

THE KING

THE COMMONWEALTH RENT CONTROLLER AND OTHERS :

<i>National Security—Landlord and tenant—Rent control—Determination of rent—</i>	H. C. OF A.
<i>Application for variation by one of several tenants—Power of controller to vary</i>	1947.
<i>rent of all tenants of his own motion—National Security (Landlord and Tenant)</i>	⎵
<i>Regulations (S.R. 1945 No. 97—1947 No. 31), regs. 16-18, 21, 23, 30, 31 (2),</i>	SYDNEY,
<i>40-45, 50.*</i>	<i>Aug. 11, 12 :</i>

*High Court—Prohibition to Commonwealth officer—Provision prohibiting prohibition or certiorari—Re-determination by Commonwealth Rent Controller—Whether judicial or administrative function—The Constitution (63 & 64 Vict. c. 12), s. 75 (v.)—National Security (Landlord and Tenant) Regulations (S.R. 1945 No. 97—1947 No. 31), regs. 23, 30, 38.**

Held (1) that the Controller had no power to vary under reg. 23 of his own motion the rent of premises occupied by lessees other than the applicant;

(3) that reg. 38 did not exclude the power of the High Court to grant prohibition in respect of the excess of jurisdiction by the Controller.

* The material provisions of the Regulations are set out in the judgment of Latham C.J. and Dixon J.

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On 25th March 1947 the delegate of the Commonwealth Rent Controller in Queensland upon the application of National Mutual Life Association of Australasia Ltd., owner of the National Mutual Building in Queen Street, Brisbane, determined, pursuant to the *National Security (Landlord and Tenant) Regulations*, the fair rent of accommodation in respect of the National Mutual Building, that building being "prescribed premises" within the meaning of the Regulations. Part of the premises was occupied by National Mutual Life Association of Australasia Ltd., the rest of the premises being let to thirty-nine tenants.

Dorothy May Clifford, the tenant of the basement of the premises, applied, on 15th April 1947, for a variation of the determination of the rent of "part of the prescribed premises" on the ground that, by an error or omission, an injustice had been occasioned by the determination in that the valuation of the premises was excessive, rentals were not correctly apportioned and error had been made in connection with cleaning charges. It was proved that the rent of the basement occupied by Dorothy May Clifford had been determined on the basis that the owner of the premises provided for the cleaning of those premises, whereas in fact Dorothy May Clifford paid for such cleaning. Notice was given by the delegate to the owner and to all other tenants of the premises that an application had been made for "a variation of the determination of the above prescribed premises." On the hearing of the application the owner of the premises, Dorothy May Clifford, and one other tenant were represented. On 29th May 1947 the delegate revoked the original determination and re-determined the rental of the portion of the premises occupied by Dorothy May Clifford and purported to re-determine the rentals of all other portions of the premises in accordance with reg. 23 of the *National Security (Landlord and Tenant) Regulations*.

Upon the application of the owner of the premises *Dixon J.* ordered the respondents to show cause before the Full Court of the High Court why a writ of prohibition should not issue to the delegate of the Commonwealth Rent Controller prohibiting him from further proceeding on his determination of 29th May 1947 in respect of the National Mutual Life Association Building upon the grounds (1) that none of the grounds mentioned in reg. 31 (2) of the *National Security (Landlord and Tenant) Regulations* existed; (2) that the respondent the Deputy Rent Controller misconstrued reg. 31 (2) of the said Regulations in holding that an error or omission had occurred and an injustice had been occasioned because in his view (a) the

valuation of the building was excessive and (b) the rentals had not been correctly apportioned and in treating the fact that an error had been made in connection with the cleaning charges in respect of premises tenanted by the respondent Dorothy May Clifford as warranting in law a re-determination or variation of the fair rents for the entire building; (3) that upon the application of the respondent Dorothy May Clifford the respondent the Deputy Rent Controller had no power under reg. 31 (2) of the said Regulations to determine, re-determine or vary the fair rent of any tenants of the said building except the respondent Dorothy May Clifford the only applicant to him; (4) that the Deputy Rent Controller had no power under reg. 23 of the said Regulations to proceed of his own motion to re-determine or vary the fair rents payable by the tenants of the said building; (5) that the Deputy Rent Controller had no power under the said reg. 23 to re-determine or vary the fair rents as aforesaid without complying with sub-reg. (2) of the said reg. 23 and that the said sub-regulation was not complied with.

Kitto K.C. (with him *Hanger*), for the prosecutor. The Controller may of his own motion make a determination (reg. 23) but not vary one, and by varying the rents of all tenants on the hearing of an application by one tenant to vary her rental he acted in excess of his powers. On such an application he can only vary his determination on certain specified grounds (reg. 31 (2)). Here there was no application before the Controller except that of Miss Clifford, no notice of intention to determine any rent other than hers and the notice did not indicate an intention to proceed on the Controller's own motion or on any of the specified grounds. The Controller exceeded his powers in purporting to vary Miss Clifford's rent in respect of matter other than cleaning, and to vary the rents of other tenants. "Error and omission" in reg. 31 (2) means error or omission of fact not error as to opinion (*Hall v. Harris* (1)). Regulation 31 was not intended to provide a substitute for an appeal, which is provided for in the regulations. The regulations (regs. 40-45, 47, 50) show that the Controller or delegate must act in a judicial manner because he is regulating the rights of parties and prohibition will lie if he exceeds his powers under the regulations.

Bennett K.C. (with him *Fahey*), for the respondents. Prohibition does not lie to the Rent Controller because (1) he exercises a purely administrative function; (2) he is *functus officio* and (3) he did not exceed his powers. As to (1) the Controller has no duty to hear. He may determine the fair rent after inquiry. It is only when a

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matter goes on appeal that the proceeding becomes judicial (*Hampton & Co. v. United States* (1); *Silk Bros. Pty. Ltd. v. State Electricity Commission of Victoria* (2); *Arnold v. Hunt* (3); *R. v. Electricity Commissioners* (4); *R. v. Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (5); *R. v. Legislative Committee of the Church Assembly* (6); *National Security (Prices) Regulations*). To be a duty to act judicially there must be a hearing with all the associated features of a hearing (*Board of Education v. Rice* (7); *R. v. Housing Appeal Tribunal* (8); *Local Government Board v. Arlidge* (9); *Capel v. Child* (10); *R. v. Archbishop of Canterbury* (11); *R. v. Westminster Assessment Committee* (12); *R. v. Commissioner of Patents*; *Ex parte Weiss* (13); *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (14); *R. v. Macfarlane*; *Ex parte O'Flanagan* (15)). As the functions of the Controller are purely administrative prohibition does not lie. As to (2) prohibition does not lie because the Controller is *functus officio* (*Clifford and O'Sullivan* (16); *R. v. Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (17); *R. v. Hickman*; *Ex parte Fox* (18); *R. v. Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (19); *Waterside Workers' Federation of Australia v. Gilchrist, Watt and Sanderson Ltd.* (20); *Estate and Trust Agencies* (1927) *Ltd. v. Singapore Improvement Trust* (21). As to (3) reg. 23 gives power to the Controller to determine rents of his own motion and vary them after a determination. That is not cut down by any other words in the regulations (See *Acts Interpretation Act* 1901-1941, s. 33; *Parisienne Basket Shoes Pty. Ltd. v. Whyte* (22)). Regulation 31 (2) is only to stop frivolous applications.

Kitto K.C. in reply referred to *Errington v. Minister of Health* (23).

Cur. adv. vult.

Sept. 17

The following written judgments were delivered :—

LATHAM C.J. and DIXON J. The *National Security (Landlord and Tenant) Regulations* provide that the Commonwealth Rent Controller

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| (1) (1928) 276 U.S. 394 [72 Law. Ed. 624]. | (12) (1941) 1 K.B. 53. |
| (2) (1943) 67 C.L.R. 1, at pp. 17, 20. | (13) (1939) 61 C.L.R. 240. |
| (3) (1943) 67 C.L.R. 429, at p. 433. | (14) (1945) 72 C.L.R. 37. |
| (4) (1924) 1 K.B. 171, at p. 205. | (15) (1923) 32 C.L.R. 518, at p. 519. |
| (5) (1944) 69 C.L.R. 407. | (16) (1921) 2 A.C. 570, at p. 584. |
| (6) (1928) 1 K.B. 411, at p. 415. | (17) (1920) 28 C.L.R. 456. |
| (7) (1911) A.C. 179. | (18) (1945) 70 C.L.R. 598. |
| (8) (1920) 3 K.B. 334, at p. 337. | (19) (1944) 69 C.L.R. 407. |
| (9) (1915) A.C. 120. | (20) (1924) 34 C.L.R. 482, at p. 556. |
| (10) (1832) 2 C. & J. 558 [149 E.R. 235]. | (21) (1937) A.C. 898. |
| (11) (1859) 1 El. & El. 545 [120 E.R. 1014]. | (22) (1938) 59 C.L.R. 369. |
| | (23) (1935) 1 K.B. 249, at p. 259. |

(whose powers may be exercised by a duly authorized delegate—reg. 11) shall have the power of determining the fair rent of “prescribed premises”—defined in reg. 8 so as to include any part of any premises. The Controller may determine the rent upon an application by a person interested in the premises as lessor or lessee (reg. 16) giving notice to other persons interested, such as superior lessor or mortgagee (reg. 17) and (reg. 23) may determine the rent of his own motion. Under reg. 30 it is provided that a determination may be varied on application made in the same manner as an application to the Controller for a determination, and that the provisions of Part II. of the Regulations shall, so far as applicable, apply to variations of determinations. Part II. consists of five divisions. Regulations 16 to 24A constitute Div. 3 of that Part. Regulation 31 (2), which, with reg. 30, is in Div. 5, provides that “During such period as is specified in the determinations, or, if no period is so specified, during the period commencing with the date of the determination and ending twelve months after that date, an application shall not be made to vary the determination, or to determine the fair rent of the prescribed premises . . . except on the ground that—(a) by an error or omission, an injustice has been occasioned by the determination;” or upon three other specified grounds. The principal question which arises upon these proceedings is whether the power which the Controller possesses to determine the rent of prescribed premises of his own motion enables him to vary of his own motion at any time a rent which has already been the subject of a determination.

The National Mutual Life Association of Australasia Ltd. is the owner of a large building in Brisbane. The building is “prescribed premises” within the meaning of the regulations. Part of the building is occupied by the Association itself, and the rest of the building is let to thirty-nine tenants. Miss Dorothy May Clifford is the tenant of the basement of the building. On 25th March 1947, upon an application by the Association, rents in respect of all the tenants were determined. On 15th April 1947 Miss Clifford made an application for a variation of the determination of the rent of “part of the prescribed premises” on the ground that by an error or omission an injustice had been occasioned by the determination. The particulars of the error or omission were stated as “(a) The valuation of the building is excessive. (b) The rentals are not correctly apportioned, and (c) An error has been made in connection with the cleaning charges.” It was proved that the delegate of the Controller had determined the rent of the basement occupied by Miss Clifford upon the basis that the Association provided for the

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cleaning of those premises, whereas in fact Miss Clifford paid a sum stated to be 10s. or £1 a week for the cleaning of those premises. There had therefore been an error of fact which was relevant to the determination.

The delegate gave notice to the Association and to all the other tenants that an application had been made for “ a variation of the determination of the above prescribed premises.” The premises were referred to as “ National Mutual Life Association Building.” In fact Miss Clifford had not applied for a variation of the determination in respect of the whole of the premises. Indeed, she was not in a position to make such an application. Regulation 16 is the regulation which gives a right to apply for a determination, and it provides that certain lessees of prescribed premises may apply in writing to the Controller to have the fair rent of the “ prescribed premises ” determined by the Controller. Accordingly, a lessee of premises can make an application only in respect of premises of which that person is the lessee. The delegate, however, conducted a hearing of the application at which the Association, Miss Clifford and another tenant were represented. He expressed the opinion that he was entitled under reg. 23 to vary the rent of his own motion, and in fact made a determination varying the rent of all the tenants. It is contended for the Association that the delegate had no power upon Miss Clifford’s application to deal with the rent of premises other than those let to Miss Clifford. The Association has obtained an order nisi for prohibition directed to the delegate and the tenants. The application is based upon s. 75 (v.) of the Constitution, which provides that the High Court shall have original jurisdiction in all matters in which a writ of prohibition is sought against an officer of the Commonwealth. The applicant contends that the delegate is an officer of the Commonwealth exercising powers which should be exercised in a judicial manner and is therefore subject to prohibition, and that in the circumstances which existed he had no power to vary any of the rents except that of Miss Clifford.

It is not contended for the delegate that he is not an officer of the Commonwealth.

Regulation 16 provides that the lessor or certain lessees may apply in writing to the Controller to have the fair rent determined by the Controller. Regulation 17 provides that at least seven days prior to determining the fair rent of prescribed premises (other than “ shared accommodation ”) the Controller shall give notice of his intention to determine the fair rent to the lessor and lessee, to sub-lessees, and in certain cases to other persons interested in the particular premises in question. Regulation 18 provides that where

an application has been made for the determination of the fair rent of prescribed premises "the Controller may, after making such inquiries and obtaining such reports (if any) as he considers necessary, and after considering any representations made by any person whose rights may be affected by the determination, determine the fair rent of the prescribed premises." Regulation 23 provides that:—

"(1) The Controller may, of his own motion, after inquiry, determine the fair rent of any prescribed premises other than shared accommodation. (2) The Controller shall give to the lessor and lessee of the prescribed premises and to the other persons referred to in reg. 17 of these Regulations notice of his intention to determine the fair rent of the premises, and the notice so given to the lessor shall, for the purposes of this Division, be deemed to be an application. (3) In determining the fair rent of prescribed premises under this regulation, the Controller shall have the same powers as he has in connexion with an application, and any determination made by the Controller shall have the same effect for all purposes as a determination made upon an application."

It is established that when a person has legal authority to determine questions affecting the rights of subjects and, having the duty to act judicially, acts in excess of his legal authority, he is subject to the controlling jurisdiction exercised in the writ of prohibition: *R. v. Electricity Commissioners* (1). The question is whether this principle applies in the case of the Rent Controller. He is a person who has legal authority to determine what rent shall be paid by persons who are already in the relationship of landlord and tenant and therefore to affect the rights of such persons. The question in dispute is whether he is required to act judicially in the exercise of his functions, or whether he is merely an administrative officer who hears such representations from interested parties as he thinks proper and then decides a matter without being required to act in a judicial manner.

In our opinion the Regulations show that the Rent Controller is required to exercise his functions in a judicial manner. He may act upon an application (regs. 16, 17 and 18) or of his own motion (reg. 23). He also has power under reg. 30, upon an application being made, to vary a determination, and if he acts under this power the provisions of Part II. of the Regulations relating to determinations, as far as applicable, apply to the variation.

There are many provisions relating to applications which are applicable to applications for determinations and therefore to applications for variations of determinations. Regulation 17 requires

(1) (1924) 1 K.B. 171, at p. 205.

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notice to be given to interested parties. Regulation 18 requires the Controllor to make such inquiries and obtain such reports, if any, as he considers necessary, and to consider representations made by any person whose rights may be affected. Regulation 40 enables him to summon witnesses and administer oaths. Regulation 41 makes it an offence for a person served with a summons to refuse or fail to attend before him. Regulation 42 makes it an offence for a person to refuse to be sworn or to give evidence. Regulation 43 provides that a witness shall not intentionally give false testimony before the Controllor. Regulation 44 gives protection to witnesses and exposes them to liabilities in the same manner as in cases tried in the Supreme Court of a State or Territory. Regulation 45 protects reports and proceedings before the Controllor. Regulation 47 gives the Controllor in the exercise of his functions the same protection and immunity as a justice of the High Court. Regulation 50 provides that any person who is a party to proceedings under the relevant part of the regulations or who may be affected by the result of any such proceedings, may be represented by an agent, who may examine witnesses and address the Board or Controllor on that person's behalf.

The result of these provisions is that the Controllor is bound to give notice of his intention to determine or vary any rent, that he is bound to hear the parties or their agents, and that the parties are entitled to adduce evidence, examine witnesses and address the Controllor. When to these characteristics of the proceedings before the Controllor there is added the protection given to the Controllor and to witnesses in the same manner as in the case of judicial proceedings, it must in our opinion be concluded that, though the Controllor is not a court or a judge, he is under a duty to act in a judicial manner. Accordingly, in our opinion the objection that prohibition will not go because the Controllor is not a person who is required to exercise his powers in a judicial manner fails.

The prosecutor, however, is met by a further objection. Regulation 38 is in the following terms:—"Every determination of a Fair Rents Board or of the Controllor shall, except as provided by this Part, be final and without appeal, and no writ of prohibition or certiorari shall lie in respect thereof."

An appeal is provided from a decision of the Controllor to a Fair Rents Board. The respondent did not rely upon this provision as excluding in the present case the jurisdiction of the High Court under s. 75 (v.). No such provision can exclude the jurisdiction of this Court: see cases cited in *Australian Coal and Shale Employees*

Federation v. Aberfield Coal Mining Co. Ltd. (1). When Commonwealth legislation confers powers upon an officer a provision such as reg. 38 cannot be construed as intended to provide that his powers are absolutely unlimited. Such a construction would raise questions of the validity of the legislation. Such a provision cannot help to give effect to any legislation which it is beyond the power of the Commonwealth Parliament to enact. Further, even where no question of validity arises, the effect of such a provision in a particular case depends upon the construction of the relevant statute taken as a whole. If a legislature gives certain powers and certain powers only to an authority which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all persons, and in respect of all subject matters, and without observance of any conditions which the legislature has attached to the exercise of the powers. Such a provision will operate to prevent prohibition going in cases of procedural deficiencies where the authority whose powers are in question is in substance dealing with the matter in respect of which power is conferred upon it. But if, upon the construction of the legislation as a whole, it appears that the powers conferred upon the authority are exercisable in certain cases, and definitely that they are not exercisable in other cases, and that any attempt to exercise them was intended to be ineffective, then a provision taking away prohibition will not exclude the jurisdiction of this Court under s. 75 (v.) of the Constitution in a case of the latter description: see *R. v. Hickman*; *Ex parte Fox* (2). It is therefore necessary to inquire whether the regulations now under consideration impose any condition which must be satisfied when it is sought to exercise the power to vary a determination of rent.

The Regulations draw a distinction between the determination of rent and the variation of a determination. The power to make a determination is conferred by reg. 18. It is claimed that the *Acts Interpretation Act* 1901-1941, ss. 33 and 46, applies to this provision and that power to determine rents can be exercised from time to time. But, however this might otherwise be, in this case a contrary intention appears, because there are special provisions contained in regs. 30 and 31 (2) which apply to applications to vary a determination or to determine the fair rent after a determination has been made. Regulation 31 (2) applies during such period as is specified in the determination, or if no period is so specified, for a period of twelve months after the determination. The provision is that an appli-

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(1) (1942) 66 C.L.R. 161, at p. 176.

(2) (1945) 70 C.L.R. 598, at pp. 614-617.

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cation “shall not be made during such period to vary the determination or to determine the fair rent,” except on certain grounds.

For reasons already stated, Miss Clifford could make an application for variation only in respect of premises leased by her : see regs. 16 and 30. The fact that she made an application for variation has no bearing upon the power of the delegate to vary or determine the rents of other tenants. Therefore the question is whether reg. 23 enables the Controller to vary those rents of his own motion.

Regulation 30 is a special provision expressly giving power to the Controller to vary determinations. The power can be exercised only “on application made in the same manner as an application to the Controller for a determination.” It has been shown that an application can be made to the Controller for a determination only by a person interested in the particular premises in respect of which a determination is sought. Such an application must be in writing addressed to the Controller (reg. 16). No manner of making an application is provided in any other cases. So also an application for a variation can be made only by such a person and in that manner. No application is made to the Controller by any person when he acts of his own motion. The very meaning of acting “of his own motion” is that he acts without any application—though when he does so act, he must give notice and otherwise proceed as in the case of an application (reg. 23 (2)). Thus, as a variation can be made only upon an application to the Controller, and as a decision of the Controller to act of his own motion cannot be regarded as an application to the Controller, the Controller has no power to vary a determination of his own motion.

This conclusion is supported by a consideration of reg. 31 (2). The object of reg. 31 (2) is plainly to give some degree of stability to determinations so that parties shall know what their position will be either for twelve months or during the period specified in the determination, subject only to the risk of variation being made upon an application by a person qualified to make the application, and upon limited grounds. If the Controller is at liberty to vary a rent at any time of his own motion under reg. 23 there is no stability in any determination. Whenever the Controller thought proper he could vary a determination, and reg. 31 (2) would have no effect at all. He could act without any application by anybody or upon a request or suggestion from any person, whether a tenant or not, and whether or not any of the grounds for variation set out in reg. 31 (2) in fact existed. It is possible to give effect to reg. 31 (2) only by holding that an application to vary within the period mentioned in the regulation can be made only by a person who is interested in

premises in respect of which there has been a determination, and who is entitled under the regulations to make an application to the Controller.

The position, therefore, is that, in respect of tenants other than Miss Clifford, there was no application to vary before the delegate, and he had no power to vary the rents of premises other than those occupied by Miss Clifford.

An objection to the foregoing reasoning was based upon reg. 21, which is in the following terms:—"Where any fair rent has been determined by the Controller it shall, as from the date fixed under the last preceding regulation and until varied in pursuance of this Division, be the rent of the premises, or of the premises together with goods leased therewith, in respect of which it is fixed."

It was pointed out that this provision assumed that rents could be varied in pursuance of "this division," that is, Div. 3 of Part II. In fact Div. 3 of Part II. contains no provision for variation unless, indeed, reg. 23, referring to variation by the Controller of his own motion, confers authority to vary rents. It was argued therefore that reg. 23 should be construed as implying such an authority.

It is true that the terms of reg. 21 suggest that rent may be varied in pursuance of Div. 3. But in fact the provisions as to variation, which are express and very specific, namely regs. 30 and 31, are contained in Div. 5. There is no provision in Div. 3, other than that already mentioned in reg. 21, which contains any express reference to variation. The strict result is that there simply is no provision in Div. 3 in pursuance of which rent can be varied, and accordingly the reference to variation contained in reg. 21 can have no operation. An alternative view, which is possibly well-founded, is that the word "Division" in reg. 21 is a mere slip for "Part," but it is preferable, we think, to put the construction of the regulation upon the other ground mentioned, namely that, taking the regulations as a whole, the provisions for variation are in Div. 5 and there are no provisions for variation in Div. 3.

The result therefore is, in our opinion, that the Controller cannot at any time vary of his own motion rents that have been determined, though when a determination has expired he can, either upon application or of his own motion, make a new determination; that he can vary such rents only upon an application made by a person entitled to make an application under the Regulations, and then only where the application is made upon the grounds mentioned in reg. 31 (2). When an application is made upon such a ground he can consider the ground alleged, but his authority is, in our opinion,

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limited to action upon the ground alleged, that is, the allegation of a ground mentioned in the regulation does not throw open the whole determination. The provisions of reg. 31 (2) are designed to enable either party to apply to the Controller to make corrections of the matters which are referred to in the grounds specified in the regulation. Further, the words "error or omission" apply to a mistake of fact or an omission to take a fact into consideration. They do not apply where the ground of an application for a variation is that the Controller should have reached a different conclusion upon the facts before him. If the words were construed in the latter sense, they would give to any dissatisfied person a right to apply for a variation at any time and the Controller would then be sitting as a tribunal of appeal from himself. Such a construction would make nonsense of the provisions in reg. 31 (2) limiting (within the period mentioned) applications for variations to applications upon four specified grounds. If these principles are applied in the present case the result is that the Controller can properly vary the rent to make allowance for the mistake as to the costs of cleaning Miss Clifford's premises, but that he is not at liberty to review his decisions as to the valuation of the building or the apportionment of rentals. Accordingly, upon the application of Miss Clifford there was authority to vary the determination of the rent which she paid in respect of the premises leased by her so far as, in the opinion of the delegate, the mistake as to the cost of cleaning justified a variation, but her application did not authorize the Controller to vary the rents of premises leased by other tenants or to vary her rent as a result of the reconsideration of matters other than cleaning costs.

Accordingly, in our opinion the order nisi should be made absolute.

RICH J. This is an application to make absolute a rule nisi for prohibition against the delegate of the Commonwealth Rent Controller and tenants of a certain building situate in Brisbane owned and in part occupied by the National Mutual Life Association. The application is made pursuant to s. 75 (v.) of the Constitution which confers jurisdiction on this Court in all matters in which a writ of prohibition is sought against an officer of the Commonwealth. It is not disputed that the Controller is such an officer. The substantial question for our determination is whether the Controller has the power of his own motion and at any time to determine a rent which has already been determined. Briefly stated, the relevant facts are that the rents of the "prescribed premises" of all the tenants including Miss Clifford had been determined. At a later date Miss Clifford applied for a variation of the rent of part of the prescribed

premises on the ground that "by an error or omission, an injustice had been occasioned by the determination": *National Security (Landlord and Tenant) Regulations*, reg. 31 (2) (a). There had been such an error or omission in the case of Miss Clifford's rent because it appeared that the Controller had determined it on the footing that the landlord was liable for the cleaning charges whereas she had paid the requisite amount. Regulation 16 enables a lessee who has fulfilled certain conditions as to payment of rent to "apply in writing to the Controller to have the fair rent of the premises determined." The scope of this application is limited to the premises occupied by the lessee and does not extend to all the premises. The notice however, given to the Association and to all the other tenants by the delegate, stated that an application had been made under reg. 31 "for a variation of the determination of the above described premises"—viz., the Association Building. The delegate then proceeded to hear the application in the presence of representatives of the Association, Miss Clifford and another tenant. The delegate stated that he "had jurisdiction conferred by reg. 23 to entertain the application" and he exercised it by redetermining all the rentals of the prescribed premises. In so doing was he acting merely in an administrative capacity or was it his duty to act judicially? The relevant regulations empower him to determine the rights and liabilities of parties and therefore he is bound to act judicially. Without detailing the regulations which impose this duty I refer to regs. 16-18, 23, 30, 40-45, 47 and 50. The difference between judicial power and the power in the exercise of which there is a duty to act judicially has been discussed in a number of cases amongst others, *Errington v. Minister of Health* (1); *E. Robins & Son Ltd. v. Minister of Health* (2); *Rola Company (Aust.) Pty. Ltd. v. The Commonwealth* (3). The further objection to the application based on reg. 38 is fully discussed in the judgment of the Chief Justice and *Dixon J.* and as I am in substantial agreement with it I refrain from recapitulating their reasons. It then remains to consider whether the Controller (or his delegate) has authority to vary a determination of his own motion at any time under reg. 23. The regulations contain special provisions relating to variations of determinations which require an application by an interested person before a variation can be made within the periods referred to in reg. 31 (2). As to this matter I agree with the opinion expressed in the reasons for judgment of the Chief Justice and *Dixon J.*

The order nisi should be made absolute.

(1) (1935) 1 K.B. 249.

(2) (1939) 1 K.B. 520, at p. 533.

(3) (1944) 69 C.L.R. 185, at pp. 203, 204.

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STARKE J. Rule nisi for writ of prohibition founded upon s. 75 (v.) of the Constitution calling upon the Commonwealth Rent Controller and others to show cause why the delegate of the Rent Controller should not be prohibited from further proceeding on his determination of 29th May 1947 of the fair rents of certain premises in Brisbane known as the National Mutual Building.

In March 1947, the Deputy Commonwealth Rent Controller had, upon an application of the National Mutual Life Association of Australasia Ltd., determined, pursuant to the *National Security (Landlord and Tenant) Regulations*, the fair rent of accommodation in respect of the National Mutual Building in Brisbane.

In April 1947, one of the tenants, Dorothy May Clifford, carrying on business under the style of Spurgins Ladies Hairdressing, made application to the Deputy Rent Controller for a variation of the determination in respect of "the part of the prescribed premises" known as the National Mutual Building which she occupied pursuant to the regulations already mentioned on the ground that by an error or omission an injustice had been occasioned by the determination.

Notice of her application for a variation was given to the National Mutual Life Association of Australasia Ltd. and all the tenants of the building, including the applicant, and that the application was set down for hearing. The Deputy Rent Controller, to whom the Commonwealth Rent Controller had delegated his powers under the regulations, already mentioned, proceeded to hear the application and determined the fair rent not only of the premises occupied by Dorothy May Clifford in the National Mutual Building but of all the tenants in the building.

The application to vary was made pursuant to regs. 30 and 31. A determination may be varied, on application made in the same manner as an application to the Controller for a determination, and the provisions relating to determinations apply so far as applicable to variations of determinations. But during the period mentioned in the regulations an application shall not be made to vary the determination or to determine the fair rent of the premises except on the ground, *inter alia*, that by an error or omission an injustice has been occasioned by the determination.

A lessor or lessee (reg. 16) may apply in writing to the Controller to have the fair rent of prescribed premises determined by the Controller. The Controller is required to give notice of his intention to determine the fair rent of the premises to the lessor and lessee and may after making such inquiries and obtaining such reports as he considers necessary and after considering any representations made

by any person whose rights may be affected by the determination, determine the fair rent of the premises (regs. 16, 17, 18). The fair rent so determined by the Controller shall, until varied, be the rent of the premises (reg. 21).

The Deputy Rent Controller, in determining the fair rent of all the tenants of the building and not merely the fair rent of the premises occupied by Dorothy May Clifford, purported to act upon the provisions of reg. 23. The Controller, that regulation provides, may of his own motion after inquiry determine the fair rent of any prescribed premises. He is required to give the lessor and lessee of the premises and to certain other persons notice of his intention to determine the fair rent of the premises and the notice so given to the lessor is for the purpose of the regulations deemed to be an application. But this provision was no warrant for proceeding to a new determination of the fair rent of the whole of the premises. A determination had already been made and was in existence and further, the Deputy Controller did not give notice of his intention to determine the fair rent of the premises, but only of an application under reg. 31 for a variation of the determination of the fair rent of the "above prescribed premises", the National Mutual Building, Brisbane, which he notified he had set down for hearing on 23rd April 1947, when those notified were invited to attend for the purpose of making any representations bearing on the application.

The application for a variation by Dorothy May Clifford was the only matter of which the Deputy Controller was seised and had any authority under the Regulations to determine. He was satisfied that by an error or omission an injustice had been occasioned by the original determination. Doubtless the error or omission must be one of fact, but building and developmental costs and cleaning charges had been erroneously stated in connection with the original determination. Accordingly, the Deputy Rent Controller had authority to vary the original determination in respect of the premises occupied by Dorothy May Clifford but not to vary it with respect to the premises occupied by the other tenants.

But it is objected that the Commonwealth Rent Controller, his deputy and delegate were exercising administrative functions in respect of which prohibition does not lie. "But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised

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in these writs" (*R. v. Electricity Commissioners* (1)). The Commonwealth Rent Controller, his deputy and delegate have legal authority within the meaning of this principle to determine questions affecting the rights of subjects, namely, to determine the fair rents which shall be paid by them in respect of prescribed premises and to act judicially in so doing.

Another objection was based upon reg. 38 :—"Every determination of a Fair Rents Board or of the Controller shall, except as provided . . . be final and without appeal, and no writ of prohibition or certiorari shall lie in respect thereof." This provision does not, however, affect the jurisdiction of this Court to grant prohibition under s. 75 (v.) of the Constitution (*Australian Coal and Shale Employees Federation v. Aberfield Coal Mining Co. Ltd.* (2)). But the regulation is important for the purpose of ascertaining the authority confided to the Rent Controller. It is plain that it does not enable him to transcend the Constitution. Nor does it confer jurisdiction upon him, subject to the appeal given by the regulation, authority finally to determine whether the conditions required by it for the exercise of his jurisdiction have or have not been fulfilled.

All reg. 38 does is to take away prohibition, and that cannot be done so far as the jurisdiction conferred upon this Court to grant prohibition pursuant to s. 75 (v.) of the Constitution.

The relation between the constitutional power and privative clauses such as reg. 38 does not yet appear to be clearly settled: see *Waterside Workers' Federation of Australia v. Gilchrist, Watt & Sanderson Ltd.* (3); *R. v. Hickman*; *Ex parte Fox* (4); *Australian Coal and Shale Employees Federation v. Aberfield Coal Mining Co. Ltd.* (5).

It is not important in this case to determine whether the matters that fall for decision under reg. 31 are within the jurisdiction of the Rent Controller. On the whole I should think they are, for they relate to the form of the applicant's proceedings and the proof that is required in those proceedings.

The rule nisi should be absolute as to all the determinations of the Deputy or Delegate Rent Controller other than his determination in respect of the premises occupied by Dorothy May Clifford. The determination in her favour was based upon an application to vary in accordance with the regulations and the various determinations, though based on the same evidence, are separate and distinct.

(1) (1924) 1 K.B. 171, at p. 205.

(2) (1942) 66 C.L.R. 161.

(3) (1924) 34 C.L.R. 482, at pp. 520, 521.

(4) (1945) 70 C.L.R. 598, at pp. 614-617.

(5) (1942) 66 C.L.R. 161, at pp. 176, 182 186.

WILLIAMS J. I agree substantially with the reasons for judgment of the Chief Justice and *Dixon J.* I agree with them that the order nisi should be made absolute.

Order absolute with costs.

Solicitors for the prosecutor, *Crouch & Patterson*, Brisbane, by *Pigott, Stinson, MacGregor & Palmer*.

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

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