a matter of duty, to protect the interests of those who have served in a past war. In *Attorney-General for the Commonwealth* v. *Balding* (2) it was said by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (3) :—This "is a provision for the re-establishment in civil life of persons who have served in the defence forces of the Commonwealth when they are discharged from such service. That is a matter so intimately connected with the defence of the Commonwealth as manifestly to be included within the scope of the power."

It has been suggested that the object of the Regulations is merely to increase wages for a political purpose. All legislation has a political purpose in one sense, but the word "political" is sometimes used as a term of disparagement, as if a political purpose was almost necessarily unmeritorious and, in the present case, necessarily not really connected with the subject of defence. But the Court has nothing to do with these matters. If legislation falls within a power conferred upon the Commonwealth Parliament the motives of legislators in exercising the power are not a matter for consideration by the Court as affecting the validity of the legislation. I add, however, that a stage might be reached when it would be beyond reason to allege that the continuance of a particular war control, not within Commonwealth powers in time of peace, was necessary for defence purposes. It would then be the duty of

(1) (1916) 21 C.L.R. 433.
(2) (1920) 27 C.L.R. 395.
(3) (1920) 27 C.L.R., at p. 398.

the Court to hold that the legislation was invalid or had ceased to be operative: Cf. *Ruppert* v. *Caffey* (1); *Chastleton Corporation* v. *Sinclair* (2). But, in the present case, in my opinion, it has not been shown that the challenged Regulations may not be desirable or possibly necessary for the purposes declared in the preamble to the Regulations, which purposes have a real connection both with the prosecution of the war and with the defence of the Commonwealth. In *Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (3) Viscount *Haldane*, referring to emergency legislation based on war conditions, said (4):—"Very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite."

The Regulations are, in my opinion, within the powers conferred upon the Governor-General by the *National Security Act*, and the demurrer should be allowed.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon*. I agree with it and cannot usefully add anything.

The demurrer should be allowed.

STARKE J. Demurrer to a statement of claim in which a declaration is sought that Statutory Rules 1945 No. 39, amendment of the *National Security* (*Female Minimum Rates*) *Regulations*, are beyond the power conferred upon the Governor-General by the *National Security Act* 1939-1943 and are void and of no effect.

We have lived so long in an atmosphere of make-believe in connection with the regulation of industry that it is hard to return to realities. On other occasions I have expressed the opinion that much of this regulation was ultra vires and I have not heard or read any reason for departing from that opinion: See *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (5); *Pidoto* v. *Victoria* (6); *Australian Woollen Mills Ltd.* v. *The Commonwealth* (7); *H. V. McKay Massey Harris Pty. Ltd.* v. *The Commonwealth* (8). Relying, doubtless, on these decisions the Commonwealth embarked upon the fixation by regulation of the minimum rate of wages payable to females in what are described as vital industries.

(1) (1920) 251 U.S. 264 [64 Law. Ed. 260].
(2) (1924) 264 U.S. 543 [68 Law. Ed. 841].
(3) (1923) A.C. 695.
(4) (1923) A.C., at p. 706.
(5) (1943) 67 C.L.R. 347.
(6) (1943) 68 C.L.R. 87.
(7) (1944) 69 C.L.R. 476.
(8) (1944) 69 C.L.R. 501.

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The Governor-General in Council made the following Regulations 1945 No. 139 under the *National Security Act* 1939-1943 :—

" Notwithstanding anything contained in any law of the Commonwealth or of any State or Territory of the Commonwealth or in any award, order, determination or industrial agreement, the rate of remuneration to which any female employed in any occupation within a vital industry shall be entitled, in respect of the normal weekly hours worked in any pay period commencing after the date of commencement of this Regulation " (31st August 1945) " shall be—

(*a*) in the case of a female who is being paid, or is entitled to be paid, at an adult rate of remuneration not based on experience—not less than seventy-five per centum of the corresponding minimum male rate ; or

(*b*) in the case of a female who is being paid, or is entitled to be paid, at a rate-for-age rate of remuneration or an experience rate of remuneration—not less than the rate which bears to seventy-five per centum of the corresponding minimum male rate the same proportion as the rate which she is being paid or is entitled to be paid bears to the rate prescribed for an adult female or a fully experienced female (as the case may be)."

" Employed in any occupation within a vital industry " means employed in any vital industry or part of a vital industry or any occupation within a vital industry which is specified by the responsible Minister by notice specified in the *Gazette*. This Regulation was made under the power to make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth contained in the *National Security Act* 1939-1943, and continues in operation, unless sooner repealed, until the expiration of the *National Security Act* 1939-1943 : See s. 19. But what has it to do with securing the public safety and the defence of the Commonwealth and the Territories ? An answer to the question is attempted in the preamble to the Regulation. " Whereas it is necessary, pending the re-establishment in civil life of members of the Defence Force and for the purpose of assisting that re-establishment, that the carrying on of certain industries in which females are employed should be facilitated ; and . . . with a view to facilitating the carrying on of those industries, it is expedient that disparities in the minimum rates of remuneration for females in respect of various classes of employment should be reduced." But we have already held that the declaration of objects such as these, in regulations, is not conclusive (*R.* v. *University of Sydney* ; *Ex parte*

Drummond (1); *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2)). And surrounding circumstances such as existing law or regulations, the facts pleaded, and also facts that are notorious, may be referred to for the purpose of examining the validity of the challenged regulations (*Attorney-General for Alberta* v. *Attorney-General for Canada* (3); *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation for New South Wales* (4)). The *Women's Employment Regulations*, scheduled to the *Women's Employment Act* 1942, permitted the rate of payment to certain categories of females to be fixed at not less than sixty per cent and not more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature. It is obvious that a disparity was created by these Regulations.

The statement of claim alleges that the rates of pay and conditions of labour of the females entitled to the benefits of Regulation 1945, No. 139 were governed by awards, orders and determinations of industrial authorities. But the *National Security* (*Female Minimum Rates*) *Regulations* (1944 No. 108) must be here mentioned. The object of these Regulations was 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 were ordinarily engaged to work which might 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. And reg. 5 provided that the Minister might in respect of a vital industry or occupation within an industry refer to the Commonwealth Court of Conciliation and Arbitration the question 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, or occupation, were unreasonably low in comparison with the minimum rates of pay for females employed in other industries which were vitally necessary during the war; and if so, the question whether it was in the national interest, and fair and just, to increase the minimum rates of pay so determined to be unreasonably low; and if so, what minimum rate or rates of pay for females should be paid in the industry, or occupation, or what amount or amounts should be paid in addition to the rates prescribed by the awards, orders, and determinations or industrial agreements in force at the date of the determination; and the question as to the period (not extending beyond

(1) (1943) 67 C.L.R. 95, at p. 102.
(2) (1944) 69 C.L.R. 476, at p. 491.
(3) (1939) A.C. 117, at p. 130.
(4) (1940) A.C. 838, at p. 847.

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six months after the termination of the present war) in respect of which the rate or rates or amount or amounts should be paid.

The Regulation requires the Court to inquire and determine the questions specified in the reference. And where the Court makes a determination under these Regulations it thereupon comes into force and the rate or rates or additional amount or amounts so determined in respect of females employed in any industry or occupation within an industry, notwithstanding anything contained in any law of the Commonwealth or of a State or Territory of the Commonwealth or in any award, order, determination or industrial agreement, are payable by employers in accordance with the determination as the minimum rate or rates or as part thereof in respect of females employed by them in the industry or occupation. But in making its inquiry and determination the Court was precluded from the consideration of awards, orders or determinations of the Women's Employment Board (reg. 4), and it was provided (reg. 8) that the Court should not :—

(*a*) be bound by any of the provisions of Part V. of the *National Security* (*Economic Organization*) *Regulations*, which, by reg. 16, pegged wages ;

(*b*) have regard to any submission that it was necessary to offer differential monetary inducement or attraction to promote the recruitment of female labour for vital industries. And in no case was the rate of remuneration of any female to be lower than the rate payable immediately prior to the date of the determination.

So on the face of these Regulations it was not apparently necessary for the purpose of the defence of the Commonwealth or the more effective prosecution of the war or any of the other objects of the Regulations to correct any disparities brought about by the operation of the Women's Employment Board or require differential monetary inducements or attractions to promote the recruitment of female labour for vital industries. It is a matter of public knowledge and notoriety that the Minister referred to the Court of Conciliation and Arbitration, for inquiry and determination, the various questions in respect of specified vital industries pursuant to the provisions of the Regulations 1944 No. 108, reg. 5, above mentioned (See *Gazette*, 11th August 1944 No. 162, p. 1918), and equally notorious that the majority of the Court were not able to determine that the minimum rates payable in any of the referred industries were unreasonably low when compared within the limits of the Regulation with the minimum rates in other vitally necessary industries. The specified vital industries so referred were precisely the same as those specified in the

notice in writing dated 3rd September 1945 given pursuant to Regulations 1945 No. 139, and mentioned in par. 18 of the statement of claim, though it was stated at the Bar that the aircraft manufacturing industry, the munition manufacturers industry and the industries carried on in motor body, coach, or carriage building establishments were, about October 1945, withdrawn from the industries specified as vital. In the face of these provisions in the *Female Minimum Rates Regulations* and the determination of the Arbitration Court the unreality of Regulations 1945 No. 139, as a regulation for securing the public safety and the defence of the Commonwealth, is apparent. And the fact that Italy, Germany and Japan had all been defeated in war at the time of the passing of the Regulation has no little significance in relation to the purpose and the passing of the Regulation. The preamble suggests that it is necessary that the carrying on of certain industries in which females are employed should be facilitated and that disparities in rates should be reduced. But how does increasing rates of pay that were not unreasonably low facilitate the carrying on of industries in which females are employed, or reduce disparities, or afford any reasonable and substantial basis for the conclusion (*Reid* v. *Sinderberry* (1)) that the Regulation 1945 No. 139 is for securing the public safety and defence of the Commonwealth, which is the authority under which the Regulation purports to have been made. These matters and others to which I adverted in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2) satisfy me that the Regulation is not authorized by the *National Security Act* 1939-1943, s. 5, and that it is a regulation for the improvement and betterment of the social and industrial conditions of certain females. But as I said before we live in an atmosphere of make-believe.

In my judgment the Regulation is ultra vires and void and the demurrer should be overruled.

DIXON J. The Court held the *Female Minimum Rates Regulations*, made on 19th July 1944, to be valid (*Australian Woollen Mills Ltd.* v. *The Commonwealth* (3)). What the Regulations sought to effect was described by *Williams* J., in his judgment, in the following terms:—"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

(1) (1944) 68 C.L.R. 504, at p. 515.
(2) (1944) 69 C.L.R. 476, at pp. 493-494.
(3) (1944) 69 C.L.R. 476.

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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 " (1).

It was because the Regulations were thus connected with the prosecution of the war that their validity was upheld. The ground of the decision is expressed in a sentence by *Rich* J. He said: " 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 " (2).

We are now called upon in this suit to consider the validity of an amendment of the *Female Minimum Rates Regulations* made just before the formal surrender in Tokio Bay of the Japanese Government. The whole aspect of affairs had, of course, then changed. Whatever might be involved in enforcing the surrender which the Japanese had agreed to make and in disarming and disposing of the forces of the enemy, and however long it might take, what the empowering provision of the *National Security Act* describes as " the more effectual prosecution of the war " had necessarily come to mean the completion of a process begun by the enemy's agreement, on 15th August 1945, to surrender.

The amending Regulation, which was made on 30th August, was not, like the original Regulations, directed at the transfer of women to employments more necessary for the war, but, as its preamble or recitals say, at the carrying on of industries employing women pending the re-establishment in civil life of members of the Defence Forces and in order to assist that re-establishment. I think that we should take the recital as meaning or assuming that, as the process begun by the surrender proceeds to completion, the troops will become increasingly available for demobilization and discharge, and as saying that, until this happens, some of the industries employing females should be carried on because their continuance and the retention of women in them will help in re-establishing servicemen in civil life.

It is next recited that, with a view to facilitating the carrying on of those industries, it is expedient that disparities in the minimum rates of remuneration for females in respect of the various classes of employment should be reduced. This recital I understand as a statement of the immediate consequence which the operative clauses of the

(1) (1944) 69 C.L.R., at p. 497. (2) (1944) 69 C.L.R., at p. 489.

new Regulation will bring about, a consequence expected to promote the wider but remoter purpose.

What the operative clauses of the Regulation do may be briefly stated as fixing the minimum rates of female wages in employments to which the Regulation is applied at not less than seventy-five per cent of the lowest rate prescribed for males by the award, determination or the like otherwise governing the female wages, or proportionately for juniors or those remunerated according to experience. Industrial awards, orders and agreements are to be construed and dealt with so as to give effect to the Regulation. The employments to which it is applied must fall within a " vital industry " as declared by the Governor-General in Council, a procedure the significance and effect of which are dealt with in the *Australian Woollen Mills Case* (1). But it is left to the Minister by notice in the Gazette to specify the whole or part of a vital industry or an occupation within it for the purpose of the actual application of the new Regulation.

The validity of its provisions is impugned on the ground, of course, that they are outside the power which is or could be conferred on the Governor-General in Council by the *National Security Act*. The relevant parts of the power that has been conferred may, for present purposes, be stated as an authority to make Regulations for securing the public safety and the defence of the Commonwealth and for prescribing matters necessary or convenient to be prescribed for the more effectual prosecution of the war against Germany and Japan : cf. s. 5 (1).

The attack upon the new Regulation traverses or denies every successive step in the reasoning which connects it with the power.

Whatever the recitals may say, the possibility is disputed of the Regulation wearing any other complexion than a bare expression of industrial policy, independent of carrying on hostilities or bringing the war to completion, or, indeed, even of dealing with something consequential upon the war, if that be within the statutory power of the Governor-General. Then it is said that, with the formal surrender of Japan arranged for and about to take place, neither the public safety, nor the defence of the Commonwealth, nor the more effectual prosecution of the war could call for the fixing of minimum rates of female wages ; there was nothing further to prosecute, no danger threatening public safety, nor to defend the Commonwealth against. Next, the place of the recited purpose of reducing disparities in the minimum rates of females' remuneration is impugned. How, it was asked, could disparities be reduced by the operation of the Regulations ? It fixed a minimum by reference to male wages with all their

(1) (1944) 69 C.L.R. 476.

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disparities and even so was not an absolute nor exclusive statement of minima, but one subject to a proviso preserving any higher wages that might be enjoyed. Then the two further steps involved in the recitals are each challenged. What real bearing, it was asked, has the reduction of disparities on the continuance of industries and what assistance in the re-establishment of servicemen is it to keep women employed in such industries as the Minister might choose to specify ? These, no doubt, are formidable criticisms of the amending Regulation. But they are of a nature demanding care and firmness in drawing the line between, on the one hand, the extent and operation or application of the power, matters which we must decide, and, on the other hand, the motives or policy actuating its exercise, matters which are neither our responsibility nor concern. The statement that it is enough that a parliamentary power of legislation is found to extend to the subject matter of a law and that the policy or motive underlying the law does not touch the validity is a commonplace hardly worth reiteration. But where the legislative power is defined by reference, in some degree, to purpose, as is the case with the power to make laws with respect to the naval and military defence of the Commonwealth, an inquiry whether that is the object of a challenged law is apt to slide off into considerations of motive and policy. We are not, it is true, here dealing with the validity of an Act of Parliament but with subordinate legislation. But it is to be remembered that the authority is confided to the Governor-General in Council, the Crown, and that, subject to what may appear from any particular statute as to the grounds for exercising the power it describes and confers, the reasons why the Crown may have been advised to adopt the Regulations are, in general, beside the mark.

The risk of being led off into such matters is greater with the defence power because also of the peculiar lack of fixity of its application or operation to support a particular measure. The relation between the meaning of the power and its application supplies an instance of a fixed concept with a changing content. As has often been explained in this Court, what it will enable the Commonwealth to do at any given time depends upon events. Its very nature means that its strength is commensurate with the exigency or danger which calls for its exercise. Its strength must flow and ebb accordingly. We have gone through a long conflict against enemies so strong as to demand the use of every resource we possessed ; so that the authority of the Central Government under the war power necessarily became not only supreme but almost total. Its practical operation must now be measured by a new and different state of fact, one in which the application of the defence power must be determined

by reference rather to the exigencies that attend the cessation of war than to the need of sustaining the conflict. In this changed or perhaps changing relevance of the power the object of any particular regulation may be less readily identified and defined and distinguished from the policy upon which it proceeds and the motives by which it is inspired.

The Female Minimum Rates amending Regulation, if it is to be judged by its recitals, appears to me to seek to provide for an interval, which might be short or long, between the breakdown of Japan and the re-establishment in civil life of the Defence Force. It cannot be for a court to say that the situation, as it existed on 30th August 1945, meant that " the prosecution of the war " could no longer be an object of the Executive Government. Indeed the facts of which we may take judicial notice seem to show that every reason existed for supposing that the employment of troops in completing the thorough defeat and conquest of all armed or hostile Japanese would remain a necessity, that is, their employment in prosecuting the war to its final conclusion. The bearing upon the state of industry which the collapse of Japan might be expected to have during an interval in which it might not prove possible to release large numbers of the armed forces and to proceed with the re-establishment of the members of the Defence Force in civil life was essentially a matter for the Executive to consider.

That the subject of women's employment during the war has become involved in complexities and difficulties seems apparent from the challenges to the *Women's Employment Act* and to regulations, orders, decisions and determinations that have been made in this Court (1). The result, actual and apprehended, upon women's employment of what had been done and what had not been done or done validly was again a matter for the Executive to judge of. Our province is confined to deciding in this case whether, upon the allegations in the pleading and those facts of which we take judicial notice, the only material before us, the fixing of minimum rates for women in specified industries or occupations might reasonably be considered to bear upon and to be likely to assist in the re-establishment of members of the Defence Force in industry. I state the question in this way, that is, somewhat narrowly, because of the recitals, which I think at least have a limiting effect in considering how the Regulation may be connected with the purpose of the power. Unless we are prepared to say " No " to the question, we should not, I think, hold the Regulation to be invalid. For, in the first place,

(1) (1943) 67 C.L.R. 347; (1944) 68 C.L.R. 485; (1944) 69 C.L.R. 185; (1944) 69 C.L.R. 299.

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if it were correct that the fixing of minimum rates for women would be likely to assist in the re-establishment of members of the armed services, then it would become a subject of the power to make regulations, that is assuming, of course, that the prosecution of the war meant that the re-establishment could not proceed at the time the Regulation was made.

In the next place, I think that, in this matter as in so many others, it is for the Executive to form its opinion provided that the reasoning relied upon is seen to be open in the circumstances and not to involve a view of which the known facts are not susceptible.

Not without some doubt, I have come to the conclusion that we ought not to say "No" to the question propounded above. The connection of the fixing of minimum rates with the further prosecution of the war is not so foreign to the facts we know as to be beyond acceptance.

For the rest, I think that it then becomes a matter of policy with which we are not concerned. This is true not only of the efficacy of the remedial operation expected by the recitals but of the work which the new *Re-establishment and Employment Act* 1945 might be expected to do without the aid of the Regulation.

There remains, however, a difficulty arising from the necessarily temporary character of the Regulation. On its face it is directed to meeting a situation which may not last through the remaining life of the *National Security Act* and yet there is nothing in the Regulation itself to restrain its operation, either by reference to a fixed period, or to any event or condition.

The American doctrine is that a law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further. It is not that it is invalidated by changing circumstances, but rather that it never had a valid application except to or in existing conditions. The matter will be found illustrated or discussed in the following cases: *Perrin* v. *United States* (1); *Lincoln Gas & Electric Light Co.* v. *Lincoln* (2); *Hamilton* v. *Kentucky Distilleries Co.* (3); *Chastleton Corporation* v. *Sinclair* (4); *Smith* v. *Illinois Bell Telephone Co.* (5); *Abie State Bank* v. *Bryan* (6); *Nashville, Chattanooga, & St. Louis Railway* v. *Walters* (7).

(1) (1914) 232 U.S. 478, at p. 487 [58 Law. Ed. 691, at p. 696].
(2) (1919) 250 U.S. 256, at p. 268 [63 Law. Ed. 968, at p. 977].
(3) (1919) 251 U.S. 146, at p. 162 [64 Law. Ed. 194, at p. 202].
(4) (1924) 264 U.S. 543 [68 Law. Ed. 841].
(5) (1930) 282 U.S. 133, at p. 162 [75 Law. Ed. 255, at p. 270].
(6) (1931) 282 U.S. 765, at p. 772 [75 Law. Ed. 690, at p. 701].
(7) (1935) 294 U.S. 405, at p. 415 [79 Law. Ed. 949, at p. 955].

It will, I think, be found that a similar doctrine must be applied under our Constitution. If a power applies to authorize measures only to meet facts, the measure cannot outlast the facts as an operative law. There is, however, American authority for the position that legislation which might be justified by reference to an emergency but is expressed in general terms and without reference to it is bad because "it must be limited by reasonable conditions appropriate to the emergency": See *W. B. Worthen Co.* v. *Thomas* (1). But, on the whole, I do not think that the Regulation now in question falls within the latter class. On its face it refers to the exigency calling it forth.

For these reasons I think the demurrer should be allowed.

McTiernan J. The Regulations which are the subject of this case profess to be amendments of the *National Security* (*Female Minimum Rates*) *Regulations*, Statutory Rules 1944 No. 108, the validity of which was upheld in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2). The last-mentioned Regulations were made on 19th July 1944. They were made to meet emergencies arising in the course of waging war: See reg. 3. The Regulations, the subject of the present case, were made on 30th August 1945 and the Minister on 3rd September 1945 took action under them to make the rates which they prescribe for female employees apply in certain vital industries. The preamble to the Regulations shows that they were made to meet emergencies arising from the suspension or cessation of the fighting. The words of the preamble are as follows:— "Whereas it is necessary pending the re-establishment in civil life of members of the Defence Force and for the purpose of assisting that re-establishment, that the carrying on of certain industries in which females are employed should be facilitated: And whereas, with a view to facilitating the carrying on of those industries, it is expedient that disparities in the minimum rates of remuneration for females in respect of various classes of employment should be reduced: Now therefore I, the Deputy of the Governor-General in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the National Security Act 1939-1943." It is patent that the emergency of re-establishing in civil life the members of the Defence Forces was one for which the Commonwealth would on 30th August 1945 and 3rd September 1945 have need to prepare. The Regulations cannot be impugned on the ground that there was at the time the Regula-

(1) (1934) 292 U.S. 426, at p. 433 [78 Law. Ed. 1344, at p. 1347].

(2) (1944) 69 C.L.R. 476.

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tions were promulgated no reality in the statement of the purposes for which the Governor-General in Council purported to make them.

The Governor-General in Council made the Regulations under the *National Security Act* 1939-1943. If they are within the powers conferred upon the Governor-General in Council by this Act, the Regulations are valid *ab initio* and will continue in operation at least until the purposes for which they are expressed to be made are accomplished or cease to exist, or until the Act terminates pursuant to s. 19, whichever first happens. The period during which s. 19 says that the Act shall continue in operation has not expired. The purposes for which the Regulations are declared to have been made have not been accomplished or disappeared. The contrary is not suggested by anything in the materials before the Court.

In my opinion the Regulations are within the powers of the Governor-General in Council under the *National Security Act* 1939-1943. The Court has decided that the purposes for which the Commonwealth Parliament may make laws under the defence power include " the re-establishment in civil life of persons who have served in the Defence Forces of the Commonwealth when they are discharged from such service " (*Attorney-General (Commonwealth)* v. *Balding* (1)). In my opinion the delegation of power made by the *National Security Act* 1939-1943 covers power to make Regulations for that purpose. The Act delegates power to make regulations for securing the public safety, for defence, and for the prosecution of the war. The power to make regulations for these purposes includes power to provide for the orderly and proper demobilization or disbanding of the forces organized to secure public safety, to defend the country and to prosecute the war. It is incidental to this power, if not of the substance of it, to assist the members of the Defence Force to obtain civil employment and to make available, upon such terms as the Commonwealth thinks fit, civilian necessaries, for example, homes, clothes, medical services, to enable them to settle in civil life. Pending re-establishment, the need may continue to keep the members of the Defence Forces supplied with military equipment and munitions of war. The nature and extent of the industrial production necessary to meet emergencies existing pending re-establishment and for re-establishment are matters within the knowledge of the Executive and the Court will not call in question the judgment of the Executive upon those matters. There is a plain, direct connection between carrying on vital industries and preparing for re-establishment and carrying out a proper plan of re-establishment. I think, therefore, that if the operation of the Regulations may facilitate the carrying on

(1) (1920) 27 C.L.R. 395.

of vital industries the power of the Governor-General in Council to make them should be upheld.

It is plain upon the terms of the preamble and the provisions of the Regulations that the reason for prescribing the rates of remuneration in reg. 4A is to reduce the disparities mentioned in the preamble. The materials upon which the demurrer has to be decided afford no ground for denying that the prescription of those rates may have this result. It is enough for the present purposes to hold that the payment of the rates may reduce the disparities. The hypothesis that the reduction of the disparities may help forward the industries and in some circumstances aid their survival is a reasonable one. I think that a connection may be shown to exist between the payment of the rates prescribed by the Regulation and the purpose of re-establishing the members of the forces in civil life. The rates are prescribed with a view to reducing disparities, the reduction of the disparities is sought in order to facilitate the carrying on of the industries, and the carrying on of the industries is necessary to meet the emergencies arising until re-establishment in civil life of the members of the Defence Forces is complete.

I should allow the demurrer.

WILLIAMS J. I have read the reasons for judgment of my brother *Dixon*, and I agree with them, and have nothing to add.

The demurrer should, in my opinion, be allowed.

Demurrer allowed.

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

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

E. F. H.