

[HIGH COURT OF AUSTRALIA.]

SHRIMPTON

PLAINTIFF ;

AND

THE COMMONWEALTH AND ANOTHER DEFENDANTS.

*Constitutional Law—Defence—National security—Economic organization—Regulations—Validity—Purchase of land subject to consent of Treasurer—“Absolute discretion” of Treasurer—Consent subject to condition that purchaser make deposit of Commonwealth bonds—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 (Economic Organization) Regulations (S.R. 1942 No. 76—1944 No. 99), Part III.*

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MELBOURNE,  
March 9, 12.

SYDNEY,  
April 23.

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

Part III. of the *National Security (Economic Organization) Regulations* provides, *inter alia*, that a person shall not, without the consent in writing of the Treasurer, purchase any land (reg. 6 (1) ) and that, where application is made to the Treasurer for his consent, he may, in his absolute discretion, grant his consent, either unconditionally or subject to such conditions as he thinks fit, or refuse his consent (reg. 9 (2) ).

A person who had agreed to purchase land applied to the Treasurer for his consent to the transaction. The Treasurer was willing to give his consent only upon certain conditions, one of which was that the purchaser should deposit with a bank Commonwealth securities to a value stipulated and should hand to the manager of the bank an “order” which expressed an agreement by the purchaser with the bank that the bonds should remain in the possession of the bank until the purchaser with the consent of the Treasurer should otherwise direct.

*Held*, by Latham C.J., Starke, Dixon and McTiernan JJ, that this condition went beyond the purpose for which the discretion was conferred upon the Treasurer and, accordingly, was not authorized by the Regulations.

*Held*, by Rich and Williams JJ., that Part III. of the *National Security (Economic Organization) Regulations*, so far as it relates to the sale or purchase of land, is not authorized by the Constitution or the *National Security Act 1939-1943*, and is invalid. Latham C.J. and McTiernan J. were of opinion that the Regulations in question were valid; Starke J. expressed no opinion on this point and Dixon J. was not prepared to say that the control over land dealings established by the Regulations is beyond the defence power.



H. C. OF A. ACTION referred to Full Court under s. 18 of the *Judiciary Act*  
 1945. 1903-1940.

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In an action in the High Court against the Commonwealth and the Treasurer, the plaintiff, Mary Frances Shrimpton, alleged in her statement of claim that by a contract in writing dated 16th August 1944 she agreed with the owners in fee simple of certain land, upon which a house was erected, to buy the land from them for £575. The contract was expressed to be "subject to consent of the Treasurer . . . as required by the *National Security (Economic Organization) Regulations*." On 7th September she applied to the Treasurer for his consent, and she received a letter in reply, dated 18th September, stating that consent would be given if the whole of the purchase price were paid in cash without borrowing in any form and if she deposited with her bank Commonwealth securities to the value of £350 and handed to the manager of the bank an "order," a form of which was enclosed. This "order" expressed an agreement (stated to be in consideration of an undertaking by the bank to hold the bonds) by the depositor with the bank that the bonds should remain in the possession of the bank until the depositor, with the consent of the Treasurer, should otherwise direct, and it requested the bank to inform the delegate of the Treasurer of the agreement. In numbered paragraphs at the foot of the statement of claim the plaintiff claimed, amongst other relief, the following declarations:—

1. A declaration that Part III. of the *National Security (Economic Organization) Regulations* so far as they relate to the sale or purchase of land are not authorized by (a) the Constitution; or, (b) the *National Security Act* 1939-1943, and are void and of no effect.

4. A declaration that upon the true construction of the said Regulations the Treasurer of the Commonwealth is not empowered to require compliance with the conditions stated in his letter of 18th September 1944 as a condition of granting his consent to a purchase of land.

The defendants' defence substantially admitted the facts alleged, the admission of the contract of sale (the terms of which were fully set out in the statement of claim) being expressed to be subject to its production at the trial.

The plaintiff's reply joined issue.

The defendants subsequently admitted that the contract of sale was correctly set forth in the statement of claim; on motion by the plaintiff, *Starke J.* ordered that the case be referred under s. 18 of the *Judiciary Act* 1903-1940 to the Full Court for argument upon



that admission, and upon the allegations contained in the pleadings, and the case came for hearing before the Full Court accordingly.

The relevant regulations are fully set forth in the judgments hereunder.

Dean K.C. (with him *P. D. Phillips*), for the plaintiff. The Regulations give the Treasurer a discretion which is not limited in any way. He can refuse his consent for any reason he thinks fit, or without giving any reason at all. His reason may have no relation whatever to defence; thus, the Regulations, in conferring such a discretion, go beyond any purpose of defence. There is nothing in the Regulations showing a purpose related to defence which would enable the phrase "absolute discretion" to be read down so as to confine it to defence purposes. Regulations conferring a discretion should disclose the conditions upon which the discretion is to operate: See *Melbourne Corporation v. Barry* (1); *Country Roads Board v. Neale Ads Pty. Ltd.* (2); *Swan Hill Corporation v. Bradbury* (3). If the Regulations are capable of being read in some limited sense, so that they are restricted in some manner to defence purposes, the condition relating to Commonwealth bonds is, nevertheless, invalid. It has no relation to defence; it is not even related to dealings in land, which, on any limited construction, must be supposed to be the subject matter of the Regulations. Therefore, on any conceivable construction of the Regulations which would bring them within the defence power, the condition is beyond their scope and is unauthorized by the Regulations themselves. As to the construction of the Regulations, if they are to be read down to bring them in some way within the defence power, the discretion given to the Treasurer might be limited to the control of prices, or limited only by the defence power, so that anything could be done which the Treasurer considered would advance defence purposes. Of these two views, it is submitted that the former is the correct one; that, looking at the Regulations as a whole and endeavouring to ascertain their scope and object, the true conclusion to be drawn is that they concern themselves with fixing prices or values—the amount to be paid by way of purchase money for the purchase of land. So construed, it is not contended that the Regulations would be beyond the defence power. In the other view, it is submitted that the condition as to the bonds would still be invalid. There can be no defence purpose in relation to the purchase of land which would entitle the Treasurer to impose this condition. It might be possible

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(1) (1922) 31 C.L.R. 174, at pp. 197,  
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(2) (1930) 43 C.L.R. 126.

(3) (1937) 56 C.L.R. 746.



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to draft regulations within the defence power which would compel everyone to invest in Commonwealth loans, but there can be no defence purpose in selecting the purchaser of land as a person who should so invest. In any case, the purpose would not necessarily be achieved by the condition. The purchaser might already have sufficient Commonwealth bonds, or might buy them from someone else. Further, by reason of the Petition of Right and the Bill of Rights, taxation or forced loans cannot be imposed without the express authority of an Act of Parliament, and the requirement of the lodging of bonds, imposed as a condition of granting a licence, is not within the power of the Executive (*Attorney-General v. Wilts United Dairies* (1); *The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd. (Wool Tops Case)* (2)). The requirement of the lodgment of bonds is also contrary to the provisions of the *Commonwealth Inscribed Stock Act* 1911-1943. Under that Act, the bonds are negotiable securities. If it were intended to deprive them of their negotiability, the proper way to do it would be by legislation or regulation expressly so providing; it cannot be done under the guise of a licensing system.

*Fullagar* K.C. (with him *Coppel* K.C.), for the defendants. The words "absolute discretion" in reg. 9 (2) must be limited by consideration of what is relevant to the defence power. The scope of the discretion is neither wider nor narrower than the scope of the defence power itself. Subject to the exceptions specified, the Regulations cover all land in Australia, and, because different considerations may apply to different pieces of land, a discretion is necessary. The word "absolute" merely emphasizes the fact that the legislature is not going expressly to limit the grounds of the discretion. The phrase "absolute discretion" cannot be pushed as far as the plaintiff suggests; that would produce something contradictory of a discretion. A discretion must be exercised according to common sense and law, and regularly; otherwise what purported to be the exercise of a discretion would not be so at all (*Rooke's Case* (3); *Sharp v. Wakefield* (4); *R. v. Board of Education* (5); *In re Coalport China Co.* (6); *Stenhouse v. Coleman* (7)). To be within the defence power, it is not necessary that the Regulations should be limited to the control of prices. A great many financial controls

(1) (1922) 91 L.J. K.B. 897.

(2) (1922) 31 C.L.R. 421, at pp. 443-445, 462, 464, 470, 474, 475.

(3) (1598) 5 Co. Rep. 996 [77 E.R. 209].

(4) (1891) A.C. 173, at p. 179.

(5) (1910) 2 K.B. 165, per *Farwell* L.J., at pp. 178, 179.

(6) (1895) 2 Ch. 404, at pp. 409, 410.

(7) (1944) 69 C.L.R. 457, per *Starke* J., at p. 467; per *Dixon* J., at p. 472.



are necessary in time of war. The control of investments is a very important matter, particularly investments in land. In war-time, there is always a danger of inflation, and there is a tendency to invest in land as a safeguard against that inflation. If that tendency is unrestricted, a great deal of the land in Australia may get into the hands of a small, rich, rentier class; this would not be prevented merely by fixing prices. In war-time, the Commonwealth should have power to examine every dealing in land, and see whether it is desirable or not. In the present Regulations, the discretion is reserved to the Treasurer as much for the benefit of the proposed dealer in land as for the benefit of the Commonwealth. So far as the condition as to Commonwealth bonds is concerned, it is of concern to the Commonwealth, in time of war, that no person's investments should be exclusively in land. The consent subject to the condition is therefore a method of controlling dealings in land, and is within the Regulations and the defence power. There is no forced loan or unauthorized taxation, and, therefore, no room for argument as to the Bill of Rights. Nevertheless, there is no doubt, it is submitted, that the Commonwealth could impose a forced loan for defence purposes. [He referred to *Vacuum Oil Co. Pty. Ltd. v. Queensland* (1).] As to the Commonwealth *Inscribed Stock Act*, compliance with the Treasurer's condition would not in any way affect the negotiable character of the bonds.

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*P. D. Phillips*, in reply.

*Cur. adv. vult.*

The following written judgments were delivered:—

April 23.

LATHAM C.J. The plaintiff, Mary Frances Shrimpton, agreed to purchase for the sum of £575 an allotment of land upon which a house is built. She applied to the Treasurer for his consent in writing to the purchase under the *National Security (Economic Organization) Regulations*, Statutory Rules 1942 No. 76, as subsequently amended. The plaintiff was advised on behalf of the Treasurer that "consent will be given if the whole of the purchase price is paid in cash without borrowing in any form and if the purchaser deposits with her bank Commonwealth Securities to the value of £350; the enclosed order, duly signed, should be handed to the Manager of the Bank when depositing the securities." The order which was enclosed with the letter was addressed to the manager of a bank and, referring to a deposit of securities with the bank, contained a statement that the depositor agreed with the bank that the



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bonds should remain in the possession of the bank until the depositor or his personal representatives, with the consent in writing of the Treasurer, otherwise directed in writing. The plaintiff contends that the regulation which prohibits the purchase of land without the consent in writing of the Treasurer is invalid as not being authorized by the Constitution or the *National Security Act* 1939-1943; and, alternatively, that, if the Regulations are valid, they do not authorize the Treasurer to impose the conditions referred to in the letter and the enclosed order. Upon all the facts alleged by the plaintiff being admitted, the case was referred to the Full Court.

The *Economic Organization Regulations* were made under the *National Security Act* 1939-1943. The Regulations contain several Parts. Part III. (consisting of regs. 6 to 10B) relates to the prohibition of transfer of certain property—and it is under that Part that the present question arises. Part IIIA. relates to the prohibition of transfer of residential businesses, Part IV. to interest rates, and Part V. consists of industrial provisions. The Regulations provide a far-reaching scheme of economic control.

Regulation 6 provides (*inter alia*) that, except as provided by Part III., a person shall not, without the consent in writing of the Treasurer, purchase any land. Regulation 6 (5) provides that an application for consent to purchase any land shall be accompanied by a valuation of the land, unless the Treasurer dispenses with such valuation. Regulation 6 (6) provides that the Treasurer may, in certain circumstances, require a valuation by an independent approved valuer, and reg. 6 (7) provides that any valuation under the before-mentioned provisions “shall specify the amount which would have been a fair and reasonable price for the land as at the tenth day of February, 1942,” or shall state the valuation at a date specified by the Treasurer. (The date 10th February 1942 is the date by reference to which industrial wages are “pegged” by reg. 16.) Regulation 7 relates to the control of the sale of shares, stock or debentures of a company. Regulation 9 is as follows:—“(1) The Treasurer may, either unconditionally or subject to such conditions as he specifies in the order, by order published in the *Gazette*, exempt from the application of the whole or any of the provisions of this Part any person or class of persons or any transaction or class of transactions. (2) Where application is made for the consent of the Treasurer under this Part, the Treasurer may, in his absolute discretion, grant the consent, either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent. (3) Where any consent or exemption is granted subject to conditions, a person shall comply with all such conditions as are applicable to him.”



It was contended for the plaintiffs that these regulations cannot lawfully be made under the provisions of the *National Security Act*. In order to be valid, they must be regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, or 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 (*National Security Act*, s. 5). Certain conditions are imposed by the Regulations upon an application for consent; for example, the application must be in writing (reg. 6 (3)) and the applicant may be required to furnish particulars of the proposed transaction (reg. 6 (4)) and to provide a valuation (reg. 6 (5)). If these conditions are not complied with, the Treasurer may properly refuse his consent. So also it is clear that the Treasurer is to consider the value of the land and the proposed price in determining whether to give or to refuse his consent (reg. 6). But under reg. 9 (2), it is provided that the Treasurer has an absolute discretion to grant or refuse consent or to consent subject to such conditions as he thinks fit. It is urged for the plaintiff that this provision is invalid, because under it the Treasurer could give or withhold consent upon any ground whatever—personal, social, political, financial, religious, racial or other—and that failure to comply with any such condition would then become an offence (reg. 9 (3)). If the words “in his absolute discretion” and the words “subject to such conditions as he thinks fit” are so interpreted, then the Treasurer may impose as a condition of his consent any condition whatever, even though it has no relation to matters affecting the defence of the country or the prosecution of the war. If the regulation is to be so interpreted, it exceeds the limits of the authority created by the *National Security Act*.

But, if the regulation can reasonably be so construed as to uphold its validity, it should be so construed—*ut res magis valeat quam pereat*. The regulation can be held to be valid if, in spite of the words apparently giving an arbitrary and unlimited discretion to the Treasurer, it can be held that the only conditions which the Treasurer can impose as a condition of granting his consent are conditions related to the object and purpose of the Regulations, and that the object and purpose of the Regulations are such as to have a real connection with defence or the prosecution of the war.

The discretion which the Treasurer is entitled to exercise, though described as absolute, is, in my opinion, not arbitrary and unlimited; it must be exercised bona fide and for the purposes of the

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Regulations. In *Rossi v. Edinburgh Corporation* (1), it was held that a power to grant a licence did not authorize the licensing authority to impose any conditions upon the grant of a licence which commended themselves to it irrespective of "the object which the legislature must be presumed to have had in view" (2). Similarly, it has been held in this Court, in a series of cases, that a discretion, or a power to grant a licence, though conferred in very general terms, does not entitle the authority to which the discretion is granted, or upon which the power is conferred, to take into account what have been described as extraneous conditions. The discretion must be used and the power exercised bona fide and with the view of achieving ends or objects not outside the purpose for which the discretion or power is conferred: See *Swan Hill Corporation v. Bradbury* (3). The same principle was applied in *R. v. War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (4); in *Victorian Railways Commissioners v. McCartney and Nicholson* (5) and in *R. v. Trebilco*; *Ex parte F. S. Falkiner & Sons Ltd.* (6). See also *Sharp v. Wakefield* (7)—"Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (8); according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* (9)". The Regulations do not make the Treasurer "an autocrat free to act as he pleases": Cf. *R. v. Board of Education* (10).

Accordingly, it should be held that the discretion entrusted to the Treasurer must be exercised for the purpose of attaining the object and securing the purpose of the Regulations, such object and purpose being ascertained by an examination of the terms of the Regulations. Such an examination shows, as far as transactions in land which require consent are concerned, that the considerations which are deemed to be relevant are matters affecting the value of the land (reg. 6 (5)-(8)), the particulars of the proposed transaction—not of some other transaction (reg. 6 (4))—and possibly the proposed use of the land (reg. 6 (9)). Regulation 6 (9) is in the following

(1) (1905) A.C. 21.

(2) (1905) A.C., at p. 26.

(3) (1937) 56 C.L.R. 746, at pp. 757, 758.

(4) (1933) 50 C.L.R. 228; see pp. 242, 243.

(5) (1935) 52 C.L.R. 383; see pp. 390, 391, 395.

(6) (1936) 56 C.L.R. 20; see pp. 27, 32.

(7) (1891) A.C. 173, at p. 179.

(8) (1598) 5 Co. Rep. 996 [77 E.R. 209].

(9) (1792) 4 T.R. 753, at p. 757 [100 E.R. 1286].

(10) (1910) 2 K.B. 165, at p. 179.



terms :—" Where an applicant for consent to purchase any land on which is erected a dwelling-house has informed the Treasurer that he intends to live in the dwelling-house, the applicant shall not, without the consent in writing of the Treasurer, let the land." This regulation suggests, though it does not actually provide, that the Treasurer may inquire whether a house is intended to be used for the purposes of a residence for the purchaser, and that he may take the reply to his inquiry into consideration when he is deciding whether or not to give his consent to a proposed purchase. When the Treasurer has before him particulars as to the matters mentioned, he is then in a position to determine whether, having regard to these matters, consent should be given. It is in relation to these considerations that the Treasurer has an absolute discretion—to say " Yes " or " No," or to impose conditions. There is no indication in the Regulations that, in a case to which the Regulations apply, the Treasurer is to take into account any matter other than the proposed terms of purchase, the estimated value of the land and, possibly, in the case of a dwelling-house, the proposed use of the land. In *McCartney's Case* (1) it was held that a discretion of one governmental agency (a transport board) should not be exercised for the purpose of giving effect to the administrative policy of another governmental agency (the Victorian Railways Commissioners). So, here, it should be held that the Treasurer should not, in determining whether or not he should consent to a particular land purchase, exercise his discretion in accordance with matters which are completely irrelevant from the point of view of the Regulations, e.g., the desirability of either encouraging or preventing transactions in Commonwealth securities. The Regulations give the Treasurer no power to ascertain or to investigate the capacity of the proposing purchaser to make or to maintain an investment in Commonwealth securities. The relevant regulations deal only with purchases of land. It is an improper use of the discretion entrusted to the Treasurer by the Regulations to use them for the purpose of controlling dealings by land purchasers in other property.

Thus, in my opinion, the condition which the Treasurer has sought to impose in the present case with respect to the deposit for a period of Commonwealth bonds is not authorized by the Regulations. For this reason, the plaintiff is, in my opinion, entitled to a declaration that, upon the true construction of the Regulations, the Treasurer is not empowered to require compliance with the condition stated in his letter relating to the deposit of Commonwealth securities.

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(1) (1935) 52 C.L.R. 383.



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This conclusion makes it unnecessary for me to deal with other arguments submitted for the plaintiff upon this aspect of the case.

It is necessary, however, to deal with the other condition prescribed by the Treasurer's letters, namely, that the whole of the purchase price should be paid in cash without borrowing in any form. The plaintiff claims a declaration "that, upon the true construction of the said Regulations, the Defendant Joseph Benedict Chifley as Treasurer of the Commonwealth is not empowered to require compliance with the conditions stated in his letter of the 18th September 1944 as a condition of granting his consent to a purchase of land." In my opinion, the condition as to the payment of the purchase money in cash, without borrowing, is a condition which relates to the terms of the proposed transaction of purchase, and is a condition which the Treasurer may properly impose under the Regulations.

It was argued, however, for the plaintiffs that the Regulations themselves were invalid because not authorized by the *National Security Act*. This Court has already held that the *National Security Act* authorizes the making of regulations fixing the prices of goods and services: See *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1). The reasoning which justifies the control and fixation of prices of goods and charges for services under the defence power with the object of preventing or limiting speculation and preventing dangerous inflation also, in my opinion, justifies the fixation and control of the price of land for the same purposes. In the case of goods and services, prices and charges can be fixed in respect of classes. In the case of land, any sensible system of controlling prices must deal with individual transactions. Prices for individual pieces of land cannot be controlled in the same way as prices for classes of identical goods or charges for services. A consideration of the particular piece of land concerned is essential if an endeavour is to be made, upon any practicable system, to determine what should be regarded as a proper price for the land. Thus a licence system is almost inevitable if prices of land are to be controlled—and there is, as I have already said, the same reason in time of war for controlling the price of land as for controlling prices of goods and charges for services. It was argued, and I agree, that reg. 6 (9) cannot be supported by these particular arguments. Other considerations based upon the war shortage of houses may possibly support such a provision. But reg. 6 (9) is, I think, severable from the other regulations, and, even if it were held to be invalid, it would not follow that the other regulations relating to the purchase

(1) (1943) 67 C.L.R. 335.



of land were invalid. Upon this view, it is not necessary to decide in the present proceedings whether reg. 6 (9) is valid or not.

I am of opinion that the regulations in question in this case, interpreted in the manner before-mentioned, are authorized by the *National Security Act*, but that the Treasurer had no authority to impose the condition relating to Commonwealth securities. The result is that, in my opinion, the plaintiff is entitled to the limited declaration which I have stated.

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RICH J. The instant case raises questions as to the validity of certain *National Security (Economic Organization) Regulations*. Regulation 6 (1) (a) of Part III. of these Regulations provides that, except as provided in that Part, a person shall not, without the consent of the Treasurer, purchase any land, and reg. 9 (2) provides that, where application is made for the consent of the Treasurer, he may, in his absolute discretion, grant the consent, either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent. By reg. 9 (3), where any consent is granted subject to conditions, a person must comply with all such conditions as are applicable to him.

The relevant facts are not in dispute. The plaintiff, by a contract dated 16th August 1944, agreed to purchase certain land for the sum of £575. On 7th September, she applied to the Treasurer for his consent, and, on 18th September, received a reply stating that consent would be given if the whole of the purchase price was paid in cash, without borrowing in any form, and if she deposited with her bank Commonwealth securities to the value of £350 and arranged that the bank should hold the securities until she should, with the Treasurer's consent, otherwise direct. It is contended that regs. 6 (1) (a) and 9 (2) are ultra vires, and that, in any event, the Treasurer had no power to impose the condition, which he has purported to impose, with respect to the deposit of securities.

The questions raised involve the scope of the defence power. So wide is the impact of modern war upon the life of a community which is fighting for its existence, that there is no aspect of its life as to which an industrious imagination cannot contrive to conjure up some association with defence. But the presence in the Australian Constitution of the defence power does not cause war, whether apprehended, in progress, or in immediate retrospect, to transform the Federation into a unitary State. The things which may lawfully be done by the Commonwealth legislature, or by authorities to which it may delegate its functions, by virtue of the defence power, must be really, and not fancifully, colourably, or



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ostensibly, referable to the defence of the Commonwealth. As I have stated in other cases, there must be a nexus between the objects of the particular regulation and the subject of defence. In the case now before us, I can find no real nexus between the defence of the Commonwealth and an absolute prohibition of the purchase of land ; nor do I think that the qualification of such a prohibition by a provision that the Treasurer may in his absolute discretion consent to such a purchase, unconditionally or subject to such conditions as he thinks fit, has the effect of bringing the condition within power. This is merely saying that no-one in Australia may buy land unless the Treasurer thinks fit, and he may impose any conditions he likes. It has been sought to water down the plain language of the Regulations in the hope of bringing them into some semblance of association with defence. It has, for instance, been pointed out that reg. 6 (4) enables the Treasurer to call for particulars of the proposed transaction, and reg. 6 (6) to call for a valuation ; and it has been contended that, because he is expressly authorized to obtain this information, he is impliedly prohibited from paying attention to anything else. From this somewhat remarkable *non sequitur*, the inference is invited that reg. 9 (2) does not mean what it says. "Absolute discretion" does not mean absolute discretion, it means limited discretion, and "such conditions as he thinks fit" means such conditions of a particular kind as are elsewhere impliedly prescribed for him. Various authorities have been cited in an attempt to justify this method of construction, but none which is in point. I decline to spend time on verbal gymnastics. If ever there was a case in which it was sought to confer an absolute and unfettered administrative discretion on a Minister, this is the case: Cf. *Metropolitan Meat Industry Board v. Finlayson* (1); *Liversidge v. Anderson* (2); *R. v. Archbishop of Canterbury*; *Ex parte Morant* (3). The provisions as they stand are, in my opinion, clearly bad ; and, having regard to what was said by the Chief Justice in *Pidoto v. Victoria* (4), they are clearly incapable of being read down to partial validity by any process of judicial interpretation. Whether they are capable of being remoulded into something supportable is a matter upon which it would not be proper for me to express an opinion, and I therefore express none. I would add, however, that, if an absolute prohibition against land purchase, qualified only by a provision authorizing the Treasurer to consent to particular purchases subject to such conditions as he might think fit to impose, could be regarded as valid, the condition sought to be imposed in the present case could not be supported.

(1) (1916) 22 C.L.R. 340.

(2) (1942) A.C. 206, at p. 252.

(3) (1944) K.B. 282.

(4) (1943) 68 C.L.R. 87.



In that case, there would be no limitation to the conditions that might be imposed, except that they must be related to land purchase. But a power to impose conditions for a particular purpose, however widely expressed, could not justify the imposition of a condition designed to serve a different and unauthorized purpose (*R. v. Barger* (1)). In any view which may be taken of the Regulations, the condition now in question is clearly bad (*Williams v. Melbourne Corporation* (2)). The conditions which may be imposed in the absolute discretion of the Treasurer may, so far as the language of the Regulations goes, have any or no relation to the defence of the Commonwealth; they need not even purport to affect a matter possessing a relation to defence. In the present case, I am prepared to assume that the condition imposed might be within the absolute discretion which the Regulations purport to bestow upon the Treasurer if the Regulations were valid, but the supposition merely serves to illustrate their invalidity. For how can the condition imposed have any bearing on the subject of defence? The utmost that can be said for it is that it might stabilize the market value of the war loans. This is not, in my opinion, its result. Some members of the community may prefer to purchase land rather than lend money to the Government. But to many others—probably a very large number—the purchase of a house is a matter of necessity and is important to the well-being of the purchaser and his family. To impose such a condition upon persons who have only sufficient money to purchase a house could hardly aid defence. Indeed, if the discretion were not freely exercised, it might even promote some disaffection and discontent. Apart from any question of the conditions which may be imposed by the Treasurer, I consider that the Regulations requiring his consent and investing him with an absolute discretion go far beyond what even the alleged need for regulating the subject matter in the interests of defence would justify. For there is no limit to the exercise of the arbitrary discretion so given in granting or withholding his consent. But, in any case, in the Regulations themselves, I can see no sufficient nexus with defence. In other words, no specific relation appears between the objects sought and defence. They go far beyond the regulations passed under the *National Security Act* with regard to the fixing of prices and of rent, objects which are considered peculiarly helpful in organizing the community for the purposes of war and defence.

For these reasons, I am of opinion that the Regulations are invalid as being outside the ambit of the national security legislation, and that the plaintiff is entitled to a declaration in terms of the first prayer of the statement of claim.

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(1) (1908) 6 C.L.R. 41.

(2) (1933) 49 C.L.R. 142, at p. 155.



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STARKE J. Case referred to the Full Court for argument upon an admission of fact, and upon the allegations contained in the pleadings.

The object of the action is to have Part III. of the *National Security (Economic Organization) Regulations*, so far as it relates to the purchase of land, declared invalid, and also to have it declared that the Treasurer of the Commonwealth is not entitled to require, as a condition of granting his consent to the purchase of land, compliance with certain conditions, which I shall later set forth.

The Regulations provide that a person shall not (subject to certain exceptions which are immaterial in this case), without the consent in writing of the Treasurer, purchase any land. And the Regulations further provide that the Treasurer may, in his absolute discretion, grant the consent either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the same.

Application was made to the Treasurer for his consent to the purchase by the plaintiff of certain land for the sum of £575, but the Treasurer replied "that consent will be given if the whole of the purchase price is paid in cash without borrowing in any form and if the purchaser deposits with her Bank Commonwealth securities to the value of £350," and an order, which was enclosed, signed and handed to the manager of the bank when depositing the securities. The order enclosed was in the following form :—

" To :—  
The Manager,  
.....  
.....  
\* I/WE hand you herewith to be held on my/our behalf  
.....  
\* You already hold on my/our behalf  
.....  
\* (Strike out clause not applicable.)

In consideration of the Bank undertaking to hold or continue to hold such Bonds I/WE agree with the Bank that such Bonds shall remain in its possession until—  
I or my executor or administrator/We or the survivor of us or the executor or administrator of such survivor  
shall, with the consent in writing of the Treasurer of the Commonwealth to be delivered to the Bank, otherwise in writing direct and I/WE hereby request you to inform the Delegate of the Treasurer of this Agreement."

Despite the absolute discretion given to the Treasurer to grant his consent, either unconditionally or subject to conditions, still the



Treasurer must not exercise his powers arbitrarily, or decline to consider matters that he ought to consider, or take into consideration extraneous and irrelevant matter as a condition of consent: See *Stenhouse v. Coleman* (1). And what has this condition that the purchaser shall lodge with her bank Commonwealth securities of no less a value than £350, in connection with a purchase of £575, to do with the public safety and the defence of the Commonwealth, which is fundamental to the exercise of the powers contained in Part III. of the *Economic Organization Regulations*? It was claimed that the Commonwealth has more or less plenary power over the economic, social and industrial conditions of the Commonwealth in time of war, but that claim is wholly opposed to the Constitution and to some decisions of this Court. And in any case, it was said, the conditions were necessary for the public credit, or to prevent inflation, or for some other purpose which the Court had no authority to examine or to understand. But the authority given to the Treasurer is for the purpose of controlling the purchase of land, and not for the purpose of forcing citizens to invest in the Bonds of the Commonwealth or to freeze their securities and prevent them dealing with them. Conditions imposed under the Regulations must, in my opinion, have some relation to the purchase or disposition of land and not to the disposition or pledging of other property.

The condition imposed by the Treasurer in the present case, that the purchaser shall deposit with her bank Commonwealth bonds to the value of £350 and sign the order already mentioned, is plainly bad and an arbitrary and unlawful exercise of power. It is unnecessary, in this view, to discuss the validity of the *Economic Organization Regulations*, and, indeed, it is not desirable that the Court should pass upon the constitutionality of legislation until it is necessary to do so in order to determine the rights of the parties before it.

A declaration should be made that the condition imposed by the Treasurer in the present case, that the plaintiff should deposit with her bank Commonwealth bonds to the value of £350 and sign the order above mentioned, is contrary to law and unauthorized by the *Economic Organization Regulations*.

DIXON J. In this suit, the plaintiff complains of a condition attached by the Treasurer to his consent to a proposed purchase by her of a piece of land. The condition is that she lodges with her bank Commonwealth securities to the value of £350 and hands to the manager an "order" in a form specified. The so-called order expresses an agreement on her part with the bank that the bonds

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(1) (1944) 69 C.L.R. 457, at p. 467.



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should remain in the possession of the bank until the depositor, with the consent of the Treasurer, should otherwise direct, and it requests the bank to inform the delegate of the Treasurer of the agreement.

The agreement is stated to be in consideration of an undertaking by the bank to hold the bonds, a consideration the reality of which is not self-evident, seeing that the promise to be given by the plaintiff as promisor to the bank as promisee, in effect, amounts only to agreeing to allow the bank to execute this supposed consideration.

It is under reg. 6 of Part III. of the *National Security (Economic Organization) Regulations* that the plaintiff sought the consent to the purchase. Regulation 6 forbids, among other things, the purchase of any land, except with the consent in writing of the Treasurer. Regulation 9 (2) provides that the Treasurer may, in his absolute discretion, grant the consent, either unconditionally, or subject to such conditions as he thinks fit, or refuse to grant the consent.

The contention of the plaintiff falls into two parts. First, she maintains that, in assuming to forbid in this manner the sale and purchase of land, except with the consent of the Treasurer, the Regulations go beyond the power conferred by the *National Security Act* upon the Governor-General in Council. Then, failing this proposition, she says that, in any case, the condition actually imposed falls outside the scope of the Regulations and is unauthorized.

In their first form, the Regulations were made on 19th February 1942. They have been amended considerably since that date, but rather by way of amplification than in a manner to suggest any change of purpose or policy. In a general way, I think that it is not difficult to see what that purpose or policy is. They were made at a time when the war in the Pacific wore, for this country, its most threatening aspect. They were described by the title "Economic Organization." As then promulgated, they dealt with the limitation of profits and the control of dealings in land, of dealings in shares and securities, of interest rates and of wages rates. It seems a legitimate inference that, as part of the economic measures then decided upon, it was intended to restrain purchases and other dealings in land, whether rural or urban, to those appearing to be justified by their bearing on the use of the land itself or the needs or circumstances of the parties, and thus to prevent speculation, the movement of land values, the withdrawal of capital from investments expressed in money and the substitution of land as a security, and, generally, the diversion into land of funds available for investment in Government securities. A further, and perhaps secondary,



purpose probably was to reduce the volume of land dealings so that the energies of fewer people would be absorbed in them.

Unfortunately for the courts, the object of what is now Part III. is not expressed in terms in the Regulations, and it must be deduced from what the Regulations assume to do, from the context, from the circumstances in which they were made, and from the general understanding of the relation between war and the economic activities and conditions of a community. Particular provisions make it clear that the Regulations regard certain considerations as material, e.g., (i) the value of property (reg. 6 (5)-(8) ); (ii) the fixing of values at those prevailing in 1942 (reg. 6 (7) (a) and (2) (g) ); (iii) the occupation or use of the land (reg. 6 (2) (a) ), and particularly for a dwelling place (reg. 6 (9) ); (iv) special circumstance of one of the parties (reg. 6 (2) (f) and reg. 8).

These provisions contain indications of matters to which the Regulations are directed, but the matters so indicated are not necessarily exhaustive. No doubt the nature of the subject and the difficulty of defining, in advance, the considerations upon which the Treasurer should proceed in giving or withholding his consent led to the adoption of the mode of control expressed by a general prohibition subject to a discretion to consent. But, where the power under which subordinate legislation must be supported is limited, an attempt to regulate by giving an absolute discretion, without stating the matters to be considered or the purpose to which it is to be directed, provokes challenge. Notwithstanding, however, what at first sight may seem to be the extreme to which the expressions of reg. 9 (2) go, I do not think it should be interpreted as giving to the Treasurer a power to withhold his consent for any reason, however extraneous to the purposes of the Regulations, or to attach any condition, however irrelevant.

In the first place, I think s. 46 (b) of the *Acts Interpretation Act* 1901-1941 operates to prevent such an interpretation, because, if an intention to give such a power were ascribed to it, the regulation would amount to an attempt to give a controlling authority wider than the power would allow.

In the next place, I think the word "absolute" is actually concerned, not with insuring that the purposes for which the Treasurer may use his discretion are unlimited, but rather with the finality or conclusiveness of his decision. But finality, in the sense of complete freedom from legal control, is a quality which cannot, I think, be given under our Constitution to a discretion, if, as would be the case, it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which

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the law or regulation conferring the discretion derives its force. An exercise of a power, whether legislative or administrative, cannot rise higher than its source, viz., the power itself, and an attempt under the power to make unexaminable what is done in ostensible pursuance of a further delegation of authority must, to that extent, fail. Regulation 9 (2) should be construed down, and the discretion understood as relating to the purposes which in point of constitutional validity justify the regulation and as being "absolute" only within those limits. I do not think the presence of this provision, so interpreted, vitiates Part III. of the *Economic Organization Regulations*.

I am by no means prepared to say that the control over land dealings established by the regulations is beyond the defence power. If I have correctly stated the ends which the regulations now forming Part III. were designed to secure, I should think that they formed part of an economic plan, or, at least part of a connected series of economic measures, which, at all events in the conditions prevailing in February 1942, might be considered to bear directly upon the prosecution of the war. They might be regarded as stabilizing values or prices of land, conserving effort and funds available for the purposes of the war, and of preventing abuses, both in relation to investment and with reference to the occupation and use of land, abuses undesirable in war-time.

But it by no means follows that the Regulations interpreted and justified in the foregoing manner enable the Treasurer, in the exercise of his discretion, to impose the condition of which the plaintiff complains. The condition is meant to require the plaintiff, as purchaser, to set aside war bonds and to place them, so to speak, *extra commercium* until the Treasurer gives his consent to their liberation. I have some doubt whether legally, as opposed to practically, the method of accomplishing this purpose is effective. For, probably, reg. 9 (3) is satisfied by the mere deposit of the bonds and by the giving of the "order" and that document might prove inefficacious. But, even so, that is not a feature tending to justify the condition.

To carry out the requirement, the purchaser might appropriate Commonwealth bonds she already held, or it might be necessary to buy them on the market or obtain them by applying in a new loan. Doubtless, one consequence of the imposition of the condition is to promote subscriptions to loans, and, if the condition is systematically applied to a large number of cases, to take an appreciable amount of bonds off the market. It may be assumed, too, that one reason for controlling the purchase of land was to promote investment in



war loan rather than in land. But the means chosen by the Regulations for achieving this end was confined to controlling the purchase of land as an alternative investment. Positive inducements or quasi-compulsion were not resorted to. It is taking a great step to treat the Regulations as authorizing the use of the discretion they give to the Treasurer to constrain indirectly the purchasers of land to set aside indefinitely Commonwealth bonds and, if they have not got them, to acquire them for the purpose.

Such a measure is of a kind which, I think, at least requires express and unmistakable authorization. While it does not fall into any of the historical categories claimed for it by the plaintiff, viz., forced loans, or levying money without grant of Parliament, it does involve an important matter of principle or policy with respect to the relation between the subject and the Executive concerning loans and, what perhaps is conclusive in this case, a matter of principle or policy which the Regulations, on the face of them, stopped short of adopting. It is a measure that nothing but express words should be regarded as covering. The Regulations bear no evidence of contemplating it, and, moreover, all the considerations which support the validity of the Regulations are against the use of the discretion of the Treasurer as an indirect means of requiring investment in or appropriation of war loan.

For these reasons I think that the condition imposed is beyond the scope of the Regulations.

I think that upon the pleadings the plaintiff is entitled to a declaration with respect to that condition substantially in the form prayed for by the fourth paragraph of her claim at the foot of the statement of claim.

MCTIERNAN J. In my opinion, the provisions applying to land transactions of Part III. of the *National Security (Economic Organization) Regulations* are authorized by the *National Security Act 1939-1943*, but the condition relating to the deposit of Commonwealth securities, to which the Treasurer made his consent to the purchase of land in this case subject, is not sanctioned by the above-mentioned provisions.

The provisions in question enable the Treasurer to control the flow of money into the dealings in land specified in reg. 6 (1): the operation of these provisions aids in the conservation of money awaiting investment in order that it may be available for subscription to Commonwealth securities issued in war-time. It could be demonstrated, I think, that the control of land transactions which is set up by the Regulations would check the inflationary pressure

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which economic conditions peculiar to war exert on the monetary system of the country; the safeguarding of the value of the currency is an object essential to the efficient prosecution of the war. For these reasons, I think the plan for the control of land dealings which is embodied in the Regulations now in question lies with the defence power of the Commonwealth, according to the interpretation and application which the Court has consistently given to provisions of s. 51 (vi.) since *Farey v. Burvett* (1).

The Treasurer has, under reg. 9 (2), a discretion to consent or to refuse to consent to any transaction in land to which reg. 6 (1) applies: the "absolute discretion," which, in terms, reg. 9 (2) vests in the Treasurer, is to consent either unconditionally or subject to such conditions as he thinks fit.

The Regulations are in the first place to be read and construed as s. 46 (b) of the *Acts Interpretation Act* 1901-1941 requires, subject to the *National Security Act*. The assumption which it is therefore necessary to adopt is that the discretion which is vested in the Treasurer is limited by the purposes, securing the public safety and defence of the Commonwealth, for which the Act empowers the Governor-General in Council to make regulations. But it does not follow that the Regulations give him a discretion to give his consent subject to any condition related to defence which he may think fit to select. If the Treasurer granted consent subject to the condition that the purchaser of land undertook to do a war-time job, that condition would be connected with defence, but it would be entirely disconnected with the subject matter of the Regulations.

Regulation 9 (2), upon its proper construction, gives to the Treasurer a discretion, untrammelled by any grounds specified by the Regulations, to select any condition which is connected with the subject matter of the Regulations. The subject matter is the control of the land transactions specified in reg. 6 (1). The conditions relating to Commonwealth securities lie outside the scope of the discretion vested in the Treasurer, because they have no logical relation to the transaction, the purchase of land, for which his consent was sought.

It may be conceded that the imposition of such conditions upon purchases of land for investment, to which class it is said the present transaction belongs, might support the national economy against inflation, but the legal objection to the conditions is that they are beyond the scope of the particular plan which these Regulations enact to attain that end.



In my opinion, the conditions relating to the bonds are not sanctioned by the Regulations, and the plaintiff is entitled in this action to relief on that footing.

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WILLIAMS J. The plaintiff in this action, which has been referred to the Full Court under s. 18 of the *Judiciary Act* 1903-1940, has attacked the validity of regs 6 and 9 of the *National Security (Economic Organization) Regulations*, so far as they relate to the sale of land. Regulation 6 (1) provides that :—" Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer— (a) purchase any land ; (b) take an option for the purchase of any land ; (c) take any lease of land ; (d) take a transfer or assignment of any lease of land ; or (e) otherwise acquire any land."

Regulation 6 (2) contains certain exceptions to the operation of reg. 6 (1) which are not material in the present case. Regulation 6 (3) and (4) provides for an application for the consent of the Treasurer in writing, which is to contain such particulars of the proposed transaction as he requires. Regulation 6 (5), (6), (7) and (8) requires an application for consent to purchase any land to be accompanied by a valuation of the land as at 10th February 1942, and for the Treasurer requiring a valuation in the case of other transactions for which his consent is required. Regulation 6 (9) provides that, where an applicant for consent to purchase any land on which is erected a dwelling house has informed the Treasurer that he intends to live in the dwelling house, the applicant shall not, without the consent of the Treasurer, let the land. Regulation 9 (2) and (3) provides that, when application is made for the consent of the Treasurer, he may, in his absolute discretion, grant his consent, either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent.

The plaintiff purchased a house property from the defendant for £575 as an investment and applied to the Treasurer for his consent. The Treasurer replied that consent would be given if the whole of the purchase money was paid in cash, without borrowing in any form, and if the purchaser deposited with her bank Commonwealth securities to the value of £350, and signed an order, to be handed to the manager of the bank when depositing these securities, providing that, in consideration of the bank undertaking to hold the bonds, she agreed that they should remain in its possession until she or her personal representative should, with the consent in writing of the Treasurer to be delivered to the bank, otherwise in writing direct.

Counsel for the plaintiff made the following submissions :— (1) That, upon the proper construction of the Regulations, the



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right of the Treasurer to prohibit dealings in land, other than dealings expressly excepted, is absolute, and that such an absolute prohibition is not a valid exercise of the power to legislate for the defence of the Commonwealth delegated to the Executive by the *National Security Act*. (2) That if, contrary to this submission, the Regulations can be construed so that, in the exercise of his discretion whether to grant or refuse the licence or grant it subject to conditions, the Treasurer must be guided by considerations which are relevant to the prosecution of the war, then the condition with respect to the £350 is beyond his authority and unauthorized. (3) That the requirement of lodging the bonds with the bank as a consideration of granting his consent is void by reason of the Bill of Rights and Petition of Right. And (4) that this requirement is contrary to the provisions of the *Commonwealth Inscribed Stock Act*.

The right given to the Treasurer by reg. 9 is, in his absolute discretion, to consent or to consent subject to conditions or to refuse his consent, and the scope and effect of the Regulations is, apart from the case of excepted transactions, to prohibit the sale or letting of any land in Australia without the consent in writing of the Treasurer. If the Regulations are valid in their present form, it necessarily follows, I think, that they would be equally valid if the exceptions were repealed, and they became regulations which stated that no sale or lease of land in Australia should take place without the consent of the Treasurer. A large part of reg. 6 is devoted to providing for a valuation of the land or the interest in the land that is being dealt with as at 10th February 1942. It is clear, from the decisions of this Court, that it is within the defence power for the Commonwealth Parliament or its delegate to legislate in war-time to control the prices at which property may be sold, so that, if the regulation had simply stated that land could only be sold or let at a price or rent which would have been a fair and reasonable price or rent on 10th February 1942, and that the Treasurer could withhold his consent to a sale or lease at any higher amount, no question could have arisen as to their validity, but it is impossible, I think, to adopt this construction in the face of the wide and absolute terms of reg. 9.

Further, reg. 6 (9) shows that the purpose of the Regulations is not simply to control prices, and that amongst the particulars which the Treasurer can require under reg. 6 (4) is the purpose for which the purchase is being made. The effect of the Regulations is therefore to confer upon the Treasurer power to inquire into every particular of the transaction, and, if he does not approve of any particular, or of the transaction as a whole, to refuse his consent



absolutely or to make his consent subject to some condition. Mr. Fullagar attempted to support the bestowal of these wide powers on the broad ground that control of investment and speculation in land is a matter which is related to the defence of the Commonwealth, and that the control must be wider than a mere control of prices. He submitted that the public in war-time fear inflation, that this creates a desire to invest in land; and that, owing to the tendency of the Australian population to congregate in towns, land, especially in towns and their suburbs, is likely to become in short supply, so that, if dealings are controlled merely in respect of price, there is a risk of larger and larger areas of this land being owned by a small rentier class, some of whom are purchasing for investment and others speculating on the probability of the rise in the value of land after the war. It may be that such a class exists, and that it is desirable that excessive areas of town and suburban lands should not be owned by such a class. That is a political question, on which it would be improper for me to express an opinion, but legislation of that nature is legislation upon a social subject which falls within the domain of State legislation. It has been said in this Court on several occasions that there must be a specific and not some vague general connection between the particular legislation and the prosecution of the war. This was well expressed by the Chief Justice in *Victorian Chamber of Manufactures v. The Commonwealth (Industrial Lighting Regulations)* (1) when he said of the *Industrial Lighting Regulations* (2) that:—"They do not deal with a subject which has any specific relation to the subject of defence, except in so far as all matters affecting the well-being of the community have such a relation, and that is a general and not a specific relation." In *Farey v. Burvett* (3) Isaacs J. pointed out that the defence power is a power to command, control, organize and regulate *for the purpose of guarding against the peril to Australia* the whole resources of the continent, living and inert, and the activity of every inhabitant of the territory. (The italics are mine.) But the question must arise, in every case, to what extent the resources of the continent, living and inert, are valuable for that particular purpose. The connection, for instance, between the necessity to promote industrial peace in industry, and, for that purpose, of controlling the wages and conditions of work, seeing that disputes on these matters are the usual cause of industrial disturbances, and the prosecution of the war is plain and clear, because it is industry which produces the munitions and other materials which are required for the armed

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

(3) (1916) 21 C.L.R. 433, at p. 455.

(2) (1943) 67 C.L.R., at p. 418.



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forces to fight the war and for the maintenance of the civilian population. Land is useful for two main purposes: (1) it can be built on so as to provide homes, factories, stores, and other forms of shelter, and (2) vacant land can be used for the purpose of primary production, mining and other such purposes. These are all purposes which can play their part in the mobilization of land as one of the resources of the nation to meet such perils, so that the Commonwealth must have extensive powers of controlling the use of land in war-time. It has ample power to enter into possession of land and to acquire the ownership of land the use of which is required for any purpose of defence; and, without acquiring any interest in land, it has exercised control of such use in many ways, for instance by giving tenants statutory rights under the *Landlord and Tenant Regulations*, directing the use that is to be made of agricultural land under the *Agricultural Production Regulations*, controlling the supply of materials such as building materials and fertilizers, and in other ways. But, apart from control of its use, the connection between any interference with the proprietary rights enjoyed by the owners of land under the laws of the States and the prosecution of the war becomes, except in certain limited respects, shadowy and unreal.

One respect is where the impact of war has a serious effect upon the ability of some class in the community to meet its debts as they fall due. Where members of such a class have mortgaged their land, or are purchasing land by instalments, it may be reasonable to safeguard their proprietary rights by suspending and varying their contractual obligations under moratorium laws. Further, the right to fix prices and rents at which land may be sold and let, as part of some national scheme of pegging prices, interest rates and wages to guard against inflation, is, as I have said, recognized and conceded, and it would be incidental to such a purpose, I should think, to require that sales should be made for cash without borrowing. But the condition of depositing the £350 of bonds with the bank is in a different category. It takes the form of a contract of bailment between the purchaser and the bank, which the purchaser, subject to any lien of the bank, could terminate at any time. But the condition would, I think, derive statutory force from the authority conferred upon the Treasurer by the Regulations to make his consent subject to conditions, so that, if the bonds were withdrawn without his permission, criminal proceedings could be taken against either of the parties under reg. 21 (b) of the *Economic Organization Regulations* and s. 10 of the *National Security Act*. But I am of opinion that the Regulations, assuming they were valid, would not authorize the making of such a condition. It could only be valid if it was made



for a purpose for which the authority to legislate under the defence power by regulation was delegated to the Executive by the *National Security Act*. Although a person to whom this power has been sub-delegated is given an absolute discretion to legislate whenever in his opinion it appears to be necessary or convenient to do so for some purpose of defence, there is still a duty imposed upon the Court to see that the legislation is within the ambit of the defence power: *Stenhouse v. Coleman* (1). It would be the duty of the Court, therefore, to determine whether the condition could be capable of aiding some purpose of defence. It does not require the purchaser to acquire his bonds from the Commonwealth. It is sufficient if he acquires them in the market or if he already owns them. It is, therefore, not legislation to compel a purchaser to lend money to the Commonwealth. If it was, in view of the express power to borrow conferred upon the Commonwealth Parliament by s. 51 (iv.) of the Constitution, I should be slow to hold that such legislation could be enacted under the *National Security Act*.

It was submitted that to provide that a purchaser who has money to invest should only be allowed to invest in land if he also invests or has invested some portion of his assets in war loans is to aid the prosecution of the war, because it is necessary for the Commonwealth to borrow money for that purpose. But legislation of this nature could be equally justified in peace-time as incidental to the execution of some other power vested in the Commonwealth Parliament by s. 51 of the Constitution which required the borrowing of money. The condition is, in pith and substance, an exercise of a power, not to compel persons to lend money to the Commonwealth, but to control the investment by a limited class of persons of a proportion of their private property. If a person who desired to purchase real estate could be compelled, as incidental to defence, to invest, and keep some part of his assets invested in war loans, it would seem to follow, as the night the day, that he could be compelled to make and keep such an investment, whether he desired to purchase any land or not. If the condition is valid, complete and absolute control of the disposition and investment of private property must pass to the Commonwealth Parliament in war-time, the question of the extent to which that control should be exercised being entirely one of political expediency. But the Commonwealth has ample power to raise the sinews of war by taxation and borrowing, and such control would, in my opinion, exceed anything that could conceivably be reasonably required to aid in the prosecution of the war, and would be beyond the ambit of the defence power.

(1) (1944) 69 C.L.R. 457.

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For these reasons, I am of opinion that the plaintiff is entitled to a declaration, as asked in the first prayer of the statement of claim, that Part III. of the *National Security (Economic Organization) Regulations*, so far as it relates to the sale or purchase of land, is not authorized by the Constitution or the *National Security Act*, and is void and of no effect, and that it is unnecessary to express an opinion with respect to the other submissions made on behalf of the plaintiff.

*Declare that upon the true construction of the Regulations referred to in the statement of claim the defendant Treasurer of the Commonwealth is not empowered to require as conditions of granting his consent to a purchase of land by the plaintiff that security should be deposited with a bank or that an order as specified in the letter dated 18th September 1944 referred to in the statement of claim should be signed by the plaintiff and handed to the manager of the bank. Defendant to pay costs of the action.*

Solicitors for the plaintiff, *Mills & Oakley*.

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

E. F. H.