[HIGH COURT OF AUSTRALIA.]

THE REAL ESTATE INSTITUTE OF NEW SOUTH WALES AND ANOTHER . . } PLAINTIFFS;

AND

BLAIR AND OTHERS . . . . . DEFENDANTS.

H. C. OF A. 1946.

SYDNEY, *Aug.* 13, 14.

MELBOURNE, *Oct.* 22.

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

Constitutional Law — Defence — National security — Regulations — Validity — Legislative policy—Re-establishment of members and ex-members of the Forces—Dependants—Unoccupied dwelling houses—Right of possession—Cessation of hostilities—War-time legislation and regulations thereunder—Operation—Continuance—Acquisition of property—Validity of legislation and regulations—Challenge—Parties—Competence—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*), (*xxxi.*)—*National Security Act* 1939-1946 (*No.* 15 *of* 1939—*No.* 15 *of* 1946), *ss.* 5, 19—*National Security* (*War Service Moratorium*) *Regulations* (*S.R.* 1941 *No.* 61—1946 *No.* 125), *regs.* 28A, 30, 30A, 30AA, 30AB, 30AC, 30ACA, 30AD, 30AE, 30AF.

Provisions for the housing of even a limited class of members and ex-members of the Forces before or after the cessation of active hostilities are provisions for the defence of the Commonwealth within the meaning of s. 5 (1) of the *National Security Act* 1939-1946 and are authorized by the defence power; therefore regs. 30A, 30AA, 30AB, 30AC and 30AD of the *National Security* (*War Service Moratorium*) *Regulations*, promulgated after the surrender of all enemy forces but following earlier provisions somewhat similar in character, are a valid exercise of the defence power.

DEMURRER.

An action was commenced in the High Court by the Real Estate Institute of New South Wales (hereinafter called "the Institute") and Arthur Henry Collett as plaintiffs against Keith Andrew William Blair, the Commonwealth of Australia, and the Attorney-General of the Commonwealth as defendants. The statement of claim, as amended, stated that the Institute is a company duly incorporated under the *Companies Act* 1899 (N.S.W.) and entitled to sue under

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its corporate name. *Inter alia* the objects of the Institute are to enable its members, who are auctioneers and agents of real estate in New South Wales, to transact their general business as real estate agents to the best advantage by the adoption of such rules as they may deem proper. It was further claimed, substantially, as follows :

4. By reason of regs. 30A, 30AA, 30AB, 30AD and 30AE hereinafter mentioned, the respective businesses of a large number of the members of the Institute have been adversely affected in that—(*a*) the said regulations have introduced great uncertainty and confusion as to the position of owners of dwelling houses in relation to letting and selling and dealing with such dwelling houses ; (*b*) the said regulations have caused a large diminution of sales and purchases of dwelling houses ; (*c*) the said regulations have caused a large diminution in lettings of dwelling houses.

5. Since 30th June 1945 the plaintiff Arthur Henry Collett has been the owner of a dwelling house situated in Queanbeyan, New South Wales, and known as Number 288 Crawford Street, Queanbeyan.

6. Prior to 30th June 1945 the said plaintiff had been for many years a lessee of the said dwelling house.

7. Since 1939 the said plaintiff had been the owner of a dwelling house situated in Manly, New South Wales.

8. Each of the said dwelling houses has at all material times been fully furnished with furniture of the said plaintiff.

9. It is necessary for the said plaintiff to reside periodically in the said dwelling house at Queanbeyan for business purposes and the said plaintiff has since 1939 resided for periods at that dwelling house at Queanbeyan and for periods at the said dwelling house at Manly.

10. On or about 10th May 1946 the Governor-General of the Commonwealth purported to make certain regulations under the provisions of the *National Security Act* 1939-1946 namely regs. 30A, 30AA, 30AB, 30AD and 30AE as part of the *National Security* (*War Service Moratorium*) *Regulations*.

11. By the *National Security* (*War Service Moratorium*) *Regulations* it is provided that those Regulations should be administered by the Attorney-General of the Commonwealth.

12. On 15th May 1946 the said plaintiff was in residence at his said dwelling house situated in Manly and was not in person in physical occupation of the said dwelling house at Queanbeyan.

13. On 15th May 1946 the defendant Keith Andrew William Blair made an application purporting to be made under the *National Security* (*War Service Moratorium*) *Regulations* to the Court of Petty Sessions at Queanbeyan for a warrant authorizing delivery of possession to

him of the said dwelling house situate at 288 Crawford Street, Queanbeyan.

14. On or about 16th May 1946 the plaintiff Arthur Henry Collett received by registered post from the said defendant a document in the words and figures following :—

"NATIONAL SECURITY (WAR SERVICE MORATORIUM) REGULATIONS.

To the Court of Petty Sessions,

Holden at Queanbeyan.

In pursuance of Regulation 30A of the above Regulations, I Keith Andrew William Blair C/o Commercial Bank of Australia Ltd., Queanbeyan, Bank Officer, being a discharged member of the Forces having been discharged from the Royal Australian Air Force about four months, hereby apply for a Warrant authorising the delivery of possession to me of the dwelling house known as No. 288 Crawford Street, Queanbeyan, which is unoccupied and is owned by Arthur Henry Collett of 15 Addison Road, Manly.

Dated this Fifteenth day of May, 1946.

(Sd.) K. A. W. Blair, Applicant."

Accompanying this document was a notice that the application would be heard at Queanbeyan on 21st May 1946.

15. On 20th May 1946 the said plaintiff went into personal occupation of the said dwelling house at Queanbeyan and has since that date continued to reside there.

16. On 21st May 1946 the said application came on for hearing before a magistrate at the Court of Petty Sessions, Queanbeyan, and the hearing of the application was adjourned.

17. The application has not yet been dealt with by any magistrate at the Court of Petty Sessions, Queanbeyan.

18. It is submitted that the said regs. 30A, 30AA, 30AB, 30AC and 30AD and each of them are beyond the powers or authorities conferred by (*a*) the Constitution, (*b*) the *National Security Act* 1939-1946.

The plaintiffs claimed :—

(1) A declaration that regs. 30A, 30AA, 30AB, 30AC and 30AD of the *National Security* (*War Service Moratorium*) *Regulations* or some one or more or all of them as amended by Statutory Rules 1946 No. 125 are void.

(2) An injunction on behalf of the plaintiff Arthur Henry Collett restraining the defendant Keith Andrew William Blair, his servants and agents from—(*a*) continuing any proceeding purported to be taken under the *National Security* (*War Service Moratorium*) *Regulations* for a warrant authorizing delivery of possession to the said defendant of the dwelling house situate at 288 Crawford Street,

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Queanbeyan; (*b*) taking possession of the said dwelling house under any warrant issued in any such proceedings.

(3) An order that the defendants pay the costs of the action.

(4) Such further or other relief as the nature of the case might require.

The defendants demurred to the whole of the statement of claim on the grounds, *inter alia*, that:—

1. It disclosed no cause of action to which effect could be given by the Court against the defendants or any of them;

2. It disclosed no right to relief in the plaintiffs or either of them; and

3. Regs. 30A, 30AA, 30AB, 30AC and 30AD of the *National Security* (*War Service Moratorium*) *Regulations* were and each of them was and at all material times had been valid and of full force and effect.

The relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

Barwick K.C. (with him *McLelland*), for the plaintiffs. For the purpose of the group of *National Security* (*War Service Moratorium*) *Regulations* now under consideration a person cannot be a protected person as defined in sub-reg. (9) of reg. 30 inserted by Statutory Rules 1946 No. 125, unless he had been required by reason of war service to live for not less than a prescribed period in premises other than the premises occupied by himself or his family as a home; this pre-supposes that at some relevant time, the time at which his qualification accrued, he had a home. It is not a requirement that at the date of the application the "protected person" should be without a home. There is no nexus whatever between this qualification and the defence power. Assuming, however, that the fact that the protected person is a member of the Forces makes the nexus, the regulations in their scope are too wide (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)). The scheme has nothing whatever to do with a homeless member of the Forces. A successful applicant under the scheme is not required to pay either rent or compensation in respect of the period intervening between the date of his notice and the date upon which he became the tenant. The disregard of the rights of owners places the scheme beyond the constitutional power. The regulations are silent as to *quantum* of rent; they do not (*a*) set a term to the tenancies created under the scheme; (*b*) limit the nature of the user of the dwelling house; (*c*) require that the successful applicant shall himself reside in the dwelling house; or (*d*) provide for the maintenance or repair

(1) (1943) 67 C.L.R. 116, at pp. 150-156.

of the dwelling house. The *National Security Act*, as a whole, having regard to its purpose and structure, was an Act intended to deal with active hostilities. The war came to an end, or, in other words, His Majesty ceased " to be engaged in war " in March 1946. Statutory Rules 1946 Nos. 86 and 125 were made after that date.

Mason K.C. and *Louat*, for the defendants.

Mason K.C. Regulation 30A of the *National Security* (*War Service Moratorium*) *Regulations* was first inserted in 1942, at a time when the war situation was critical and when many men and women were being enlisted for service in the Forces. That regulation was by way of an assurance to those men and women that their dependants would have some preference in obtaining housing accommodation. The various amendments since 1942 have all been directed to the providing of machinery for making effective the principle then laid down. This preference is based on the same general principle as re-establishment benefits generally. The defence power at least covers the re-establishment in civil life of members of the Forces after their discharge therefrom (*Attorney-General* (*Commonwealth*) v. *Balding* (1) ; *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (2)). No logical distinction can be drawn between financially assisting an ex-member of the Forces in procuring a business as in *Balding's Case* (1), and giving him a legal priority to procure a home. Re-establishment is not limited to reinstating an ex-member of the Forces in his former employment but includes, in general, the being placed in a position to enjoy, as far as practicable, the amenities he enjoyed prior to his enlistment. The regulations now under consideration give preference to ex-members of the Forces and their dependants in the matter of unoccupied dwelling houses. An unoccupied dwelling house is a dwelling house which is not being used ; and this in a time of great national shortage of housing accommodation. There is nothing unreasonable or onerous in giving to an ex-member of the Forces, or his dependants, a legal priority to use such a dwelling house, even if there be no compensation to the owner pending the determination of the application. This is emphasized by the meaning given to the words " occupied " and " unoccupied " in *Morrisby* v. *Winter* (3). The question of the reasonableness of the regulations is not a matter for the Court. In exercising the defence power for the purpose of rehabilitating and giving preference to ex-members of the Forces in the matter of housing accommodation,

(1) (1920) 27 C.L.R. 395.
(2) (1945) 71 C.L.R. 161.
(3) (1946) V.L.R. 471.

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the fact that the rights of private individuals may be drastically interfered with in a very onerous way is a matter that does not go to invalidity. The question of whether, hostilities having ceased, the war was, at the relevant time, still being prosecuted was dealt with in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1). It is immaterial that the benefits of the regulations are conferred upon some only of the ex-members of the Forces and their dependants. Those entitled to benefit are, nevertheless, ex-members of the Forces, and their dependants, who have been compelled by reason of war service to live away from their respective homes. Upon the proper construction of the regulations as amended by Statutory Rules 1945 No. 101 and 1946 No. 86 the right conferred upon a protected person is a right inalienable and personal to him. The tenancy of a protected person who sublets can be terminated under Statutory Rules 1945 No. 101. The regulations continue in force until 31st December 1946 and a tenancy can be created thereunder until that date.

Louat. The *National Security Act* amounts to a delegation by Parliament to the executive of the whole content of the defence power (*Polites* v. *The Commonwealth* (2)). Whatever Parliament can do under the defence power from time to time can be done under the *National Security Act*, subject to the requirements as to the method of making regulations and to the limitations. That construction of the Act does not alter in the light of any changed circumstances. The fact that hostilities have ceased is a matter affecting the content of the defence power, but whatever the *National Security Act* would have authorized, subject to the constitutional limits, it will still authorize.

Barwick K.C., in reply. As to whether the delegation of the defence power was a delegation of the entire power was not a matter which received critical attention during the period of active hostilities. With the cessation of hostilities the matter does need some examination. The duration of the *National Security Act* 1939-1943, as provided in s. 19, and s. 5 in relation to post-hostilities activities, is very closely related. The indication is that the generality of the words in s. 5 is limited to the period of hostilities. There is nothing in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1) to the contrary. The words "Subject to this section, the Governor-General may make regulations for securing the public safety and the

(1) (1945) 71 C.L.R. 161.

(2) (1945) 70 C.L.R. 60, at p. 82.

defence of the Commonwealth " taken in conjunction with the whole of s. 5, only amount to a delegation of so much of the defence power as related to the prosecution of the war.

Cur. adv. vult.

The following judgments were delivered :—

LATHAM C.J. Demurrer to a statement of claim in an action in which the plaintiffs claim that regs. 30A, 30AA, 30AB, 30AC and 30AD of the *National Security* (*War Service Moratorium*) *Regulations* are void.

It is alleged in the statement of claim that the plaintiff Collett is the owner of two dwelling houses in New South Wales, one situated at Queanbeyan and the other at Manly. They are both fully furnished and the plaintiff resides periodically in each of them. The defendant K. A. W. Blair is a protected person within the meaning of the regulations mentioned. At a time when the plaintiff Collett was not actually present at his Queanbeyan house Blair applied to a Court of Petty Sessions at Queanbeyan for a warrant authorizing delivery of possession to him of that house. The application has been adjourned and the question of the validity of the regulations under which Blair makes his application for the warrant is raised in this action.

The regulations provide that a protected person may apply for a warrant authorizing the delivery of possession to him of " a dwelling-house which is unoccupied or about to become unoccupied " : reg. 30A—Statutory Rules 1946 No. 86. Regulation 30 (9) enacted by Statutory Rules 1946 No. 125 provides that, for the purposes of the regulation, a person shall not be deemed to be a protected person unless he is—

" (*a*) a member of the Forces who—(i) is ; or (ii) was, for a total period of not less than twelve months during his period of war service, required, by reason of his war service, to live in premises other than premises occupied by him, or by a member of the household to which he belongs, as a home."

The expressions " member of the Forces " and " war service " are defined by reg. 28A. It is not necessary to consider separately pars. (*b*), (*c*) and (*d*) of reg. 30 (9). They relate to discharged members of the forces and to female dependants or parents of members or discharged members of the forces. In each case the qualification of any person as a protected person depends upon a member of the forces having been required by reason of his war service to live for a period in premises other than premises occupied by him, or by a member of the household to which he belongs, as a home.

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Notice of an application by a protected person for delivery of possession of the dwelling house to him must be given to the owner of the dwelling house or his agent personally or by registered letter: reg. 30A (3). After service of the notice the owner of the dwelling house is prohibited from permitting any person to enter into occupation of the dwelling house and from himself entering into occupation of it (reg. 30A (4)). If the owner does permit any other person to enter into occupation or himself enters into occupation in contravention of the regulation, the house is still deemed to be unoccupied—reg. 30AA. Regulation 30AB provides that upon the hearing of an application the Court shall consider any hardship which would be caused to the owner or other persons (except a person who has entered into occupation of the dwelling house in contravention of the regulation) by the granting of the application, and any hardship which would be caused to the applicant or any other person by the refusal to grant the application. Regulation 30AD provides: "Upon delivery of possession of a dwelling house to a protected person under a warrant granted under regulation 30AB of these Regulations, the protected person shall be deemed to be a tenant of the owner of the dwelling house."

This regulation also provides that the rent to be paid for a dwelling house shall be (*a*) where the rent has been fixed by a Fair Rents Board, any rent not exceeding the rent so fixed as is agreed upon between the owner and the tenant or as, in default of agreement, is fixed by the court, or (*b*) in any other case such rent as is agreed upon between the owner and tenant, or in default of agreement as is fixed by the court.

Counsel for the plaintiff criticized the regulations on various grounds. It was pointed out that there was no definition of dwelling house and no indication of what constituted occupation of a dwelling house. As soon as a notice was served the dwelling house was kept compulsorily vacant. Regulation 30AC provides that where more than one application is made in respect of the same dwelling house, all applicants are to be notified of the other applications and the Court is to hear and determine all the applications at the same time. It was pointed out that this regulation could be used by a number of applicants working in co-operation so as to compel an owner to keep a dwelling house vacant for an indefinite time without the owner having any possible means of redress or escape. Other points of criticism of the regulations were that they provide no definite term of tenancy; that no provision was made for repair of the premises; that the applicant was not required to live in the premises; that apparently he could sublet the premises (See

Statutory Rules 1945 No. 101, enacting a new reg. 30 (5) (*b*)) ; that there was no provision for any restriction upon the purposes for which premises could be used ; that it was possible for one applicant to obtain several homes under the regulations ; that the owner had no right to enter and view the condition of the premises.

In my opinion, none of these criticisms affect the validity of the regulations. They refer to considerations which should doubtless be before the mind of a legislator in enacting any law dealing with such a subject, but the fact that the regulations do not show an adequate appreciation of the nature (or even of the existence) of many problems which are involved in the relation of landlord and tenant cannot affect their validity.

The war brought about great changes in the distribution of population and involved great disturbance of families. It was accompanied by a shortage of houses which made it very difficult for members of the forces to procure suitable accommodation for their families or themselves. Legislative provisions to deal with these conditions were clearly within the scope of the power of the Commonwealth Parliament to make laws with respect to defence.

The termination of actual hostilities does not bring such a power as this to an end. It was held in *Attorney-General (Commonwealth)* v. *Balding* (1) that under the defence power the Commonwealth Parliament had power to provide for the re-establishment in civil life of persons who have served in the defence forces when they are discharged from such service. As an element in such re-establishment the Commonwealth Parliament has power to provide means of procuring housing accommodation for the families of persons engaged, or who have been engaged, in war service and, in particular, for their female dependants, and parents who are dependent upon them. Such provisions are incidental to the maintenance of military forces under conditions which will help to induce men to serve willingly and without avoidable anxiety.

It was conceded for the plaintiff that it was within the legislative power of the Commonwealth to provide homes for soldiers or their dependants who were homeless, but it was pointed out that the application of these regulations did not depend upon either the soldier or his dependants being without a home. A court, if it thought proper, could grant an application even when the protected person already had a home. The application of the regulations depended upon whether a member of the forces had been required by reason of his war service to live at any premises other than premises occupied by him or by a member of the household to which he

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

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belonged as a home, either at the time of his application or for a total period of not less than twelve months at any time during his period of war service. This provision includes only persons who were required to live at particular premises and not persons who were required to live only in some particular locality. The provision applies in 1946 to persons who in 1940 were required to live away from home on war service. It was therefore said that the regulations were not really directed to providing homes for members of the forces in general, whether serving or discharged, and their dependants.

In so far as this argument is based upon the fact that the servicemen and their dependants who can obtain the benefit of the regulations consist only of a limited class, it amounts, in my opinion, only to a contention that the regulations do not go so far as they might have gone. They select a particular class of servicemen and their dependants and give them certain benefits in the way of priority in obtaining living accommodation. The class might have been made either wide or narrow, but whether it should be wide or narrow is entirely a matter of legislative policy, with which the court is not concerned. It is not necessary, in order to exercise a power validly, that it should be exercised up to its full limit. Within the limits of the power the legislature may make its provisions either wide or narrow, as it thinks proper. In my opinion this particular criticism of the regulations has no relation to the question of their validity.

There is no provision in the regulations which requires the applicant to live in an unoccupied house in respect of which an order is made. There is no provision in the regulations which prevents an applicant who has obtained an order from subletting the premises. Indeed, Statutory Rules 1945 No. 101, in enacting a new reg. 30 (5) (*b*), shows that it is contemplated that an applicant may sublet premises in respect of which he has obtained a tenancy as the result of proceedings taken under the regulations. Further, there is nothing in the regulations to prevent one applicant from obtaining several homes under the regulations, though doubtless a court in the exercise of its discretion would not make more than one order in favour of a particular applicant.

These considerations show that the regulations are not limited to the provision of homes for servicemen and their dependants who actually require a home to live in. But to provide homes for servicemen or their dependants, is (subject to fulfilling constitutional requirements as to the acquisition of property, to which I refer hereafter) a purpose to which Federal legislation may validly be directed. This power was exercised by the *War Service Homes Act* 1918-1946. In order to be eligible for benefits under that Act it was not necessary

that a soldier should be homeless or in need of some other housing accommodation than that which he already had. It should not now be held that the validity of such legislation depends upon its being limited to servicemen or their dependants who satisfy some condition relating to a need of housing accommodation.

It was further contended that the *National Security Act* 1939-1946, s. 5 (1), in authorizing the making of regulations for the more effectual prosecution of any war in which His Majesty is or may be engaged, did not authorize the making of regulations dealing with the housing of soldiers who were discharged from the forces or after hostilities had ceased. In my opinion, the making of provision for the housing of soldiers after the war is—like other provisions for the reinstatement of servicemen in civil life—a provision which has a direct relation to the prosecution of a war. It is sufficient to say that it is a reasonable view that the effectual prosecution of a war during the war itself depends in part upon satisfactory provision for re-establishing in civil life members of the fighting forces when the fighting is over. But, further, s. 5 (1) also provides that the Governor-General may make regulations for securing the defence of the Commonwealth. Provisions for the housing of members of the forces and discharged members of the forces and their dependants are, in my opinion, provisions for defence of the Commonwealth: See *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1). In my opinion, the considerations just mentioned are sufficient to meet the argument for the plaintiffs based upon the fact that regs. 30A, 30AA, 30AB, 30AC and 30AD were made in May 1946, after the surrender of enemy forces. But I refer also to what I have said in *Dawson* v. *The Commonwealth* (2) as providing what I regard as an answer to the contention that the regulations ceased to operate either upon the surrender of enemy forces or governments or six months after such surrender under the *National Security Act* 1939-1943, s. 19.

There is another aspect of these regulations to which, however, no reference was made in argument. They are provisions under which successful applicants become tenants of property, and therefore acquire an interest in property. Even if it were held that reg. 30AD did not result in the creation of tenancies strictly so called, it could nevertheless be argued that there would be a right of exclusive possession in the protected person and therefore an acquisition of property by him: See *Minister of State for the Army* v. *Dalziel* (3). Section 51 (xxxi.) of the Constitution provides that the Commonwealth Parliament may make laws with respect to "The acquisition

(1) (1945) 71 C.L.R., at p. 170.
(2) *Ante*, at p. 157.
(3) (1944) 68 C.L.R. 261.

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of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." It has been held that the requirement of just terms applies to all laws made under any Federal legislative power for acquisition of property by the Commonwealth (*Johnston, Fear & Kingham* v. *The Commonwealth* (1)). The Court, however, has not yet expressly considered whether or not the same limitation applies not only to Federal laws with respect to the acquisition of property by the Commonwealth but also to Federal laws with respect to the acquisition of property by any person. As, however, the question of just terms in relation to s. 51 (xxxi.) of the Constitution was not raised in argument, I reserve my opinion upon it.

For the reasons which I have stated the regulations should not, in my opinion, be held to be invalid, and the demurrer should therefore be allowed.

I add that I can see no cause of action in the plaintiff the Real Estate Institute of New South Wales, but no argument was heard upon this subject.

RICH J. The question of substance involved in the matter now before us is whether a group of *National Security* (*War Service Moratorium*) *Regulations*, giving special privileges to " protected persons " in relation to obtaining tenancies of unoccupied dwelling houses, is ultra vires the defence power of the Commonwealth. At present, we are concerned only with whether these regulations are valid as regards discharged servicemen ; and I therefore confine myself to this aspect of the matter. I adhere to the opinion which I ventured to express in *Shrimpton* v. *The Commonwealth* (2) :—" 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 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."

(1) (1943) 67 C.L.R. 314.

(2) (1945) 69 C.L.R. 613, at pp. 623, 624.

Is there, then, at the present time a sufficient nexus between the objects of the regulations which have been challenged and the subject of defence ? The question is essentially one of degree. The function of the defence power does not, of course, begin when the first shot is fired nor end with the last. The reintegration into the normal life of the community of the men who have been drawn off into the fighting services is, with reasonable limits, as much a function of the defence as was their initial absorption into those services. It is notorious that there is now a serious housing shortage in Australia, in part caused by diversion of men and materials to war purposes. I do not think that it is beyond the scope of the defence power to provide reasonable facilities for enabling men of the fighting services to re-establish themselves in civil life during a reasonable time after they have been discharged ; and, in existing circumstances, I do not think that the temporary continuance of the provisions which have been challenged, in the form in which they now stand, is, in its application to discharged servicemen, outside the scope of the defence power. For these reasons, I think that the demurrer should be allowed and the suit dismissed.

STARKE J. Demurrer to a statement of claim which claims a declaration that *National Security* (*War Service Moratorium*) *Regulations* 30A, 30AA, 30AB, 30AC and 30AD as amended by Statutory Rules 1946 No. 125 (which came into operation on 1st August 1946) or some of them are void and also other ancillary relief by way of injunction.

So far as material these regulations provide that a protected person may, if he thinks fit, apply in writing, to a court of limited civil jurisdiction constituted by a police stipendiary or special magistrate in the State or Territory in which is situated a dwelling house which is unoccupied or about to become unoccupied, for a warrant authorizing and requiring the delivery of possession of the dwelling house to the applicant. The Court, unless it is satisfied that there is reasonable cause why the application should not be granted, is required to grant it. But this authority is further limited by the provisions in Statutory Rules 1946 No. 125, reg. 4. See Statutory Rules 1946 Nos. 86 and 125.

Until the application is heard and determined or a warrant (if granted) is executed an owner is not permitted personally or by his agent to allow any person to enter into occupation of the dwelling house or himself to enter into occupation thereof. Upon delivery of possession of a dwelling house to a protected person he is deemed to be a tenant of the owner and the rent to be paid is provided by the

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regulations (reg. 30AD, Statutory Rules 1946 No. 86). A protected person means a member of the Forces, discharged member of the Forces, female dependant of a member or parent of a member (See reg. 28A). But these expressions are limited by the provisions in Statutory Rules 1946 No. 125.

The provisions relevant to this case relate to a member or a discharged member of the Forces. The Statutory Rules 1946 No. 125 provide that for the purposes of this regulation (reg. 30) a person shall not be deemed to be a protected person unless he is—(*a*) a member of the Forces who—(i) is ; or (ii) was, for a total period of not less than twelve months during his period of war service, required, by reason of his war service, to live in premises other than premises occupied by him, or by a member of the household to which he belongs, as a home ; (*b*) a discharged member of the Forces who was—(i) immediately prior to his discharge ; (ii) for a continuous period of not less than three months during the period of six months immediately prior to his discharge ; or (iii) for a total period of not less than twelve months during his period of war service, so required.

It is unnecessary to consider the other provisions of reg. 2 for they relate to female dependants or parents which are distinct from those relevant to this case and plainly severable from them. Again though the writ in this action was issued in June 1946 and therefore before the Statutory Rules 1946 No. 125 came into operation, still the constitutional validity of the Rules before the amendment made by the Statutory Rules just mentioned depends upon the same considerations for their validity as the amended Rules. Consequently they do not require separate consideration and statement.

The contention for the plaintiffs in the action is that the regulations attacked are not authorized by the Constitution or by the *National Security Act* under which they were made.

First, however, as to the parties to this action. The Real Estate Institute is not a competent party. According to the allegations in the pleadings it is an incorporated company and comprises a large number of real estate agents who carry on business in New South Wales and who claim that their businesses are affected by the regulations. But only those whose rights are infringed and not strangers are entitled to challenge the validity of legislation or regulations or orders made thereunder. The pleadings disclose no right of the Real Estate Institute that is infringed or even affected by the regulations (See *Victorian Chamber of Manufactures* v. *The Commonwealth* (1)).

(1) (1943) 67 C.L.R. 335, at p. 343.

The plaintiff Collett has, however, sufficient interest to maintain the action. According to the pleadings his right arises in this way. Collett is the owner of a dwelling house at Queanbeyan in New South Wales and the defendant Blair, in pursuance of *National Security* (*War Service Moratorium*) *Regulations*, being a discharged member of the Forces, applied to the Court of Petty Sessions holden at Queanbeyan for a warrant authorizing the delivery of possession to him of the dwelling house belonging to Collett which he alleges is unoccupied. The proceedings to deprive Collett of the possession of his dwelling house by virtue of the provisions of the regulations give him, in my opinion, sufficient interest in attacking their validity so far as they affect him and in claiming a declaration of their invalidity so far as they are unauthorized by the Constitution and the *National Security Act*. But Collett cannot roam at large over the regulations and attack them generally. He must be confined to those which affect his rights to the possession of his dwelling house and are unseverably tied up with them.

Next, the substance of the regulations. In my opinion, the regulations, so far as they relate to members and discharged members of the Forces, are valid. They are regulations with respect to defence because they have a real and substantial connection with defence and war service. They secure in certain cases dwelling houses for members and discharged members of the armed Forces required by reason of war service to live in premises other than premises occupied by them or by members of their household as a home.

Further, it was contended that some of the regulations could not be supported under the *National Security Act* because they were passed after hostilities ceased. But the *National Security Act* did not thereby cease to operate for reasons which I stated in *Dawson's Case* (1) and now refer. And regulations securing to some members or discharged members of the armed forces, though passed after the cessation of hostilities, are within the authority given by the *National Security Act* to make regulations for securing the public safety and defence of the Commonwealth or are incidental thereto.

The demurrer should be allowed.

DIXON J. Upon this demurrer to the plaintiffs' statement of claim we have been invited to consider at large the validity of regs. 30A, 30AA, 30AB, 30AC and 30AD of the *National Security* (*War Service Moratorium*) *Regulations*, interpreted by reference to the definitions contained in reg. 28A and to reg. 30 and in the light of Part III. of the *National Security* (*Landlord and Tenant*) *Regulations*.

(1) *Ante*, at p 157.

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There are two plaintiffs. Both claim a declaration of right declaring that some one or more or all of the five foregoing regulations are void. One of the plaintiffs is an incorporated association or society of real estate auctioneers and agents. Though its members may have some *locus standi* to complain of the regulations, if they are not validly made, no facts are pleaded that would support a claim on the part of the corporate association to relief against their purported operation.

The second plaintiff is in a better position to maintain the suit. He is the lessee of one dwelling house and the owner of another, both of them fully furnished. For a time he was not in physical occupation of that which he held as lessee. While this was so the defendant Blair, as a discharged member of the forces, applied in writing to a Court of Petty Sessions under reg. 30A (1) for a warrant authorizing the delivery to him of possession of the dwelling on the footing that it was unoccupied. The application has not been disposed of and the second plaintiff claims, besides the declaration of right, an injunction restraining the defendant Blair from continuing the proceeding or taking possession of the dwelling house under any warrant that may be issued.

I think that the facts stated disclose a sufficient interest in the second plaintiff to support his claim to a declaration of right as a means of putting in issue the validity of so much of the regulations as affect him. Injunction is another matter, particularly if the proceedings in the Court of Petty Sessions, as under the regulations, were considered judicial; but the form of relief has no practical importance. What the second plaintiff is entitled to ask is a decision upon all of the provisions which are or may be relied upon to obtain possession of the premises he holds as lessee. The validity of these provisions may, of course, depend on other provisions, and if so they come under examination for the purpose. But beyond that he is in no better position than the other plaintiff to invite the Court to inquire into the validity of each and every part of regs. 30A to 30AD.

When the defendant Blair made his application and when the writ was issued, these five regulations stood in the form in which they were inserted in the *War Service Moratorium Regulations* by Statutory Rules 1946 No. 86. Regulation 30 stood in the form given to it by Statutory Rules 1945 No. 101 and reg. 28A stood as amended by Statutory Rules 1946 Nos. 86 and 87. But regs. 28A, 30, 30A and 30AB have since been amended materially by Statutory Rules 1946 No. 125 and the operation of all the regulations I have mentioned has been affected in some degree by the insertion by that Statutory Rule of regs. 30ACA and 30AF and the amendment of reg. 30AE. Statutory Rules 1946 No. 125 came into operation on 1st August 1946, and it is

not altogether clear that it applies to the application then already made by the defendant Blair and pending: See *Kraljevich* v. *Lake View and Star Ltd.* (1). However, I do not think that any of the alterations it makes would save the regulations in question, if otherwise they should be held to have been invalid.

In the first instance the attack upon the regulations was based upon the contention that they could not be justified by the constitutional power to make laws with respect to the naval and military defence of the Commonwealth. It was not denied that the legislative power is wide enough to support laws of some kind for the reinstatement in civil life of men discharged from the armed services, including the provision of habitation. Nor was it denied that care for the habitation of dependants of men away serving with the armed forces might fall within the power. But it was said that the regulations impugned were not confined to these things; indeed, that they were not directed to them at all.

The persons who are authorized by the regulations to obtain possession of dwellings that are, or are about to become, unoccupied form a category called "protected" persons. When certain provisions are read in combination, it is seen that the category does not include all servicemen and discharged servicemen without dwellings: regs. 28A and 30 (1) and (9) (*a*) and (*b*). A man who is or was a member of the forces, to be a "protected person," must be, or for a specified period have been, "required, by reason of his war service, to live in premises other than premises occupied by him, or by a member of the household to which he belongs, as a home." On the other hand, the category goes far beyond servicemen and discharged servicemen. It includes a female dependant of a member of the forces and of a discharged member of the forces, and it includes a parent. But, again, the condition is that such member was required by his war service to live in premises other than those occupied by him &c. as a home. The definitions of "parent of a member" and of "parent of a discharged member" import dependancy. It is needless to elaborate the point that many people entitled to apply as protected persons may be suffering but little, with reference to housing, from the consequences of their own or their relatives' war service. Accordingly the regulations are said to exhibit too remote a connection with defence to amount to an exercise of the constitutional power. If, however, it was thought that the description of "protected person" was sufficiently connected with defence to supply a prima-facie justification under the defence power, then, so it was argued, the content of the regulations, that is, what they

(1) (1945) 70 C.L.R. 647.

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purport to do, goes beyond anything that might reasonably be considered conducive to the purpose of securing dwelling places for servicemen and for their dependants. In support of this argument, the very complicated provisions of the various regulations were examined and many difficulties in their operation were suggested. It would be a lengthy task to explain in detail what the regulations provide and what they fail to provide for and how they may operate in certain cases. In the view I take it is enough to describe in general terms the chief features which were said to take them beyond what could be supported as an exercise of the defence power. What they seem to attempt to do is (i) to empower a magistrate to put a serviceman or his dependent parent or wife or other female dependant in possession of a dwelling which the magistrate considers to be unoccupied or to be about to become unoccupied; (ii) to constitute him or her a tenant of the dwelling, but for no definite term and subject to no clear conditions; (iii) to require him to pay a rent fixed by the magistrate in default of agreement, always subject, however, to a maximum ascertained or to be ascertained as a fair rent; (iv) for the serviceman or his dependants to qualify for the benefit he must during some period have been required by war service to live in premises other than his home; (v) once in possession the serviceman or his parent, his wife or his other female dependant, can remain, notwithstanding changes in the position and necessities of the owner. Further, when an application is made, the premises must in effect be left unoccupied, no matter how much time elapses before the application is disposed of.

In my opinion, we should limit ourselves to the case of a discharged serviceman and not embark on a consideration of the provisions for his dependants. For that is the only case before us and I see no reason to doubt that, even if the presence in the list of protected persons of some dependants cannot be supported as a good exercise of power, it would not bring all the regulations down. The condition about the serviceman's spending some of his war service in living in premises other than his home is probably to be explained as an attempt to confine the operation of the regulation to cases where the war service was calculated to bring to an end the domestic arrangements under which the soldier, sailor or airman had been living. But the condition does not extend, it restricts, the class to be benefited. There is the clearest connection between the purpose of the legislative power and the purpose of the regulations, at all events in relation to the servicemen themselves. To my mind, on this footing, all the criticisms that were made of the regulations go to policy and not to power. Given the power to deal with the housing

of servicemen, the fact that some servicemen are included, although they are not homeless, and that others may not qualify for a preferential claim to an unoccupied dwelling, although they are homeless, goes entirely to the manner in which the power has been exercised and not to ultra vires. Counsel for the Commonwealth laid stress upon the purpose with which the regulations (in their first form) were introduced during the war, which he said was to assure servicemen that on their return they would have a prior claim on unoccupied dwellings and that while they were away their wives and families would have the same priority. No doubt this is a fair description of what the regulations might be designed to do.

So far as the constitutional power is concerned, I think that the provisions of the regulations which do or may affect this case are not ultra vires.

But when Statutory Rules 1946 No. 86, No. 87 and No. 125, were adopted, viz. in May and July 1946, active hostilities had ceased and the surrender of the enemy had long been complete. The wide and flexible application of the legislative power with respect to defence had necessarily changed its direction. Its direction was no longer towards sustaining the conflict with the enemy, but towards measures calculated to liquidate the organization for war and restore conditions of peace.

But the statutory power conferred by the *National Security Act* upon the Executive Government to make regulations was framed at the beginning of the war and, of course, it had in view the struggle upon which we were then entering. Is the statutory power relevant to the purpose to which the constitutional power now applies ? The material words of the power are those with which s. 5 (1) begins and those with which it ends, viz. " regulations for securing the public safety and the defence of the Commonwealth " ; and " for prescribing all matters which, by this Act, 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, or for carrying out or giving effect to this Act."

If regs. 28A, 30, 30A, 30AA, 30AB, 30AC, 30ACA, 30AD, 30AE and 30AF were now for the first time to be adopted as the expression of a newly established policy, I should find it difficult to sustain them as an exercise of the statutory power conferred in the foregoing words. In the expression for " securing the public safety and the defence of the Commonwealth " the word " securing " governs the word " defence " and the whole phrase looks, not to winding up after the close of the hostile war, but to the prosecution of the war against the

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enemy. This is the case clearly enough with the phrase " for the more effectual prosecution of any war " &c.

But the regulations in question are no more than an amended and elaborated or amplified form of much earlier provisions. Statutory Rules 1945 No. 101 was adopted on 28th June 1945 and I think that regs. 28A, 30, 30A and 30AA, as they stood after that Statutory Rule was passed, were valid as exertions of the power conferred by the words in s. 5 I have discussed. For at that time they constituted a measure incidental to the active conduct of the war. The regulations of which this cannot, as I think, be said are Statutory Rules 1946 Nos. 86, 87 and 125. But, at all events, upon the matter with which this case is concerned, namely the position of the discharged serviceman, these three Statutory Rules appear to me to do no more than strengthen in some respects, qualify in others, and change in detail, provisions expressing the same policy and proceeding upon the same general plan. It is true that Statutory Rules 1946 No. 86 takes the form of repealing the former provisions and replacing them with the new. But that is only a draftsman's procedure. The substance is as I have said.

The question then arises whether the power given by s. 5 includes authority thus to alter and amend existing regulations which, being within the constitutional power, remain on foot, though if freshly adopted at this stage they would be outside s. 5.

Such an authority is in truth an incidental power necessary to the proper continuance of the regulations. Act No. 15 of 1946 shows that the legislature contemplated the continuance of many regulations and orders until 31st December 1946, and upon this question of construction it is proper to take into account the new version of s. 19 enacted on 18th April 1946 by s. 2 of No. 15. For it is relevant to the operation to be ascribed to the last words of s. 5, namely " or for carrying out or giving effect to this Act."

The Act No. 15 of 1946, while ending the operation of the *National Security Act* on 31st December 1946, implies an intention that, until that date, the regulations and the regulation-making power shall be sustained. Remembering what were the general purposes of the *National Security Act*, a wide operation should be given to the concluding words of s. 5. For it could never have been intended that a large body of law expressed in regulations should remain immutable between the collapse of the enemy and the termination of the statute.

On the whole, I think that regulations contained in Statutory Rules 1946 Nos. 86 and 87 and, if it matters, No. 125, so far as they affect the present case, are within power.

For these reasons the demurrer, in my opinion, should be allowed and the suit dismissed with costs.

McTIERNAN J. In my opinion the demurrer should be allowed. My reasons for allowing it are the same as those of the Chief Justice. I think that it is unnecessary to add anything to his Honour's judgment.

WILLIAMS J. This is a demurrer by the defendants to an action brought by the plaintiffs claiming a declaration that regs. 30A, 30AA, 30AB, 30AC and 30AD of the *National Security* (*War Service Moratorium*) *Regulations*, as amended by Statutory Rules 1946 No. 125, or some or all of them are void.

Regulation 30A gives a person deemed to be a protected person the right to apply in writing to a court of limited civil jurisdiction constituted by a police, stipendiary, or special magistrate in a State or Territory in which is situated a dwelling house which is unoccupied or about to be become unoccupied for a warrant authorizing the delivery of possession to the applicant. Regulation 30AD provides that upon delivery of the possession of a dwelling house to a protected person under a warrant he shall be deemed to be a tenant of the owner of the dwelling house. Regulation 30AD (2) provides for the payment of rent at an amount agreed upon between the owner and the tenant not exceeding the fair rent, if any, fixed or determined by a fair rents court or in default of agreement at an amount fixed by the court which granted the application. Regulation 30 (5) provides that, notwithstanding the provisions of the *National Security* (*Landlord and Tenant*) *Regulations*, an order shall not be made for the recovery of possession of any premises from a protected person on the grounds specified in (*g*) or (*i*) of sub-reg. (5) of reg. 58 of the *National Security* (*Landlord and Tenant*) *Regulations* unless the court making the order is satisfied (*a*) that reasonably suitable alternative accommodation is available for the occupation of the protected person or (*b*) that the protected person has sublet the premises in respect of which the order is sought and is permanently residing elsewhere. Regulation 30 (4) provides that in the application of the provisions of the *National Security* (*Landlord and Tenant*) *Regulations* to a lessee who is a protected person, reg. 58 shall be read as if for par. (*a*) of sub-reg. (5) there were substituted the following par. (*a*) that the lessee has failed to pay the rent in respect of a period of not less than fifty-six days. Protected persons are defined by the amendment made to reg. 30 (9) by Statutory Rules 1946 No. 125. Shortly stated they comprise a member of the forces and a discharged member of the forces who has been for a defined period " required, by reason of his war service, to live in premises other than premises occupied by him, or by a member of the household to which he

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belongs, as a home " and the female dependants and parents of such member of the forces.

The only private rights of property invaded by the regulations are those of the owners as defined by reg. 30AF inserted by Statutory Rules 1946 No. 125 of dwelling houses which are alleged to be unoccupied or about to become unoccupied. The plaintiff the Real Estate Institute of New South Wales is not alleged to be an owner of any such dwelling house and I agree that it has not a sufficient interest to maintain the action. But the plaintiff Collett is in a different position. He is a lessee of a dwelling house at Queanbeyan in which he is accustomed to reside for part of the year and as such is an owner of the house for the purposes of the regulations. The defendant Blair claims that he is a discharged member of the forces and as such a person deemed to be a protected person. He has applied in writing for a warrant for the possession of this dwelling house. The application has come on for hearing before a magistrate in the Court of Petty Sessions at Queanbeyan and has been adjourned.

The classes of persons included in the definition of persons deemed to be protected persons are severable, and it is not necessary on this demurrer to consider the validity of the regulations except in relation to the class to which the defendant Blair belongs.

The regulations are made under the power conferred upon the Federal Executive Council by the *National Security Act* to exercise the constitutional defence power of the Commonwealth " for securing the public safety and the defence of the Commonwealth." The original reg. 30A giving members and discharged members of the forces a right to apply for possession of unoccupied dwelling houses (therein referred to as any dwelling house which is vacant or about to become vacant) was first inserted in the *National Security* (*War Service Moratorium*) *Regulations* by Statutory Rules 1942 No. 437, notified in the *Gazette* on 14th October 1942. The subsequent alterations to this regulation have been made by omitting or repealing the existing regulations and inserting new regulations in their stead. The regulations, the validity of which has been impeached, were inserted by Statutory Rules 1946 No. 86, notified in the *Gazette* on 13th May 1946, and by Statutory Rules 1946 No. 125, notified in the *Gazette* on 26th July 1946. There was in law a repeal of the existing regulations and their re-enactment in an amended form. If they had been the expression of an original legislative intent I would have similar difficulties to *Dixon* J. and for substantially similar reasons in fitting them within the content of the power conferred upon the Executive to legislate to secure the public safety and defence of the Commonwealth. But both sets of Statutory

Rules are intituled amendments of the *National Security* (*War Service Moratorium*) *Regulations* and if otherwise free from objection can, I think, be supported as within the power by reason of their origin during hostilities. I agree with Mr. *Mason* that the present regulations, although couched in language appropriate to what might be described somewhat inaccurately as a statutory tenancy, do not in law confer more than a purely personal right to use the dwelling house as a residence. Like similar provisions in the English *Increase of Rent &c. Acts*, they do not give a tenant an estate in the land which the tenant can assign or devise by will or which would devolve upon his bankruptcy or intestacy to his trustee in bankruptcy or next of kin. See the general remarks as to the effect of the English Acts in *Keeves* v. *Dean* (1) ; *Skinner* v. *Geary* (2). It may be that a tenant under the regulations could sublet part of the premises so long as he continued to reside in the other part himself, or sublet the whole of the premises while he was temporarily absent but intended to return, but once he sublet the whole premises for any period that was inconsistent with such an intention he would be liable to be ejected on the ground that he had sublet the premises and was permanently residing elsewhere. The regulations are intended to benefit a strictly limited class of discharged members of the forces, that is to say members who had a home before they became engaged on war service and who gave up that home because, on account of their war service, they were required to live in other premises. I have already expressed the opinion in *Miller* v. *The Commonwealth* (3) that the *National Security Act* 1946 has the effect of continuing the principal Act and such regulations made thereunder as are not expressly repealed until 31st December 1946, so that the present regulations will expire on that date.

The establishment in life of discharged members of the forces may reasonably include the provision of dwelling houses where they can live with their wives and families. The crucial question is the legislative means available to the Commonwealth for accomplishing this purpose. Section 51 (xxxi.) of the Constitution confers power upon the Commonwealth Parliament to make laws with respect to the acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws. There can be no question that under this power the Parliament could legislate for the temporary or permanent acquisition on just terms of any real or personal property or any estate or interest in such property required for the purpose.

(1) (1924) 1 K.B. 685.
(2) (1931) 2 K.B. 546.
(3) *Ante*, at p. 187.

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The Constitution, like any other document, must be construed as a whole and this express power, as the Chief Justice pointed out in *Johnston, Fear & Kingham* v. *The Commonwealth* (1), imposes a limitation upon legislation for the acquisition of property for any purpose including any purpose of defence with respect to which the Parliament has power to make laws. In my opinion, there is no general authority under the Constitution for the Parliament in the exercise of its legislative powers to interfere with the proprietary rights of individuals under the laws of the States and compel one citizen to make his property available for the benefit of another.

During hostilities legislation under the defence power requiring householders to billet members of the forces, and probably also members of their families, could be valid. And during the period of demobilization legislation to the same effect might be valid. By analogy to billeting, legislation passed in war-time requiring citizens to allow members of the forces and their families to reside in unoccupied houses could also be valid.

We are now in a period when the defence power is contracting. In my opinion the operation of the defence power in peace-time could not be wide enough to authorize legislation, otherwise than under s. 51 (xxxi.), to make dwelling houses owned by individuals available as dwelling houses for discharged members of the forces. But the present regulations can, I think, be justified as an exercise of the defence power during hostilities and the immediate aftermath. They are of temporary duration and any statutory rights they create would not continue after their expiration. In these circumstances I am not prepared to hold that those regulations which are challenged are at present beyond the ambit of the defence power.

I would therefore allow the demurrer.

Demurrer allowed with costs. Judgment for defendants with costs.

Solicitors for the plaintiffs, *E. H. Tebbutt & Sons.*

Solicitor for the defendants, *G. A. Watson,* Acting Crown Solicitor for the Commonwealth.

J. B.

(1) (1943) 67 C.L.R., at p. 318.