[HIGH COURT OF AUSTRALIA.]

WENN . . . . . PLAINTIFF;

AND

ATTORNEY-GENERAL (VICTORIA) . . DEFENDANT.

ON REMOVAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 25-28.

SYDNEY, *Aug.* 20.

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

Constitutional Law—Inconsistency of Commonwealth and State statutes—Rehabilitation of discharged servicemen—Preference in employment—Promotion—Re-establishment and Employment Act 1945 (*No.* 11 *of* 1945), *ss.* 4, 10, 12, 16, 24-27 *—Discharged Servicemen's Preference Act* 1943 (*No.* 4989) (*Vict.*), *ss.* 4, 7, 9, 10.

The *Re-establishment and Employment Act* 1945, enacted by the Commonwealth Parliament, provided, in Part II., Div. 1, for reinstatement of members of the Forces in civil employment. It provided that any person who had completed a period of war service might apply to his former employer for reinstatement in employment (s. 12 (1)) and that the employer should make available to the applicant employment in the occupation in which the applicant was employed immediately prior to the commencement of his period of war service and under conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the former employer (s. 16 (1), (3) (*a*)). " Employer " was defined for the purposes of Div. 1 as including the Crown (whether in right of the Commonwealth or of a State) (s. 10 (1)). Part II., Div. 2, which provided for preference in employment, contained the following provisions :—The application of the Division should extend in relation to employment by the Crown in right of the Commonwealth or a State (s. 26). An employer should, in the engagement of any person for employment, engage, in preference to any other person, a person entitled to preference—which meant, so far as here material, a " member of the Forces " (ss. 4, 25)—unless he had reasonable and substantial cause for not doing so (s. 27 (1)); but nothing in s. 27 should apply in relation to the engagement for employment by any employer of a person already employed by him (s. 27 (5) (*a*)). " The provisions of this Division shall apply to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the Forces, of any law of a State " (s. 24 (2)).

The *Discharged Servicemen's Preference Act* 1943 (Vict.) provided that, where any employer invited applications for any position in his employment only from persons in his employment, he should in making any promotion to that position give preference to a suitable and competent discharged serviceman in his employment who applied for that promotion (s. 10 (1)). " Discharged serviceman " was defined (s. 2 (1)) so that it covered only a limited class of those who would be members of the Forces within the meaning of the Commonwealth Act. It was also provided that the provisions of s. 10 (and of certain other sections) of the Act should be observed in respect of employment by or under the Crown in right of the State of Victoria as if the Crown were an employer within the meaning of the Act (s. 4 (1)).

Held, by *Latham* C.J., *Rich*, *Dixon* and *McTiernan* JJ., that the Commonwealth Act disclosed an intention that, so far as the matter of preference in employment to discharged members of the Forces was to be governed by law, the Commonwealth law only should apply. Accordingly, s. 10 of the Victorian Act was inconsistent with the Commonwealth Act and was invalidated by s. 109 of the Constitution.

Per Latham C.J. and *McTiernan* J.: The provisions of the Commonwealth Act making it applicable to the Crown in right of a State, were within the power conferred by s. 51 (vi.) of the Constitution to legislate with respect to defence. In its application to the Public Service of a State the Act was not in excess of power as being an undue interference with the exercise by the State of its governmental functions. *Melbourne Corporation* v. *The Commonwealth*, (1947) 74 C.L.R. 31, referred to.

Per Rich and *Dixon* JJ.: Under s. 109 of the Constitution, s. 10 of the Victorian Act failed because it is part of an inseparable State plan—applying generally to employment in Victoria—dealing with the reinstatement in employment and the appointment and promotion of discharged servicemen, which, as a whole was in conflict with the Commonwealth Act. The provision of s. 4 (1) extending that plan to the Crown in right of Victoria depends on the existence of the Act as a valid law of general application. It was therefore unnecessary for the purposes of the present case to decide whether the provisions of the Commonwealth Act purporting to make that Act applicable to the Crown in right of the State were valid.

QUESTIONS OF LAW referred to Full Court.

In an action which was begun in the Supreme Court of Victoria against the Attorney-General of that State and was removed into the High Court the statement of claim of the plaintiff, Lionel Charles Wenn, was substantially as follows :—

1. The plaintiff at all material times was a member of the Public Service of the State of Victoria, being a permanent officer thereof as a warder in the Penal and Gaols Branch of the Department of the Chief Secretary of that State.

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2. In or about February 1947 the plaintiff made application to be promoted to the position of senior warder at Pentridge, a penal establishment of that branch.

3. The plaintiff was not a discharged serviceman but otherwise possessed the necessary qualifications and competence for promotion to that position.

4. The plaintiff was not recommended by his departmental head for promotion to that position, on the ground that, by virtue of the provisions of the *Discharged Servicemen's Preference Act* 1943 (Vict.), preference had to be given in promotion to positions within the Public Service of Victoria to discharged servicemen.

5. In or about March 1947 the plaintiff, being aggrieved by the failure to recommend him, appealed against such failure, and his appeal was heard by the Public Service Board pursuant to the provisions of the Public Service Acts (Vict.).

6. The plaintiff's appeal was dismissed by the Board on the ground that under the Act above-mentioned preference had to be given in promotion to positions within the Public Service of Victoria to discharged servicemen.

7. By virtue of the provisions of the *Re-establishment and Employment Act* 1945 of the Commonwealth of Australia, and of s. 109 of the Constitution of the Commonwealth, the provisions of the *Discharged Servicemen's Preference Act* 1943 (Vict.) are not applicable to promotions to positions within the Public Service of Victoria.

8. As a result of the matters aforesaid the plaintiff has suffered and will suffer prejudice and detriment in future applications by him for promotion within the Public Service of Victoria in positions which will from time to time become vacant therein.

The plaintiff claimed a declaration that the provisions of the *Discharged Servicemen's Preference Act* 1943 of the State of Victoria do not apply to promotions to positions within the Public Service of the State of Victoria.

The defendant delivered a defence which was substantially as follows :—

1. He admits the allegations contained in pars. 1 to 6 of the statement of claim.

2. As to the contentions of law contained in par. 7 thereof, he will contend that the same are not valid.

3. Further to par. 2 hereof, he will contend that the provisions of the *Discharged Servicemen's Preference Act* 1943 (Vict.) (herinafter referred to as Act No. 4989), s. 10, operate validly as law according to the true intent and meaning thereof and the section is not rendered invalid by the provisions of the *Re-establishment and*

Employment Act 1945 of the Commonwealth of Australia (hereinafter referred to as Act No. 11 of 1945).

4. Further and in the alternative, he will contend that, if on the true construction thereof, any provisions of Act No. 11 of 1945 are inconsistent with Act No. 4989, s. 10, then the provisions of Act No. 11 of 1945 are beyond the power to make law of the Parliament of the Commonwealth as conferred by the Constitution of the Commonwealth and, in particular, the power so conferred by s. 51 (vi.) of the Constitution and are invalid.

5. Further and in the alternative, he will contend that, if on the true construction thereof any provisions of Act No. 11 of 1945 are inconsistent with Act No. 4989, s. 10, and the provisions aforesaid would but for the matters hereinafter set out be within the power to make law of the Parliament of the Commonwealth, then the provisions of Act No. 11 of 1945 on the true construction thereof do not extend to or apply to the Crown in right of the State of Victoria in making any promotion of a servant of the said Crown in its employment, or alternatively, if the provisions aforesaid do so extend or apply, the same are beyond the power to make law of the Parliament of the Commonwealth as conferred by the Constitution of the Commonwealth and are invalid.

6. He denies the allegations contained in par. 8 of the statement of claim but admits that by reason of the allegations contained in pars. 1 to 6 thereof the plaintiff has sufficient interest in asserting the contention of law contained in par. 7 and in claiming the declaration sought.

Starke J. ordered that the cause be removed into the High Court and that the questions of law raised by the defence be argued before the Full Court.

Sholl K.C. (with him *Gowans*), for the plaintiff. The provision of the State Act which the plaintiff is particularly concerned to exclude is s. 10, which deals with "promotion." That section, it is submitted, is an inseverable part of a legislative scheme which is inconsistent with that of the Commonwealth Act; moreover, s. 10 is itself inconsistent with the Commonwealth Act. In either view the operation of the section is excluded by s. 109 of the Constitution. The principles as to inconsistency are collected and summarized in a recent paper by *H. Zelling*, *Australian Law Journal*, vol. 22, p. 45, and are laid down in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1); *H. V. McKay Pty. Ltd.* v. *Hunt* (2); *Hume* v. *Palmer* (3); *Ex*

(1) (1926) 37 C.L.R. 466.
(2) (1926) 38 C.L.R. 308.
(3) (1926) 38 C.L.R. 441.

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parte McLean (1); *Stock Motor Ploughs Ltd.* v. *Forsyth* (2); *Victoria* v. *The Commonwealth* ("*Kakariki*" *Case*) (3); *Carter* v. *Egg Marketing Board* (*Vict.*) (4); *Colvin* v. *Bradley Bros. Pty. Ltd.* (5). That, as to reinstatement in civil employment, the State Act is excluded by Part II., Div. 1, of the Commonwealth Act is clear from a comparison of ss. 3 (definitions of "discharged serviceman" and "war service"), 4 and 7 of the State, with ss. 4 (definitions of "member of the Forces" and "war service"), 10, 12-16, 18, of the Commonwealth Act. Reinstatement under s. 16 (3) of the Commonwealth Act includes rights as to seniority and therefore promotion (*Commissioner for Railways* (*N.S.W.*) v. *McCulloch* (6); *Public Service Act* 1946 (Vict.), s. 32). It is inconsistent with this scheme of reinstatement to allow effective operation to a State Act affecting seniority and promotion by reference solely to the discrimen of war service differently defined and tested; therefore, s. 10 of the State Act is inconsistent with Part II. Div. 1, of the Commonwealth Act. Instances can be given to illustrate the inconsistency. For example:—An employer in Victoria employed A. A, being domiciled in New South Wales, went back and enlisted there, and served in the Commonwealth Forces in Western Australia (i.e., a Commonwealth-Act serviceman). B was then promoted in his place. He enlisted in Victoria and served in the Commonwealth Forces in New Guinea (i.e., a State-Act serviceman). Being discharged before A, he applied and was reinstated. A then was discharged, and under s. 10 (3) (*b*) of the Commonwealth Act engaged in essential works for two years, and then applied for reinstatement under the Commonwealth Act. B, under the Commonwealth Act, s. 16 (5), is employed in a less favorable position to make room for A. The employer invites applications from within his service for a new position, involving promotion for either A or B. A and B both apply. Under the Commonwealth Act, A has rights of seniority as a reinstated Commonwealth serviceman, and in the Victorian Public Service he would normally be appointed (*Public Service Act* 1946 (Vict.), s. 32). Under the State Act, s. 10, B would be preferred as a State serviceman. If it is said that the reinstatement of a man in the same position he would have been in if he had remained in his employment exposes him to the disadvantage of intervening discriminatory State provisions regarding war service, the answer is that it is inconsistent with the Federal

(1) (1930) 43 C.L.R. 472: See p. 483.
(2) (1932) 48 C.L.R. 128: See pp. 134, 136, 147.
(3) (1937) 58 C.L.R. 618: See pp. 626, 628, 630, 633 et seq.
(4) (1942) 66 C.L.R. 557: See pp. 574-576, 584, 590, 591, 598, 599.
(5) (1943) 68 C.L.R. 151.
(6) (1946) 72 C.L.R. 141: See pp. 158-160, 162, 163.

scheme that State legislation should operate so as to create disparity in relation to the seniority and promotion rights of personnel to be reinstated under the Commonwealth Act, by conferring different privileges (i) on some only of the servicemen possessing rights to reinstatement under the Commonwealth Act; (ii) on some servicemen not within the Commonwealth Act—by reference in either case solely to the characteristic of past war service. As s. 10 of the State Act is limited to " promotion " of employees in an employer's service, its normal operation would be on the same individuals as s. 16 (3) of the Commonwealth Act. If allowance is further made for the effect on the reinstated person of an employee engaged by new appointment to the same service under the preference provisions of the Commonwealth Act, Part II., Div. 2, who will normally not have seniority over the Federally-reinstated serviceman, it is obvious how servicemen of the different class selected by s. 10 of the State Act, and forming part of the same service by reason either of reinstatement or first appointment, could not claim promotion under s. 10 of the State Act, without cutting across the assumption involved in s. 16 of the Commonwealth Act. The Commonwealth Act, Part II., Div. 2, deals with the subject matter of " preference in employment," and is clearly inconsistent with the differently arranged scheme of ss. 9 and 10 of the Victorian Act. It would be a mistake to treat ss. 9 and 10 as if s. 9 dealt exclusively with first appointment and s. 10 with promotion. Section 9 deals with (i) invitation by public advertisement to outsiders to apply for first appointment—in that case the employer must prefer a suitable and competent serviceman who applies from without *or within* his own employment; (ii) first appointment of an outsider without public advertisement—in that case he must prefer a suitable and competent serviceman who applies in seven days from without *or within* his own employment. So " promotion " may compulsorily result. Section 10 deals with (i) invitation to persons already in service only—in that case the employer must prefer a suitable and competent serviceman in his own employment who applies; (ii) promotion of an employee without invitation to others—in that case the employer must prefer a suitable and competent serviceman in his own employment who applies in seven days. Sections 9 and 10, therefore, form part of one scheme. They deal with preference in relation to employment. Section 27 (1) of the Commonwealth Act requires an employer to give preference in " engagement " to a Commonwealth-Act serviceman unless reasonable and substantial cause exists to the contrary. Section 27 (5) says that nothing in s. 27 shall apply in relation to the engagement for employment by

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any employer of a person already employed by him. It concedes that " engagement for employment " (cf. s. 27 (1) and (2)) *per se* may include " promotion." Omitting for the moment s. 24 (2), contrast the effect of Commonwealth and State Acts on a case where an employer invites applications for first appointment and gets applications from both *within* and without his own service. If the Commonwealth Act alone operates, he can promote a man in his own service, even though not a State-Act or Commonwealth-Act serviceman, against a State-Act serviceman applying from outside (s. 27 (5)) ; but, if the State Act also applied he would have to appoint a State-Act serviceman from outside in preference to " promoting " his own employee (s. 9). Thus, in the same set of circumstances, a different result is produced according to which Act is applied. But, if it were true that the State Act could nevertheless validly apply where promotion alone was involved, the employer could exclude it by advertising and obtaining outside applications. The operation of the State Act cannot depend on such accidental circumstances. It cannot be that, notwithstanding s. 27 (1), the employer could, by deciding on promotion, exclude an outside serviceman under s. 27 (5) of the Commonwealth Act and then be compelled to appoint him by s. 9 (2) of the State Act. This shows that the Commonwealth Act is a code dealing with the whole subject matter of employment of servicemen for seven years (s. 33), including the subject matter of ss. 9 and 10 of the State Act. Owing to the necessary interrelation of first appointment and promotion in any scheme of preference, the Commonwealth Act deals with promotion by excluding it from preference. It allows non-preference in promotion as lawful, whereas the State Act says it is unlawful. The decision of the Commonwealth Parliament that A, B and C are to be given preference necessarily involves that D, E and F are not. In the nature of things, Commonwealth legislation on " preference " must determine who shall be entitled (and on what conditions) and who shall not. These conclusions are reinforced by the heading of Div. 2 (See *Acts Interpretation Act*, s. 13) and by ss. 24 (1) and (2). Section 24 (1) is important. It is easy to imagine that the Commonwealth Parliament intended to supplant with Div. 2 of this Act all provisions of Commonwealth Acts or awards whether they provided for preference in engagement, promotion or dismissal in respect of returned soldiers of both wars. If that is what s. 24 (1) means, then s. 24 (2) means the same. Section 24 (2) shows that the " field " is " preference in any matter relating to the employment of discharged members of the Forces." The Commonwealth Act is intended to be a complete, exhaustive

and exclusive statement of the law on the subject. The expression is even wider than "engagement for employment." It is not an answer, as to this expression in s. 24 (2), to argue that s. 27 (1) might without it apply only to promotions involving new contracts and not variations and so produce capricious results ("engagement for employment" could cover variations in employment), nor to argue that s. 24 (2) is to be measured by the ambit of s. 27 (1) as restricted by s. 27 (5). It is reasoning in a circle to say that s. 24 (2) limits the operation of the Commonwealth Act only to positive privileges conferred by s. 27 (1). The two Acts contemplate two alternative modes of dealing with the whole subject of reinstatement and preference. The State Act had in 1943 given reinstatement and lifelong preference to some only of Australian servicemen. Queensland had done substantially as the Commonwealth Act later did. Other States had done nothing. The Commonwealth Act came in in 1945 to lay down a uniform Australian scheme; it put servicemen in Australia on an equal footing so far as possible as regards reinstatement and acquisition of qualifications missed through service. Preference in promotion is not necessary to the Commonwealth scheme and is inconsistent with it. The Commonwealth Act is designed to avoid setting one serviceman against another (which the Victorian Act was doing); it conferred total, not minimum, rights in relation to war-service qualifications in employment. [He referred to *Waterside Workers' Federation* v. *Gilchrist, Watt, and Sanderson Ltd.* (1); *R.* v. *Railway Appeal Board* (2).] The Commonwealth Act is a valid exercise of the defence power. There is power to repatriate generally in civil life (*Attorney-General* v. *Balding* (3); *Repatriation Commission* v *Kirkland* (4); *Real Estate Institute of N.S.W.* v. *Blair* (5)). It is not a valid objection that the Commonwealth Act would in the present case exclude s. 10 of the State Act in relation to promotion as distinct from reinstatement or first appointment. The Commonwealth, as part of the process of re-establishment, can properly define the sphere of operation of preference for seven years (s. 34). It can confer it for first appointments but exclude it from promotions. This is so whether the scheme is regarded as a reward for services, terms for re-establishment which are just to servicemen and non-servicemen, or an inducement to persons generally to believe hereafter that war service will be properly rewarded but that the willing fulfilment of duty (military or civil) in home terri-

(1) (1924) 34 C.L.R. 482, at pp. 547, 548.
(2) (1947) Q.S.R. 81, at pp. 87, 90.
(3) (1920) 27 C.L.R. 395.
(4) (1923) 32 C.L.R. 1, at p. 8.
(5) (1946) 73 C.L.R. 213, at p. 225.

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tories will not be disadvantageous ; or as a combination of all these things. It is erroneous to say that on first restoration to a civilian job, or on first appointment to a succession of jobs, the frontier of the power is reached. If it can follow a serviceman from one employer's employment to another's by granting or denying preference, for seven years, why not from one job to another in the same employment, by granting or denying preference for the same period ? Nor is it a valid objection that the Commonwealth Act would exclude the State Act in relation to the so-called " regal functions " of the State. Under the defence power the Commonwealth can affect the States. State servants, as such, enjoy no privileges in relation to the defence power (*Victoria* v. *The Commonwealth* (1) ; *Pidoto* v. *Victoria* (2) ; *R.* v. *Commonwealth Court of Conciliation and Arbitration* (3)). It is a corollary to the power to take out from the Public Service its servants who are eligible for military service that there should be a power to repatriate and rehabilitate those servants, to the extent of imposing on State Governments conditions such as preference or non-preference in engagement, or preference or non-preference in promotion, at all events for a reasonable post-war period. If the Commonwealth can validly deal with the reinstatement of State public servants who are ex-servicemen, there is no ground for saying—having regard particularly to the considerations applicable to modern total war (*Andrews* v. *Howell* (4))—that the Commonwealth's power ceases on the effective resumption of duty by a serviceman in the State Public Service, if the control exercised in relation to preference or non-preference in engagement, or preference or non-preference in promotion, is related to the possession of the character of discharged servicemen, is reasonably capable of being regarded as related to broad defence policy, and is not aimed at obstructing State Governments as such. This is not like the case of attempting to deal with a State Public Service without regard to considerations of defence, or in relation to industry, as the case may be (*Victoria* v. *The Commonwealth* (5) ; *Pidoto* v. *Victoria* (6) ; *R.* v. *Commonwealth Arbitration Court* (7)). Nor is it like the case of legislation calculated or intended seriously to affect a State's stability as a political organism (*Melbourne Corporation* v. *The Commonwealth* (8)).

P. D. Phillips K.C. (with him *Menhennitt*), for the defendant. There is no inconsistency between s. 10 of the Victorian Act and any of the provisions of the Commonwealth Act. That is to say,

(1) (1942) 66 C.L.R. 488, at p. 504.
(2) (1943) 68 C.L.R. 87, at p. 103.
(3) (1944) 68 C.L.R. 485, at p. 500.
(4) (1941) 65 C.L.R. 255.
(5) (1942) 66 C.L.R. 488.
(6) (1943) 68 C.L.R. 87.
(7) (1944) 68 C.L.R. 485.
(8) (1947) 74 C.L.R. 31.

there is no express provision in the latter Act with which s. 10 is in conflict, nor does the Act "cover" any "field" into which s. 10 can be said to obtrude. Of the sections of the Commonwealth Act on which the plaintiff mainly relies as showing inconsistency, it is proposed to refer first to s. 16. Particular stress was put on s. 16 (3), it being put that "reinstatement under s. 16 (3) . . . includes rights as to seniority and therefore promotion." It is true in a broad sense that reinstatement has a relation to promotion because it puts a man back in the employment in which he may be promoted. Reinstatement is a necessary pre-condition to the enjoyment of promotion, but that is not sufficient to support the plaintiff's argument as to inconsistency. The effect of s. 16 (3) (*a*) is that the man must be given employment "under conditions not less favorable to him than those which would have been applicable to him . . . if he had remained in the employment" &c. This does not mean that he is not to be subject to conditions (whether advantageous to him or otherwise) which have supervened in the employment since his enlistment. For instance, if the conditions as to rates of wages or hours of work have changed in the interval, he must accept the new conditions. If, when the man enlisted, he was working a week of forty-eight hours and while he was away the standard working week was reduced to forty-four hours, it would be absurd to suggest that s. 16 (3) (*a*) requires his re-employment at the former standard; and likewise, if the hours had been increased from forty-four to forty-eight. The supervening condition, the reduction or increase in the hours of work, is to apply to him notwithstanding that he was not an employee at the time when the change was made. So, if the man was a State public servant when he enlisted, and one of the conditions of his employment was that promotion was regulated by seniority, and while he was away the State law was altered (See *Public Service Act* 1946 (Vict.), s. 32) to base promotion on merit instead of seniority, he must accept this supervening condition. There is nothing in s. 16 (3) (*a*) which says that he is not to suffer any disadvantage which would have accrued to him if he had remained in the employment. *Commissioner for Railways* (*N.S.W.*) v. *McCulloch* (1) does not affect this question of promotion; the real question in that case was one of reinstatement, to which different considerations apply. The case was so understood by the Supreme Court of New South Wales in *Re Commissioner for Railways*; *Ex parte Alexander* (2). It has not been suggested that s. 32 of the *Public Service Act* 1946 (Vict.), though it changed

(1) (1947) 72 C.L.R. 141.

(2) (1947) 47 S.R. (N.S.W.) 256: See p. 258; 64 W.N. 51.

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the law governing the State Public Service, cannot operate consistently with s. 16 (3) (*a*), and s. 10 of the State Act now in question is simply another change in the law which must be accepted. Section 16 (3) (*a*) merely reinstates the employee into an existing system, the characteristics of which—in the case of a State Public Service—are entirely determined by the State law. As to s. 27 of the Commonwealth Act, s. 9 of the State Act, it is conceded, is inconsistent with it, but s. 10 it is submitted, is not. When s. 9 goes, s. 10 (3) ceases to be necessary; but the other provisions of s. 10 are not in any way dependent on the operation of s. 9. It is clear from s. 27 (5) that the section makes no rule for preference in promotions (as distinct from new engagements). The result is that there is nothing expressed in the section which is inconsistent with the State s. 10. Inconsistency could exist only if there were to be implied in s. 27 a provision that the preference which the section directed should be given in the case of new engagements was not to be given in any other cases; that is, if the section intended to "cover the field." The doctrine of inconsistency as expressed by reference to "covering the field" depends, it is submitted, on finding that the field is occupied by the prescription of rights and duties. It is the legal operation of the paramount law that is to be immune, not some supposed policy deduced from its general nature apart from its legal operation. It is as if, in s. 27, the Commonwealth Parliament had said: "We give such and such directions as to new engagements; as to anything other than new engagements we say nothing." The only field occupied or "covered" by the section is that of new engagements; by saying nothing beyond that, the section does not enlarge the field. In this view it does not matter that the class of beneficiaries selected for preference in promotion by the State s. 10 is a smaller class of servicemen than the Commonwealth Act has selected for preference in new engagements.

[DIXON J. referred to *Cullis* v. *Ahern* (1).]

[Counsel referred to *Stock Motor Ploughs Ltd.* v. *Forsyth* (2); *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (3).] The next question is whether the Commonwealth s. 24 adds anything to s. 27 so as to bring about inconsistency. It is submitted that it cannot validly operate to make any such addition. Section 24 (2) of the Commonwealth Act cannot enlarge the operation of s. 109 of the Constitution; it cannot create any inconsistency between the provisions of s. 27 of that Act and the provisions of the

(1) (1914) 18 C.L.R. 540.
(2) (1932) 48 C.L.R. 128.
(3) (1925) 36 C.L.R. 130, at pp. 147-149.

State Act beyond such as may be found in the terms of s. 27 itself. If s. 24 (2) means this : " In addition to the State law which would be invalidated by the operation of the Federal law contained in this Act, all other State laws dealing with preference in any matter relating to the employment of discharged members of the Forces are hereby invalidated," it is not within the powers of the Commonwealth Parliament. If that is what it means, it is a law with respect to the legislative powers of State Parliaments, not with respect to reinstatement of, or preference to, returned soldiers or any other subject within Commonwealth legislative power. It cannot be regarded as doing anything more than give emphasis to the invalidity which results from inconsistency under s. 109 of the Constitution : in this respect, it resembles s. 24 (1), which does nothing beyond giving precision to the test of implied repeal through inconsistency which would apply at common law, making it emphatic and clear. The argument of the defendant on this point, it may be observed, is not that the question of inconsistency is solved merely by saying that the State s. 10 deals with promotions and not with new engagements : it is that s. 10 does not deal with new engagements nor will its coexistence with the Commonwealth provisions as to new engagements affect the policy, operation, nature or extent of those provisions. It is further submitted that, if the Commonwealth legislation with regard to preference in engagements did in its terms exclude provisions for preference in promotion, it would exceed the basic power which alone justifies the conferring of the preference provided by the legislation, that is, the defence power. It must be accepted now that the defence power includes some power of rehabilitation ; it is much too late to contend otherwise. However, it is not easy to see what precisely is the logical basis for the attribution of such a power, and its limits are not clear. If one considers such reasons as one can visualize as the probable basis for the attribution of the power, they do not require that the power should extend to the fixing of the maximum advantages for returned soldiers. That is to say, there is a power to *provide* advantages for returned soldiers, but no power to *prohibit* the provision of advantages for them. To the extent that it confers advantages, a law may be said to promote defence and, therefore, to have the necessary relation to the defence power ; but it is difficult to see how limiting the advantages can be said to promote defence. If the idea is to achieve uniformity, it is an unreal conception. It is not practicable to secure by legislation uniformity in the privileges to be accorded to returned soldiers. The position might well be

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different if the Commonwealth had the express power of re-establishment; but, to be within the defence power, it must be found that the law as enacted promotes defence in whatever way re-establishment is thought to promote defence. The Commonwealth Act does not prevent an employer from voluntarily giving preference to his own employees who are returned soldiers, and this is significant in two aspects. One is that it shows what is the real field occupied by the Act: it is not in opposition to preference in promotion. The other is that it puts a State, *qua* employer, in a curious position if it excludes the State law. The only way in which a State, as employer, can voluntarily give preference to its employees is by making a law about it, or some rule having the force of law. That is to say, in so far as the State law operates in the Public Service, it is the voluntary determination of the State to give its own servants preference. If this law is excluded by the Commonwealth Act, the States are put in a different position from other employers. The Commonwealth Act singles out and in a sense discriminates against the States because, in effect, it prohibits the States from doing what all other employers can do—that is, make a voluntary rule to give preference. A Commonwealth law which directs a State as to how it shall promote individuals within its Public Service by preventing the State giving preference to a class which it desires to prefer is an intrusion by Commonwealth law in the sphere of State activity which is in excess of the permissible limits of Commonwealth power. [He referred to *Re Richard Foreman & Sons Pty. Ltd*; *Uther* v. *Federal Commissioner of Taxation* (1); *Melbourne Corporation* v. *The Commonwealth* (2); *Pirrie* v. *McFarlane* (3).] If s. 10 of the State Act is not inconsistent with the Commonwealth Act, it is not invalidated by s. 109 of the Constitution by reason of the invalidity of other provisions of the Act. The effect of s. 109 is to invalidate *pro tanto* only. The question of severability does not arise here as it does when legislation exceeds the constitutional power of the Parliament. When a Parliament has exercised its legislative powers and then a paramount Parliament comes in and occupies some of the field and invalidates *pro tanto*, it is for the subordinate Parliament to cure, if it desires, any result of the operation of the balance. Accordingly, s. 10 of the State Act—unless itself affected with inconsistency—and s. 4 (1), in so far as it relates to s. 10, will survive. It may be added that s. 4 (1) is not

(1) (1947) 74 C.L.R. 508, at p. 539; also at pp. 519, 525.

(2) (1947) 74 C.L.R. 31, at pp. 66, 80, 83.

(3) (1925) 36 C.L.R. 170, at p. 191.

part of any inseverable statutory plan. It merely defines compendiously in one expression the operation of each of the sections which it mentions, saying that each of the sections 7, 9, 10, 11 and 12 shall apply to employment by the Crown in right of the State. The effect is the same as if each of those sections contained the provision saying that the section should extend to employment by the Crown.

Tait K.C. (with him *Winneke*), for the Commonwealth (intervening). It is submitted that the Victorian Act, to the extent that it gives preference in promotion to the servicemen to whom it applies, is inconsistent with the Commonwealth Act. The Commonwealth Act, Part II., Div. 2, which is headed "Preference in Employment," contains ss. 24 and 27. On its proper construction, s. 24 (2) is an express provision excluding the provisions of any State law dealing with preference in promotion of discharged servicemen. The language used to describe what is excluded is in the widest possible terms: "to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the Forces, of any law of a State," &c. The field covered by this provision is not merely preference in new engagements; it is, as the heading of the Division indicates, preference in employment. Preference in new engagements is merely part of the field, which extends also to preference in promotions. The argument for the defendant reads s. 24 (2) as if it said: "The provisions of this Division shall operate to the exclusion of any provision providing for any preference of the type provided by this Act" &c. If this was all the sub-section meant, it need not have been enacted at all; s. 109 of the Constitution would produce that result. In the last resort the defendant's argument seemed to go to the length of saying that, if the section had any meaning, it was unconstitutional. It is only by giving the words of the sub-section their literal meaning that it will have any effect, and, provided that in that meaning the provision is—as will be submitted—within power, there is no reason for reading it down. Accordingly, even if s. 27 does not touch the subject of promotions, s. 24 (2) produces the result that the Commonwealth Act is inconsistent with s. 10 of the Victorian Act so as to make s. 109 of the Constitution applicable. It is submitted, however, that s. 27 does deal with the matter of promotions—it, at least, enters the field. It is to be noticed that the command addressed to the employer by s. 27 (1) is in these words: "An employer shall, in the engagement of any person for employment, engage," &c. It does not say: "in the engagement of any person other than a person already in his

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employ" ; if it did, s. 27 (5) (*a*) would be unnecessary. The command, therefore, as it is expressed in s. 27 (1), is wide enough to apply to promotions as well as first engagements ; then s. 27 (5) withdraws the command so far as it relates to promotions. Thus, the section in effect says to the employer : (i) " You are required to give preference in new engagements " ; (ii) " You are not required to give preference in promotions." This second branch is in conflict with the State s. 10 because the latter says to the employer : " You *are* required to give preference in promotions." It was a question of policy, which the Commonwealth Parliament had to determine, how far the scheme of compulsory preference was to be carried ; and s. 27 expresses the policy. The defendant's argument as to s. 16 (3) (*a*) of the Commonwealth Act does not give effect to the words " if he had remained in the employment of the former employer." If effect is given to these words, there is no such analogy as the defendant suggests between the application of s. 32 of the *Public Service Act* 1946 (Vict.) and that of s. 10 of the State Act now in question. This can be demonstrated by supposing a case of a Victorian public servant, A, who enlisted in 1942 and was reinstated in 1946 after the *Public Service Act* came into force. While he was away seniority ceased to be the predominant element in promotion in the State Public Service. A must accept this condition because he would have been subject to it if he had not gone away. That is the hypothesis in the Commonwealth s. 16 (3) (*a*) ; to determine the conditions, A is treated notionally as not having been away. There is no room in this situation for the State s. 10 of 1943 ; its basis necessarily is that A (assuming him to be in the class to which the State Act applies) has been away, and it cannot operate consistently with the Commonwealth s. 16 (3) (*a*). The Commonwealth s. 18 confirms this view. As to the question of power, it has already been submitted that s. 27 determines a question of policy. It is of the essence of the power over re-establishment to determine how far the scheme is to go. If the scheme is too far-reaching, it may defeat its own object. This view is supported by *Real Estate Institute of N.S.W.* v. *Blair* (1). It is also a matter for Parliament whether it is necessary to have uniformity in the statutory conditions throughout Australia. The defendant is not correct in saying that the only way in which a State can give voluntary preference to its public servants is by statute : it could be done by executive action. The Commonwealth could not provide a balanced scheme of re-establishment unless it could extend it to the very substantial number of employees in the State

(1) (1946) 73 C.L.R. 213 : See pp. 221, 225, 227, 229, 230.

Public Services. This establishes a real connection with defence. It is not necessary to refer in detail to the authority, which is abundant, particularly in relation to defence, showing that the States are not immune from Commonwealth legislation. Moreover, it is to be noticed that the Commonwealth Act applies alike to all employers, including the States. It is not—as the defendant's argument showed a tendency to suggest—an attack on the States. It is not affected by the authorities which say that the States must not be impeded in the exercise of their functions. It will not prevent the States from getting the best public servants they desire; it does not interfere in any substantial or undue way with the States; it cannot harm them in any real sense.

P. D. Phillips K.C., by leave. The argument of the Commonwealth claims to use s. 109 of the Constitution as a head of legislative power. This is not justified (*Stock Motor Ploughs Ltd.* v. *Forsyth* (1); *West* v. *Commissioner of Taxation* (*N.S.W.*) (2)). The defendant's view of the construction of s. 27 of the Commonwealth Act, is supported, so far as the Crown is affected, by s. 26.

Sholl K.C., in reply. It is said for the defendant that a Commonwealth serviceman comes back to his employment subject to the conditions then existing, including any change supervening on his departure for war service which has been made by law, trade usage, or voluntary action of the employer. It is said that the 1943 State Act is just another supervening change, and that reinstatement must be subject to it; but this cannot be true of all possible types of intervening change. It must therefore be fallacious to say that reinstatement "under conditions not less favorable" &c. includes supervening State conditions prescribed with a view to putting the man in a position less favorable than if he had remained in the employment, or conditioning his reinstatement on a contingency not in the Commonwealth Act, or putting him in a position less favorable as regards some of his colleagues than if he (and they) had remained in the employment, or reinstating him subject to a liability to dismissal inconsistent with s. 18 and Part II., Div. 2, of the Commonwealth Act. It is said that s. 16 has nothing to do with promotion, but, so far as seniority affects promotion, see *McCulloch's Case* (3) per *Dixon* J. That case does not say: "You must reinstate a man subject to *all* State law." It necessarily

(1) (1932) 48 C.L.R., at pp. 147, 148.
(2) (1937) 56 C.L.R. 657; particularly at p. 707.
(3) (1946) 72 C.L.R. 141, at p. 159.

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cannot say so in relation to State law inconsistent with the Commonwealth Act. The defendant's argument seems to involve the suggestion that reinstatement under s. 16 says nothing about the future; that, once a man is reinstated, any questions as to promotion thereafter are outside the Commonwealth Act. But suppose an express term of a contract of service is that the employee shall be on twelve-months' notice. Reinstatement must entitle him at any time thereafter to twelve-months' notice. Or suppose a term that the employee shall be promoted ahead of B, C, and D. If he is reinstated on the same condition, his preference rights will continue in the future after his reinstatement. Therefore reinstatement under s. 16 may involve the restoration of a condition affecting future rights for an indefinite time. It may involve restoring a right to promotion. It may involve restoring comparative seniority (*McCulloch's Case* (1)). It is said that s. 27 (5) (*a*) altogether excludes "promotions." But s. 27 (2) may itself retain some operation in a case which ultimately results in a promotion. Section 27 (5) in effect means that, where an employer engages a person in his own employ, he need not give the preference required by s. 27 (1) or consider the factors referred to in s. 27 (3). But it cannot work to exclude the operation of s. 27 (2), which operates on a state of facts antecedent to that on which s. 27 (5) operates. It leaves s. 27 (2) to operate and also s. 27 (4), but, in effect, allows an employer an alternative exit by promoting from his own employment. If so, then an outsider under s. 27 (2) can, by force of Commonwealth law, apply in a case of an employer inviting applications for a position from his own employment (s. 10 of State Act) and have his Commonwealth qualifications, &c., considered under s. 27 (3). It is conceded that s. 9 of the State Act is rendered inoperative by the Commonwealth Act, but it is said that s. 10 is not. It is said that if you comply with s. 9, you comply with s. 10; so s. 10 (3) does not give s. 10 a wider operation when s. 9 goes. But it does. Section 9 applies only to permanent positions; s. 10 to permanent and temporary. Under s. 10 (3), promotion of non-servicemen (in the absence of servicemen) under s. 9 to permanent positions, or under s. 9 (2) to temporary positions, is excluded from s. 10; if s. 9 goes, s. 10 has to operate thereon. It is not necessary for the plaintiff to say that preference defines itself as a subject. Section 24 defines the field; alternatively, the heading to Part II., Div. 2, does so. As to s. 24 (2), there is no reason why, if it thinks it proper to make its laws exclusive in a permitted field, the Commonwealth Parliament should not say so (*Pirrie* v. *Macfarlane* (2) per

(1) (1946) 72 C.L.R. 141.

(2) (1925) 36 C.L.R., at p. 183.

Knox C.J.). It does not have to do it by compiling such a mass of detailed positive and substantive provisions that no State Act can be produced which does not collide with them: see per *Isaacs* J. in *Union Steamship Co. of N.Z.* v. *The Commonwealth* (1). If Parliament can say: "These provisions shall constitute an exclusive provision as to the preference to be accorded to discharged servicemen, whether in relation to original engagement or promotion," it can equally say what appears in s. 24 (2). It is wrong to say that the Commonwealth Parliament cannot say: "There shall be no law on this subject" (scil., "no other law"). On a subject like *preference*, in those areas where it is desired to preserve *equality* or absence of *compulsory preference*, there is nothing wrong with that method: cf. the case of a statute conferring rights, *Cowburn's Case* (2). If the State ss. 7 and 9 are inoperative, so must s. 10 be. A State Parliament must always conceive the possibility of a Commonwealth Act cutting across it. Section 10 alone creates a different enactment entirely. The test under the Victorian *Acts Interpretation Act* 1930 is the same as under the Commonwealth *Acts Interpretation Act*, s. 15A. If, in general, the State ss. 7 and 9 are inoperative, and s. 10 also, but s. 4 (1) is valid because the Commonwealth ss. 10 and 26 are ultra vires, then State ss. 4 (1) and 10 could not be relied on as a kind of separate severable *Public Service Act*, alone surviving the Commonwealth Act. It is open to the Commonwealth Parliament to consider it a proper readjustment to reinstate servicemen on a basis of (i) advantages to them in reinstatement and first engagement; and (for a reasonable time) within their employer's service; (ii) limitation or denial of advantages (or, at all events, of compulsory advantages) in relation to their comparative position as against other classes of persons (e.g., civilians) who have been necessarily affected by the total organization of all manpower by the Commonwealth under the defence power. The importance of a uniform scheme is obvious. It cannot be said that a preference or non-preference in State employment would be an undue or disorganizing thing as regards a State's performance of its functions, for the State itself has been doing the very same thing.

Cur. adv. vult.

Aug. 20.

The following written judgments were delivered:—

LATHAM C.J. Both the Commonwealth Parliament and the Victorian Parliament have passed statutes relating to what is generally described as the rehabilitation of discharged servicemen.

(1) (1925) 36 C.L.R., at pp. 147-148. (2) (1926) 37 C.L.R., at p. 478.

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The Victorian Act was passed first: it is the *Discharged Servicemen's Preference Act* 1943, and is not subject to any time limit. The Commonwealth Act is the *Re-establishment and Employment Act* 1945. Certain provisions (ss. 24 to 33), some of which must be interpreted in this case, remain in operation only for seven years—s. 34. Both Acts deal with the reinstatement by prior employers of discharged servicemen in their employment and with preference to discharged servicemen in new engagements or appointments of employees. The State Act also provides in express terms for preference in promotions. The Commonwealth Act does not—at least expressly—give any preference with respect to promotion.

The persons entitled to the benefits of the Act are differently defined in the respective Acts. The Commonwealth Act, s. 4, defines "members of the forces" so as to include servicemen who did not serve outside Australia and members of the armed forces of other parts of the King's dominions who were born in Australia or domiciled in Australia immediately before entering the forces and, for some purposes, persons who served in the 1914-1918 war: see s. 25. The qualifications for benefit under the State Act are quite different. The benefits of the Act are given to "discharged servicemen." "Discharged serviceman" is defined in s. 4 of the Act in such a way as to make it necessary for the serviceman to have a specific connection with Victoria. He must have enlisted in Victoria or been domiciled in Victoria when he enlisted or was enrolled. But, further, he must have served in a prescribed theatre of war in the war which commenced in September 1939. The theatres of war as prescribed by proclamation are all overseas, except the Darwin area (for a period) and New Guinea. All the men qualified under the Victorian Act are also qualified under the Commonwealth Act, but men who enlisted in other States and were not domiciled in Victoria do not come within the Victorian Act, and men who were domiciled in Victoria or who enlisted in Victoria do not come within that Act unless they served in the prescribed theatres of war. Thus many "members of the forces" entitled to benefits under the Commonwealth Act would not be "discharged servicemen" within the meaning of the State Act and would therefore have no rights under that Act, though they would have rights under the Commonwealth Act.

The Commonwealth Act contains 136 sections and makes elaborate provisions for the benefit of ex-servicemen with no distinctions relating to the State with which a man was in some way connected. The provisions relating to reinstatement in employment and preference in employment constitute two Divisions of one Part of

the Act. Other Divisions of that Part also relate to employment. The other Parts deal with vocational training, disabled persons, demobilization, re-establishment assistance, servicemen's settlement, housing, legal aid bureaux and war service moratorium. Thus the Commonwealth Act deals extensively and in detail with many aspects of rehabilitation upon an Australian basis. The State Act is limited to the subject of employment, and, as already stated, requires a specific connection with the State of Victoria in order to qualify for the benefits of the Act.

Section 7 of the Victorian Act provides for the reinstatement of discharged servicemen (as defined) if an application is made within a particular time and creates offences for failure to comply with the provisions of the section. The conditions of reinstatement and the excuses for failure to comply with the statute are different from those provided in the Federal Act, ss. 10 to 21, dealing with the same subject.

The Commonwealth Act, s. 16, is the principal provision with respect to reinstatement in employment. It provides that where an application has been made under Division 1 and is still in force the former employer shall make employment available to the applicant in accordance with the section. Sub-section (3) of the section provides that the employment to be made available under the section shall be employment in the occupation in which the applicant was employed immediately prior to the commencement of his period of war service " and under conditions not less favorable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the former employer, including any increase of remuneration to which he would have become entitled if he had remained in that employment." In *Commissioner for Railways (N.S.W.)* v. *McCulloch* (1) it was decided that under this provision a member of the forces entitled to reinstatement had a right to be replaced in a position in which he would preserve his seniority in relation to other employees. Accordingly, where promotion is affected by seniority, the preservation of relative seniority has a relation to promotion. Any existing advantages due to seniority are advantages of which a person entitled to reinstatement under the Federal Act cannot lawfully be deprived upon reinstatement, provided that, if he had remained in his employment, he would have had that seniority.

But it is not denied that a State Parliament, notwithstanding this provision (s. 16), may alter its Public Service Act by varying conditions of employment and that such variations will be effective

(1) (1946) 72 C.L.R. 141.

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in the case of servicemen as well as in the case of other men, provided, however, that such provisions are of a general character and do not prejudicially affect servicemen as compared with other employees. Thus, for example, the Victorian *Public Service Act* 1946, s. 32 (passed after the *Discharged Servicemen's Preference Act*), is a general provision relating to promotion in the service. It provides that all appointments to offices in the Public Service shall be made by the Public Service Board, and sub-s. (5) of that section is in these terms :—" In the appointment of a person to any office consideration shall be given first to relative efficiency and, in the event of equality of efficiency of two or more officers in the public service, then to relative seniority. In this sub-section ' efficiency ' means special qualifications and aptitude for the discharge of the duties of the office to be filled together with merit diligence and good conduct." This provision altered the law as it previously existed in the *Public Service Act* 1928, s. 56. That section provided that in the promotion of officers in the clerical division regard should be had to the merit, good and diligent conduct, length of service and relative seniority of the officer and the nature of the work performed by him. Section 32 (5) placed efficiency first and gave a senior officer a right to promotion by reason of seniority only in the event of equality of efficiency. This provision affects all State public servants whether they are discharged servicemen within the meaning of the Act or not. But it has not been argued that the Federal Act, s. 16, prevents the operation of this legislation.

Section 8 of the State Act imposes limitations upon the application of ss. 9 and 10, excluding, for example, appointments of certain relatives. There is no such exclusion in the Commonwealth Act in relation to appointments.

Section 9 (1) provides for preference in employment to be given to suitable and competent discharged servicemen who apply where invitations for appointment are given by public advertisement. This provision applies expressly to appointments and promotions. Section 9 (2) provides for the case of appointment to any position (and therefore for promotion) without previous public advertisement. In that case if an employer appoints any person other than the discharged serviceman the appointment is to be deemed provisional and within the period of seven clear days a discharged serviceman may apply in writing, and such a man will then be entitled to preference in appointment or promotion.

These provisions are quite different from the provisions of the Commonwealth Act contained in Div. 2 of Part II. (ss. 22-34) of the Commonwealth Act.

It is conceded by the defendant that the provisions of the State Act relating to reinstatement and preference in employment are inconsistent with the provisions of the Commonwealth Act and are therefore rendered inoperative by s. 109 of the Constitution. Section 109 provides that: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The question which arises in the present case relates to the subject of promotion. The plaintiff contends, and the defendant denies, that the State Act is invalid or inoperative in relation to promotion because the provisions of the Act are inconsistent with those of the Federal Act.

The plaintiff is a member of the Public Service of Victoria and claims that he is entitled under the *Public Service Act* 1946 to promotion to a position of Senior Warder at the penal establishment of Pentridge. The plaintiff is not a discharged serviceman within the meaning of the Victorian Act. He would be entitled to be promoted to the position which he seeks unless the Public Service Board of Victoria is bound by the State Act to promote a discharged serviceman in priority to him. He issued a writ in the Supreme Court of Victoria claiming a declaration that the provisions of the Victorian Act do not apply to promotions within the Public Service of the State of Victoria. The defendant, the Attorney-General for the State of Victoria, raised certain contentions of law in the defence. In the first place, the defendant contended that the Victorian Act is valid and, in particular, that s. 10, which relates to promotion, is not rendered invalid by the Commonwealth Act. In the alternative the defendant contended that the Commonwealth Act is invalid as beyond the constitutional power of the Commonwealth Parliament, that on its true construction the Commonwealth Act does not apply to promotions in the Public Service of Victoria, and that, alternatively, if the provisions with respect to promotion do so apply, they are beyond the power of the Commonwealth Parliament. The action was removed to the High Court and it was ordered that the questions of law raised by the defence be argued before the Full Court. The Commonwealth of Australia was given leave to intervene.

Both Commonwealth and State Acts relate to employment generally. They apply to what may be called private employers, and also in terms to employment by the Crown. The Commonwealth Act in s. 10 defines "employer" as including the Crown (whether in right of the Commonwealth or of a State) and any authority constituted under the law of the Commonwealth or of a

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State or Territory of the Commonwealth. Section 26 provides that the application of Div. 2 of Part II. (Preference in Employment) shall extend in relation to employment by the Crown in right of the Commonwealth or a State. In the State Act s. 4 provides that the provisions of s. 7 (reinstatement) and ss. 9-12 (new appointments, promotions, dismissals) shall be observed in respect of employment by or under the Crown in right of the State of Victoria, as if the Crown were an employer within the meaning of the Act.

Section 10 (1) of the State Act is in the following terms: "Where any employer invites applications for any position in his employment only from persons in his employment, he shall in making any promotion to that position give preference to a suitable and competent discharged serviceman in his employment who applies for that promotion within the time and in the manner specified in the invitation." This is the provision the validity of which is challenged. It requires preference in promotion to discharged servicemen as defined in the State Act. It is argued for the defendant that the Commonwealth Act does not deal with the subject of promotion at all, and that therefore there is nothing to prevent the State Parliament making provisions upon that part of the subject of rehabilitation of discharged servicemen.

The Commonwealth Act deals with reinstatement in Part II., Div. 1, and with preference in employment in Part II., Div. 2.

Section 27 in Div. 2 provides that: "An employer shall, in the engagement of any person for employment engage, in preference to any other person, a person entitled to preference, unless he has reasonable and substantial cause for not doing so." "Person entitled to preference" is a phrase defined in s. 25. With an immaterial exception it means a member of the forces who has been discharged or is awaiting discharge and, as already stated, "member of the forces" is defined in s. 4 in such a way as to include many discharged servicemen who would not be discharged servicemen within the meaning of the State Act.

Section 27 (3) contains provisions setting out the matters which an employer is required to consider in determining whether reasonable and substantial cause exists for not engaging in employment a person entitled to preference. Section 27 (4) contains provisions for determining who is to receive preference between two or more persons entitled to preference. Section 27 (5) provides: "Nothing in this section shall—(*a*) apply in relation to the engagement for employment by any employer of a person who is already employed by him." Thus it is clear that s. 27 does not apply to promotions

of persons already in the service of an employer, but only to preference in giving employment to a person not already in the employment of the employer engaging an employee. The Commonwealth Parliament deliberately abstained from giving preference in respect of promotion. The result is that the Federal law does not provide that preference shall be given in promotions. The State law does provide for such preference.

Section 24 of the Commonwealth Act is in the following terms :— " (1) The provisions of this Division shall apply to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the forces, of any law of the Commonwealth or of a Territory of the Commonwealth, or of any industrial award, order, determination or agreement made or filed under or in pursuance of any such law, and whether the law, award, order, determination or agreement was enacted, made or filed before or after the commencement of this section. (2) The provisions of this Division shall apply to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the forces, of any law of a State, or of any industrial award, order, determination or agreement made or filed under or in pursuance of any such law, and whether the law, award, order, determination or agreement was enacted, made or filed before or after the commencement of this section."

Sub-section (1) of this section is effective to exclude the application of any provisions of existing Commonwealth laws or awards &c. made under such laws which provide for preference " in any matter relating to the employment of discharged members of the forces." The sub-section, notwithstanding its terms, could not, however, operate so as to exclude the application of a subsequent Commonwealth law which made a provision relating to such employment. The Parliament cannot limit the legislative power of Parliament by providing that a statute shall not be amendable or repealable, or that it shall operate notwithstanding any subsequent legislation : (*Duke of Argyll* v. *Inland Revenue Commissioners* (1) ; *South-Eastern Drainage Board (S.A.)* v. *Savings Bank of South Australia* (2)).

The first contention for the plaintiff is that s. 27 itself contains in sub-s. (5) a provision which has the effect of excluding the provisions of any State law providing for any preference in promotions to any persons entitled to preference under the Commonwealth Act. It is argued that s. 27, sub-ss. (1) to (4), provide for preference in new engagements and that s. 27 (5) has the effect of providing that there shall be no obligation to give any preference in the engage-

(1) (1913) 109 L.T. 893. (2) (1939) 62 C.L.R. 603.

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ment for employment by any employer of a person who is already employed by him—so that an employer may at will employ in a new position a person already employed by him and therefore may promote him without being subject to any of the provisions of the section. Such a provision, it is contended, shows the intention of the Commonwealth Parliament that, while there shall be preference to certain members of the forces in relation to new employment, there shall be equality between them and other persons in relation to promotions.

The defendant answers this contention by saying that the Commonwealth Act in s. 27 simply makes no provision as to promotions but leaves the subject of promotions free to be dealt with, if the State Parliaments think proper, by State statutes.

In my opinion it is difficult to construe s. 27 by itself as impliedly providing that there shall be no preference in promotions to discharged members of the forces. Certainly it provides positively for preference in engagements, and it also provides that, so far as Federal law is concerned, there shall be no preference in promotions. But it does not provide that it shall not be lawful to give preference in promotions. It provides only that s. 27 shall not have the effect of giving such preference and therefore does not necessarily exclude State legislation upon that subject.

The second contention of the plaintiff is based upon s. 24 (2). This section does in terms exclude any law of a State providing for "preference in any matter relating to the employment of discharged members of the forces." Promotion is employment of an employee in a higher position than that previously occupied by him. Preference in promotion of employees who are discharged members is preference in a matter relating to the employment of such discharged members and is therefore within the terms of s. 24 (2). This sub-section is relied upon as an express provision showing the intention of the Commonwealth Parliament that the provisions of Div. 2 of Part II. of the Commonwealth Act shall be regarded as an exhaustive and exclusive treatment, not only of the precise subject matters with which they deal, but of the whole subject of "preference in any matter relating to the employment of discharged members of the forces."

If the Commonwealth Parliament, in a law with respect to a subject within its legislative powers, enacts provisions which show that the Parliament intended to make an adjustment with respect to certain matters upon a particular basis to the exclusion of any other adjustment, then the result is to exclude the application of any State legislation or other provision which would "disturb or

vary the Federal adjustment " : see *Clyde Engineering Co. Ltd.* v. *Cowburn* (1). Where such an intention is manifested, then the Federal provision is the only provision to be applied " both as to what is granted and what is refused " (2). In *Ex parte McLean* (3) it was held that when a Federal Act in relation to a matter which is within both Federal and State legislative power prescribes " what the rule of conduct shall be " then if the intention of the paramount legislature is " to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed . . . it is inconsistent with it for the law of a State to govern the same conduct or matter " (4). Where it can be seen by an examination of the terms of the Federal statute that " the federal scheme will be hindered or obstructed " by any additional regulation by any other authority, then Federal legislation excludes the exercise of State authority with relation to that subject matter (*Stock Motor Ploughs Ltd.* v. *Forsyth* (5)). In such a case the Commonwealth Parliament shows an intention to " cover the field," to use the phrase of *Isaacs* J. in *Clyde Engineering Co. Ltd.* v. *Cowburn* (6), and where such an intention is discoverable the State is prevented from entering the field. Sometimes there may be a difficulty in determining what the " field " is as well as in determining whether there is an intention to " cover the field." In the present case, however, the legislature has made its intention clear by saying in s. 24 (2) that the subject matter as to which it is intended that the legislation shall be exclusive and exhaustive is " preference in any matter relating to the employment of discharged members of the forces." This provision expressly states an intention to make the Federal legislation exclusive and exhaustive.

The defendant contends, however, that the doctrine of " covering the field " applies only where the Commonwealth Parliament has itself made some positive provision with respect to a particular subject with which provision any State law on that subject would be inconsistent. Section 27 (5) (*a*) excludes the application of any preference in promotion by virtue of the Federal Act. It does not make any positive provision with respect to promotions. The defendant argues that therefore the field is free for the States, the Commonwealth Parliament not having provided any law with respect to promotions, so that s. 109 of the Commonwealth Constitution cannot apply so as to render any State law inoperative.

(1) (1926) 37 C.L.R. 466, at p. 491.
(2) (1926) 37 C.L.R., at p. 491.
(3) (1930) 43 C.L.R. 472.
(4) (1930) 43 C.L.R., at p. 483.
(5) (1932) 48 C.L.R. 128, at p. 147.
(6) (1926) 37 C.L.R. 466.

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In a series of cases (to several of which I have referred) it has been held that it may be ascertained by inference from the nature and scope of the provisions of a Commonwealth statute that it was the intention of the Parliament that the provisions of the statute should be the only law to be applied to the subject, so that it can be seen that the Commonwealth Parliament intended that there should be no State law dealing with the particular subject matter in question. Where such an inference can properly be drawn the Commonwealth legislation prevails over any State law by virtue of s. 109 of the Constitution. In the Commonwealth Act now under consideration, however, the Commonwealth Parliament has not left this matter to be determined by an inference (possibly disputable) from the nature and scope of the statute. The Parliament has most expressly stated an intention which in the other cases mentioned was discovered only by a process of inference. If such a parliamentary intention is effective when it is ascertained by inference only, there can be no reason why it should not be equally effective when the intention is expressly stated.

Section 24 discloses an intention that, so far as the matter of preference in employment to discharged members of the forces is to be governed by law, the Federal law only shall apply. The Federal Act does not prevent an employer voluntarily giving preference to a discharged serviceman over others if he chooses to do so. What s. 24 (2) deals with is State laws, awards &c., which would by compulsion require any preference in employment to such men other than the preferences for which the Federal statute provides. The subject matter of the Federal Act is, as in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1), compulsion by law in relation to a particular matter. In that case (2) a Federal award was interpreted as meaning that, as far as wages were concerned, " the only compulsive wages—that is, compulsive by law—are those required by the award." So in the present case the intention of the Federal Parliament, as expressly stated in s. 24 (2) of the statute, is that the only compulsory preference in relation to employment to be given to discharged servicemen is to be that for which the Federal Act provides.

Section 10 of the State Act is a law giving preference in promotions to discharged servicemen who are not given any such preference under the Federal Act. As the Federal law is expressly declared to be exhaustive and exclusive the Federal law prevails over the State law unless the Federal law is invalid for some reason.

(1) (1926) 37 C.L.R. 466.

(2) (1926) 37 C.L.R., at p. 493.

It is argued for the defendant that s. 24 (2) is really an attempt to prevent State Parliaments legislating upon the subject with which it deals (whether the Commonwealth Parliament passes legislation upon that subject or not) and that s. 24 (2) is invalid because it is a law with respect to State legislative powers and not with respect to the subject of the restoration of discharged servicemen to civil life. The " rehabilitation "—the restoration to and re-establishment in civilian life—of discharged members of the forces is a matter which falls within the legislative power of the Commonwealth Parliament: see *Attorney-General (Commonwealth)* v. *Balding* (1). The statutory provision under consideration in that case was part of a provision " for the re-establishment in civil life of persons who have served in the defence forces of the Commonwealth when they are discharged from such service." It was held that " that is a matter so intimately connected with the defence of the Commonwealth as manifestly to be included within the scope of the power "—i.e. the defence power: see also *Real Estate Institute of N.S.W.* v. *Blair* (2). Section 24 (2) is a provision prescribing the area within which Federal law, as enacted in the Act, is to apply to the exclusion of State law in respect of a subject as to which the Commonwealth Parliament has full legislative power. All valid Federal laws prevail over State laws which are inconsistent with them—Constitution, s. 109. But the Federal laws which so prevail do not therefore become laws invalidly attempting to limit the powers of State Parliaments.

The defendant also contends that if the Commonwealth law is construed so as to exclude the giving by State law of preference in promotion to discharged servicemen, then the Commonwealth law is invalid. It is argued that while the Commonwealth Parliament may have large powers in giving benefits or advantages of one kind or another to discharged servicemen, that Parliament has no authority under the defence power to provide for the denial of benefits to discharged servicemen. The exclusion of State law in this case has the effect of denying to certain discharged members of the forces the benefit of preference in promotion. It is contended that a Federal law refusing benefits and advantages to discharged servicemen is outside the defence power because it cannot be described as a provision for reinstatement of such men in civil life. In my opinion the Commonwealth Parliament acts within the defence power when it prescribes what rights and advantages shall be given by law to such persons, and when it prohibits the giving of further rights and advantages. The Federal Parliament may

(1) (1920) 27 C.L.R. 395. (2) (1946) 73 C.L.R. 213.

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think it wise to do this upon an Australian basis so that all returned men in all parts of Australia are treated in the same way. It is in my opinion within Federal legislative power to prevent the operation of separate and possibly varying State enactments dealing with the same subject. It appears to me obvious that great confusion, dissatisfaction and unrest might well result from the specification by the laws of the Commonwealth and six States of different qualifications of servicemen for benefits, of different conditions attached to those benefits, and of different benefits required by law to be given. The Commonwealth Parliament in the statute under consideration has exercised its complete control of this subject so as to establish uniformity throughout Australia, so that the same provisions will apply to the same classes of men, wherever they were domiciled, wherever they enlisted, and wherever, within the limits prescribed by the Commonwealth Parliament, they served in relation to the war. As *Higgins* J. said in *Attorney-General* v. *Balding* (1), federal law provides for administration " on one systematic basis by Commonwealth authority." It is in my opinion within the power of the Federal Parliament to make such a provision in order to exclude all State law upon the subject and thus produce uniformity throughout Australia.

It was further argued that the Commonwealth Parliament had no power to make a law relating to the employment of State public servants. It cannot be maintained, however, that persons employed by the States are, in respect of their employment, outside any possible application of Federal laws. It has been held in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2) that industrial laws of the Commonwealth enacted under the power conferred by s. 51 (xxxv.) of the Constitution may validly be applied to persons employed by a State in industry and in particular to employees upon State railways. In *South Australia* v. *The Commonwealth* (3) it was held that the *Income Tax (War-time Arrangements) Act* 1942 was valid (under the defence power) though it contained provisions which removed members of the Public Service of the State from that service and transferred them to Commonwealth employment. The Commonwealth can conscript State public servants for war service, just as it may conscript any other person : see particularly (4) : see also *Reid* v. *Sinderberry* (5) as to the control of manpower in the Commonwealth for purposes of defence. State public servants are not entitled to any exemption

(1) (1920) 27 C.L.R., at p. 399.
(2) (1920) 28 C.L.R. 129.
(3) (1942) 65 C.L.R. 373.
(4) (1942) 65 C.L.R., at pp. 431, 437, 468.
(5) (1944) 68 C.L.R. 504.

from war service, and there is no reason for excluding them from the benefits of a Commonwealth statute providing for reinstatement and preference in employment when they are discharged from the defence services—unless, indeed, the final argument for the defendants should succeed.

That argument is that the principle of the decision in *Melbourne Corporation* v. *The Commonwealth* (1) applies in this case. There it was held that Federal legislation was invalid if it curtailed or interfered in a substantial manner with the exercise of State constitutional power—if Federal power was used for a purpose of restricting or burdening the State in the exercise of its constitutional powers—or if the law was aimed at restriction or control of a State in the exercise of its executive authority.

In the present case, however, it appears to me to be difficult to say that the Federal Act really curtails or interferes with or burdens any essential governmental operation of the States. It is a general Act applying to all employers. It does not "single out" the States by any discriminative provisions. An exclusion of State public servants from Federal benefits given to all other ex-servicemen would be open to more serious objection on the ground suggested. The Federal Act does not burden the States in the exercise of their constitutional powers. It requires the States to reinstate discharged servicemen in their former employment in accordance with its provisions and to give preference in new engagements to persons who are entitled to preference under the Federal Act. Treatment of discharged servicemen who are State public servants in the same way as other discharged servicemen may well be thought to assist rather than to impede the administration of a State public service. There is nothing in the Federal Act which compels any State to re-employ or to employ an incapable or unsuitable person. In my opinion there is no reason for describing such legislation as this as preventing the States in any way from discharging their essential governmental functions.

Section 18 of the Commonwealth Act limits the rights of employers in relation to the termination of employment or the variation of the conditions of employment of persons reinstated under the provisions of the Act. The conclusions which I have reached make it unnecessary for me to consider the arguments which were based upon this section.

In my opinion s. 10 of the State Act is inoperative because inconsistent with the Commonwealth Act. It is conceded that ss. 7 and 9 are inconsistent with the Commonwealth Act. Section

(1) (1947) 74 C.L.R. 31.

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8 has significance only in relation to ss. 9 and 10. Section 4 is part only of the whole scheme of the State Act, and falls with the other sections mentioned.

The provisions of the Act contained in all these sections are therefore inoperative. They are "invalid" in the sense in which that word is used in s. 109 of the Constitution and a declaration should be made accordingly.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with his reasons and the order proposed by him.

STARKE J. did not deliver any judgment.

DIXON J. The purpose of this action is to establish that the provisions of the *Discharged Servicemen's Preference Act* 1943 of Victoria affecting promotions are invalid because they are inconsistent with the *Re-establishment and Employment Act* 1945 of the Commonwealth. The plaintiff is a permanent officer of the public service of Victoria who is not a serviceman and the Victorian Act would adversely affect his prospect of promotion. He therefore desires its invalidation. The Federal statute says nothing to prejudice his chances of promotion and he has therefore no objection to it but, on the contrary, relies upon it to exclude the operation of the State law. To his challenge of the State provision on the ground of conflict with the Federal Act, the State, while denying the inconsistency of the particular provision as to promotion, sets up an alternative answer by way of confession and avoidance. That answer is that the Commonwealth Act is void if and in so far as it attempts to exclude the operation of State enactments with respect to the promotion of servicemen generally and if and in so far as it attempts to exclude the operation of State enactments governing the promotion of servicemen in the public service of the State. In so far as it attempts to do the first, it is said to go beyond anything relevant to the defence power. In so far as it attempts to do the second, it is said to be invalid because it amounts to an unconstitutional interference with the parliamentary and executive control of the State public service.

In the view I have formed of the legislation much of the State's answer which I have described as made by way of confession and avoidance ceases to be relevant. For I have come to the conclusion that the section in the Victorian statute to which the plaintiff objects is but part of an inseparable State plan dealing

with the reinstatement in employment and the appointment and promotion of discharged servicemen and that as a whole it is in conflict with the provisions of the Federal statute. The provisions embodying the State plan apply to employment generally in Victoria and by an express provision are specifically extended to employment by or under the Crown. It is as State provisions applying generally to employment in Victoria that I think that they are in fatal collision with the Federal legislation. But I think that the provision extending them to the Crown clearly depends upon their existence as a valid law of general application and it cannot survive their invalidation. This view of the State provisions makes it quite unimportant whether the Federal Act does or does not apply to the Crown in right of the State. The reasoning would be the same if it contained no provision purporting to make it applicable to the State Crown and it would therefore be the same whether the provision it does contain purporting to do so is or is not valid. Accordingly, I do not regard this case as involving the question whether the inclusion of the State Crown in the operation or application of the Federal Act is valid.

The provision of the *Discharged Servicemen's Preference Act* 1943 of Victoria which is directly involved is s. 10. Its purpose is to require an employer in promoting an employee to prefer a discharged serviceman. But it is preceded by provisions which deal with the reinstatement of discharged servicemen in employment (s. 7); and with preference to discharged servicemen, whether in or out of an employer's service, when appointments are made (ss. 8 and 9). Section 4 (1) requires that these provisions should be observed in respect of employment by or under the Crown in right of the State of Victoria as if the Crown were an employer within the meaning of the Act. Section 4 (2) empowers the Governor in Council to make or cancel appointments or promotions or do any other act matter or thing necessary or expedient to give full effect to the provisions. In s. 4 we have a provision that is directory and not mandatory. For it depends upon administrative action and neither penal consequences nor invalidity ensue from a non-observance of the obligation which sub-s. (1) imposes by reference to the section it mentions. It is, of course, evident that the question who is a serviceman for the purpose of this legislation is cardinal to its operation. The State Act (s. 2) defines "serviceman" with some strictness so that it covers only a limited class of those included in the expression "member of the forces" as defined by the Commonwealth *Re-establishment and Employment Act* 1945. The definition is limited in two notable directions. In the first place it is

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restricted to those who were connected with Victoria either as a place of domicile or of enlistment. In the second place it covers only those who served in a prescribed theatre of war, which in substance and effect means overseas. Now it is obvious that if preference is given by the State law to a class more limited than those who are entitled to preference under the Federal law, a section of those who, under Federal law, are entitled to stand as a class upon an equality with one another as members of a preferred class, will, under State law, belong to the same class as non-servicemen over whom this preference is given. It is unnecessary to state fully the definition of " member of the Forces " contained in s. 4 of the Federal Act and extended for the purposes of Div. 2 of Part II. by s. 25. It is sufficient to say that it includes all members of the A.I.F., including any who may not have actually served abroad, and members of the Citizen Forces enlisted, appointed or called up for continuous service whether they served at home or abroad. Div. 1 of Part II. of the Federal Act relates to reinstatement in civil employment. Section 16, which is perhaps the central provision of the Division, requires the former employer to make employment available to a person whom he employed but who joined the Services. The employer must make employment available to him when that person applies for reinstatement, having completed his war service. He must make employment available in the old occupation " under conditions not less favourable to him than those which would have been applicable to him if he had remained in the employment of the former employer " (s. 16 (1) and (3) (*a*)).

Division 2 relates to preference in employment and is to govern that question for seven years (s. 34). Here the central provision is s. 27. Sub-section (1) requires that an employer shall, in the engagement of any person for employment, engage, in preference to any other person, a person entitled to preference, unless he has reasonable and substantial cause for not doing so. Sub-section (3) states a number of matters which an employer must consider in determining whether such cause exists. Sub-section (4) states the matters that must be considered when an employer is called upon to decide between two or more servicemen entitled to preference. Sub-section (2) provides that any person entitled to preference may apply in writing, to the employer concerned, to be engaged for employment in any position, notwithstanding that employment in that position has not been offered to him. This would, I think, enable a member of the forces inside an employer's service to apply, as well as a member of the forces outside his service. Sub-section (5)

(*a*), however, provides that nothing in the section shall apply in relation to the engagement for employment by any employer of a person who is already employed by him. That means that, if the person appointed comes from inside the employer's service, it does not matter that he is not a member of the forces. Apparently the result is that if a member of the forces applies under sub-s. (2) the employer must consider in relation to all candidates for appointment or persons under consideration for appointment the matters which govern reasonable and substantial cause for not appointing a serviceman and, further, if some other competitors for the position are members of the forces, the matters specified as considerations upon which the choice between them is made. But there is this qualification, viz., if in the end he decides to appoint someone inside his service, the employer is relieved from the duty to act only on reasonable and substantial cause in appointing a man who did not serve and from the duty to proceed only on specified considerations in preferring one member of the forces to another. Section 24 contains an attempt to exclude the operation of other forms of compulsory preference where the Division applies. Sub-section (1) deals with the exclusion of requirements depending on Federal law. It says that the provisions of the Division shall apply to the exclusion of any provisions providing for preference in any matter relating to the employment of discharged members of the forces of any law of the Commonwealth or of any industrial award, order, determination or agreement. Sub-section (2) uses the same formula but in relation to State law. It says that the provisions of the Division shall apply to the exclusion of any provision providing for preference in any matter relating to the employment of discharged members of the forces of any law of a State or of any industrial award, order, determination or agreement made or filed under or in pursuance of any such law.

The expression "providing for preference in any matter relating to the employment of discharged members of the Forces" seems to mean "providing for preference to discharged members of the forces in any matter relating to employment." "Matter relating to employment" is much wider than "employment." It would, I imagine, cover all the incidents of employment; it looks at employment, not as mere engagement or appointment, but as a continuous relation which such incidents attend.

Now the purpose of these two sub-sections is to make certain that the regulations prescribed in Div. 2 with respect to the subject of preference to discharged servicemen in matters relating to employment shall be of general and uniform application and shall not be

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qualified, varied, extended or restricted by other regulations upon the same subject. The purpose includes superseding existing obligatory provisions and excluding new ones. It covers provisions of general operation, but it is manifest that the evil at which it is especially directed is particular provisions operating over a restricted area, whether the restriction be to an industry or pursuit governed by an industrial award or determination or to a State or Territory.

The subject with which Div. 2 deals is the preference of discharged members of the forces in employment, in a wider sense than mere appointment. It touches the question of preference in promotion, though, it is true, only in a limited way. The Division does so by (1) authorizing members of the forces to apply to an employer for engagement in a position not offered to them, an authority necessarily including those already in that employer's service as well as those outside (s. 27 (2)); (2) by indicating a definite decision that the preference to members of the forces shall not extend to positions filled by the promotion of someone already in the service of the employer. Further, s. 16 (3) (*a*), which forms part of Div. 1, may also affect promotion. For the conditions of employment made available to a man upon reinstatement must be not less favourable to him than those which would have been applicable to him in the occupation, had he remained in the employment instead of joining the forces. Such conditions may affect promotion, as, for example, where it is a condition of the employment that the order in which employees rank by way of seniority shall be given a presumptive effect by the employer in deciding upon promotion : *Commissioner for Railways* (*N.S.W.*) v. *McCulloch* (1).

From the provisions of the Federal Act two things appear clearly enough. One is that the rule adopted is that in all matters of preference in employment discharged members of the forces shall stand upon an equality but that certain matters shall be considered when a choice has to be made in a competition among them for employment. The other is that the legislature decided to stop short of conferring upon members of the forces any right to be preferred if an employer fills the position for which they are candidates by appointing a man already in his employment. Upon both these matters the Victorian legislation adopts an opposite view. It discriminates among the class defined by the Federal Act under the name " members of the forces." It discriminates between those connected with Victoria as a place of enlistment or of domicile at that time and all others. It discriminates between those who served in certain theatres of war, substantially abroad, and others.

(1) (1946) 72 C.L.R. 141.

Then the Victorian Act undertakes to control promotion and to require that the serviceman should be preferred (s. 10). During the argument examples were given, said to be drawn from actual instances, which illustrate the very different consequences, both to employers and employees, of applying the Federal Act to the exclusion of the State Act, of applying the State Act to the exclusion of the Federal Act, and of applying the State Act as to promotions and otherwise applying the Federal Act.

Putting aside, however, the case of promotion for the moment, it is sufficiently obvious that with respect to reinstatement and preference in appointment the two pieces of legislation are in hopeless conflict. So much was not denied on behalf of the State of Victoria. But what was said is that the Federal Act leaves the question of promotion clear, or sufficiently clear, of statutory regulation or control and that accordingly that area is open for the operation of State legislation giving preference to any section forming part of the class called by the Federal Act "members of the forces."

There are in my opinion two independent reasons why this argument cannot be maintained. The first is that the Federal Act discloses a legislative determination by the Federal Parliament of the question what shall be the extent of the legal obligation to give preference in matters of employment; and the decision embodied in the Act is that the legal obligation shall not apply where the employer appoints a person already employed by him. Between s. 10 of the State Act, providing as it does for preference to discharged servicemen in promotion, and the Federal legislation there is consequently an inconsistency which must be fatal to the section under s. 109 of the Constitution. The second reason is that s. 10 does not stand in the State Act as an isolated provision. It is closely connected with s. 9 and, moreover, it forms part of one indivisible plan for giving preference in employment to those falling under the State definition of discharged servicemen. It is not necessary to say much in support of the first reason I have assigned. Section 24 and s. 27, the effect of which I have already described, appear to me to justify the conclusion that, on the one hand, the Federal Parliament intended to define the extent to which the duty to give preference should go and to do it so as to exclude promotion, and, that on the other hand, it intended to provide in this and other respects what would be the only rule upon the subject and so would operate uniformly and without differentiation based on locality or other conditions. In this Court it is far too late to contend that s. 109 does not invalidate State law which in

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such a state of affairs carries the regulation of the same matter further than the Federal legislation has decided to go. This is a case where the Federal legislation undertakes a regulation or statutory determination of the very subject and then goes on to express an intention that it shall be an exhaustive declaration of the law on that particular subject.

To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is, I think, an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise. It is still more widely different from an attempt to limit the exercise of State legislative power so that the Commonwealth should not be consequentially affected in the ends it is pursuing. This is not a case which, in my opinion, falls within the description of legislation so powerfully attacked by *Evatt* J. in *West* v. *Commissioner of Taxation* (*N.S.W.*) (1).

There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s. 109 will of its own force make inoperative State legislation which otherwise would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. But within such limits an enactment does not seem to me to be open to the objection that it is not legislation with respect to the Federal subject matter but with respect to the exercise of State legislative powers or that it trenches upon State functions. Beyond those limits no doubt there lies a debatable area where Federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament.

But I think that Div. 2 of Part II. of the Federal Act is well within the line.

I turn now to the second reason I gave for rejecting the contention that s. 10 of the State Act stood as a valid, though isolated, regulation of preference in promotion. That reason depends upon the view that s. 10 is an inseparable part of a State plan that must stand or fall as a whole.

Now an inspection of s. 10 will show that the draftsman considered that its operation might overlap with that of s. 9. For, by sub-s. (3) of s. 10 he provided that sub-s. (2) should not apply in the case of a promotion made in accordance with s. 9. Under s. 9 (1) an employer may by public advertisement invite applications

(1) (1937) 56 C.L.R. 657.

for appointment to a position. If he gets an application from a person falling within the State definition of discharged serviceman he is bound to appoint him, if he is outside his service, or promote him, if he is within it. If he gets no such application he may appoint or promote, as the case may be, a man who has not served. In each case the appointment or promotion is final. But s. 10 (2) says that an employer, unless he has invited applications only from persons in his employment, may not appoint or promote a man who has not served except provisionally. His appointment or promotion must be provisional upon no serviceman making an application for the same position within seven days. Then sub-s. (3) qualifies that by saying, in effect, that the appointment may be final and not provisional if it is made in accordance with s. 9. Further, s. 9 excepts from its obligations an employer appointing casual or temporary employees. It may be that the words " in accordance with " in s. 9 were meant to cover these appointments too.

Be that as it may, there is enough to show that s. 10 on its own terms needs s. 9, unless its intended operation is to be enlarged. Moreover, in point of policy s. 9 (preference to servicemen in reference to appointments by engaging outside men or promoting men already employed) is closely tied to s. 10 (preference to servicemen in promotion). Section 9, however, is confessedly inconsistent with the Federal Act. In my opinion s. 10 must fall with it.

This conclusion perhaps may be considered to involve a view of the words in s. 109 " to the extent of the inconsistency " which I should not merely assume. But if it does, the next matter to which I shall now pass more distinctly involves the application of those words and provides a better illustration of my opinion. I refer to the question whether s. 4 must necessarily fail with ss. 7, 9 and 10.

In my opinion it should do so because on its face it means only to apply to the Crown provisions which it assumes to apply to all other employers. It is based entirely on the assumption that all Victorian employers will be bound by provisions which include ss. 7, 9 and 10, and, on that footing and only on that footing, it provides means for bringing the Crown under them. It would be absurd to suppose that s. 4 was meant to enact a separate law about preference for the Victorian public service, a law depending upon the incorporation of provisions intended to operate generally, notwithstanding that they proved invalid. But as to this conclusion it is said that the invalidity springs from s. 109 and that that section invalidates legislation only to the extent of the inconsistency. Adopting the view, as I do, that it is unnecessary to pass upon the validity of s. 26 of the Federal Act, which purports to apply Div. 2

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of Part II. to the Crown in right of the State, I must assume for the purpose of the decision that the Division does not bind the State. On that assumption it may be asked how does the inconsistency extend to s. 10 of the State Act. The answer is that while s. 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute. The same thing is put in another way by saying that every part of a completely interdependent and inseparable legislative provision must fall within " the extent of the inconsistency." No doubt s. 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law. But it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact. The burden of establishing interdependence in such a case is necessarily upon those who assert it in view of the words of s. 109, and perhaps it is not a light one. That is why the State *Acts Interpretation Act* 1930 is unimportant, even if upon its terms it applies to a case under s. 109.

For these reasons I am of opinion that ss. 4, 7, 9 and 10 of the *Discharged Servicemen's Preference Act* 1943 of Victoria are invalid. As to ss. 4, 9 and 10 the plaintiff is entitled to a declaration to that effect.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Declare that ss. 4, 7, 9 *and* 10 *of the Discharged Servicemen's Preference Act* 1943 *of Victoria are invalid. Defendant to pay plaintiff's costs.*

Solicitors for the plaintiff: *Michael Niall & Co.*

Solicitor for the defendant: *F. G. Menzies,* Crown Solicitor for Victoria.

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

E. F. H.