[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

FOSTER AND OTHERS;

EX PARTE RURAL BANK OF NEW SOUTH WALES . . . . . } PROSECUTOR.

WAGNER . . . . . COMPLAINANT;

AND

GALL . . . . . DEFENDANT.

COLLINS . . . . . PLAINTIFF;

AND

HUNTER AND OTHERS . . . . . DEFENDANTS.

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SYDNEY, *April* 4-7, 26-28.

MELBOURNE, *June* 6.

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

Constitutional Law (Cth.)—Defence—National security—Women's employment—Liquid fuel—Distribution—Control—Licences and ration tickets—Re-establishment of ex-members of the Forces—Dependants—Dwelling houses—Unoccupied or about to become unoccupied—Right of possession—Cessation of hostilities—Lapse of time—War-time legislation and regulations thereunder—Operation—Continuance—Validity of legislation and regulations—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (vi.), (xxxi.) (xxxv.) (xxxix.)—*Defence (Transitional Provisions) Act* 1946-1948 (*No.* 77 *of* 1946—*No.* 78 *of* 1947—*No.* 88 *of* 1948)—*National Security Act* 1939-1946 (*No.* 15 *of* 1939—*No.* 15 *of* 1946), *s.* 19—*Women's Employment Act* 1942-1946 (*No.* 55 *of* 1942—*No.* 77 *of* 1946), *Sched.*—*Women's Employment Regulations* 1946, *reg.* 6—*National Security (Liquid Fuel) Regulations* (*S.R.* 1940 *No.* 293—1944 *No.* 113), *reg.* 51—*National Security (War Service Moratorium) Regulations* (*S.R.* 1942 *No.* 437—1948 *No.* 109), *regs.* 30A-30AF.

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The continued existence of a formal state of war, after the enemy has surrendered, is not enough in itself to bring or retain within the Commonwealth legislative power over defence the same wide field of civil regulation and control as fell within it while the country was engaged in a conflict with powerful enemies.

It may be incidental to defence to continue the control and regulation of a particular subject matter for a time after the cessation of hostilities and also to maintain such control while legislative provision is being made for the necessary re-adjustment; but, unless the court can see with reasonable clearness how it is incidental to the defence power to prolong the operation of a war measure dealing with a subject otherwise falling within the exclusive province of the States, it is the duty of the court to pronounce the enactment beyond the legislative power of the Commonwealth.

The *Women's Employment Regulations* are not addressed to any problem of post-war re-adjustment, and the continuance in operation in 1948 of those regulations was obviously not connected with the prosecution of the war, nor was it incidental to any winding-up process nor to any endeavour to restore conditions which might be regarded as part of the peace-time organization of industry. The mere fact that the lack of man-power is a war consequence is not sufficient to bring the matter within the scope of the defence power, particularly after hostilities have ceased. Therefore the *Defence (Transitional Provisions) Act* 1947 is invalid in so far as it extended (if it did extend) the operation of those regulations to 31st December 1948.

The *National Security (Liquid Fuel) Regulations*, which regulate the distribution and use of petrol throughout Australia, and the *National Security (War Service Moratorium) Regulations* under which a protected person may obtain a warrant of possession authorizing him to occupy a dwelling house cannot now be said to be laws upon the subject of defence or the incidents of defence; therefore the *Defence (Transitional Provisions) Act*, s. 48 is invalid to the extent to which it purports to continue those regulations in operation until 31st December 1949.

R. v. *Foster*; *Ex parte Rural Bank of N.S.W.*

PROHIBITION.

The Rural Bank of New South Wales, a corporation carrying on the business of banking as a State bank and incorporated under the *Government Savings Bank Act* 1906 (N.S.W.), as amended, and the *Rural Bank of New South Wales Act* 1932 (N.S.W.), as amended, applied to the High Court for a writ of prohibition directed to the United Bank Officers' Association of New South Wales, the United Bank Officers' Association of Queensland, the Bank Officials' Association of South Australia, the Bank Officials' Association of Western Australia, Union of Workers, Perth, and his Honour Judge *Foster*, Commonwealth Court of Conciliation and Arbitration,

restraining them and each of them from taking any further proceedings upon or in respect of two several decisions made by his Honour on 4th June 1947 and 14th December 1948 respectively, upon the grounds, *inter alia*, (i) that the *Women's Employment Act* 1942 together with all regulations thereunder is and was on 14th December 1948 in excess of the constitutional powers of the Parliament of the Commonwealth and void of legal effect; (ii) alternatively, that regs. 6, 7, 7B, 7C, 8, 9, 9A, 9AA, 9B, 9C, 9D, 10, 12, 13 and 14A (2) purporting to derive their force from the said Act were on 14th December 1948 in excess of the said constitutional powers and invalid; (iii) that the said decision of 14th December 1948, so far as it purported to determine the terms and conditions governing future relationship between female employees of the applicant and the applicant, as from that date was in excess of the powers conferred by the said Act and the regulations thereunder and was void; and (iv) that clauses 10 and 12 of the said decision of 14th December 1948 were in excess of the powers conferred by the said Act and the regulations thereunder and were void.

In an affidavit filed in support of the application the secretary of the applicant stated, *inter alia*, that the applicant employed and had employed prior to and since 2nd March 1942, a large number of persons including a substantial number of females. On 3rd September 1942, applications were made by certain employers engaged in the business of banking to the Women's Employment Board constituted under the *Women's Employment Act* 1942 for permission in pursuance of reg. 6 of the schedule to that Act to employ females on work of the nature covered by the regulation, which permission was granted by the board. On 5th July 1944, the board gave a decision in terms of an agreement which had been made between the employers referred to above on the one hand, and the employees' organizations referred to above on the other hand, prescribing terms and conditions as between the parties to the decision for the employment of females in the business of banking. On 14th August 1944, the employees' organizations made application to the board to vary the decision and on 7th September 1944, made a further application to have the said decision, or the decision as and when varied, made binding on the applicant and certain other State Banks. In March 1946, the application for variation was refused and the application to have the said decision made operative against the State Banks was adjourned in respect of the applicant pending the result of certain negotiations between the parties which were then proceeding. On 4th June 1947, Judge *Foster*, "purporting" to exercise jurisdiction in pursuance

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of the regulations and the *Women's Employment Act* 1942, as amended, gave a decision in the terms of an agreement which had then been reached between the applicant and the United Bank Officers' Association of New South Wales which decision, deposed the secretary, " purported " to bind the applicant.

In his decision Judge *Foster* said, *inter alia*, that the matter was mentioned to him in March 1946, and the parties were to confer with a view to arriving at an agreement. The parties finally arrived at an agreement which was submitted to the court. On 23rd April 1947, the parties came before his Honour and were agreed as to the facts which formed the basis of an anomaly and on these grounds he found existent a prima-facie case for an alteration to rates of remuneration. The Senior Judge had intimated his concurrence and had authorized Judge *Foster* to hear and determine the matter in accordance with his own opinion. He, therefore, by consent of the parties, made the award in the terms agreed upon by them, as contained in a document bearing date 23rd July 1946 tendered to the court, that, *inter alia*, the work performed by the applicant's female officers affected by the agreement was work specified in reg. 6 (1) of the schedule to the *Women's Employment Act* 1942 ; that they might with the express approval of the applicant be employed or continue to be employed on such work ; that certain prescribed hours of work and rates of remuneration should be applicable to those female officers ; the rates of remuneration to operate on and from 23rd September 1942 or from the date on which the female officer concerned first came under the jurisdiction of the Women's Employment Board or the *Women's Employment Act* 1942, whichever was the later. The agreement contained a provision that it had been entered into by the applicant for the sole purpose of complying with its obligations under the *Women's Employment Act* and with a view to the submission of such agreement to the Commonwealth Court of Conciliation and Arbitration to form a decision by that Court under that Act.

The applicant's secretary further deposed that at the time of the giving of the " purported " decision there was in fact no matter in dispute between the parties and that decision amounted in fact to no more than the recording by the court (formerly the board) in the form of a decision of the agreement between the parties. The general secretary of the Association, however, said that between 5th December 1944 and 23rd July 1946 there were long and serious disputations between the applicant and the employees' organizations in the matter.

The applicant's secretary further deposed that having been advised that the " purported " decision was invalid the applicant so informed the employees' organizations and further informed them that the applicant was not satisfied with the propriety of proceeding of the footing that the decision was valid. The applicant had not made any payment under or otherwise given effect to that decision. On 5th October 1948, the employees' organizations filed an application to vary the " purported " decision in certain respects affecting the applicant, which was made the sole respondent to the application ; to re-open questions submitted by the applicant under reg. 6 (4)-(8) in relation to females within New South Wales and within the applicant's establishment ; to continue the hearing of evidence until its conclusion and to make an award accordingly ; and to refer to a committee of reference the question of what females who were employed by the applicant were employed on work specified in the decision so varied. The grounds of that application were (*a*) that the decision sought to be varied (i) was based upon an agreement made between the parties without evidence being concluded before the court and was therefore void and of no effect ; and (ii) was void and of no effect in that it merely confirmed an agreement made between the parties on 23rd July 1946 without deciding the questions submitted to it under the *Women's Employment Regulations* ; (*b*) that those regulations never contemplated an agreement in the form entered into between the parties on 23rd July 1946 inasmuch as it was laid down that the court shall make the decisions required to be made by the regulations after consideration of such factors as it thought fit and in particular to the efficiency of females in the performance of the work and any other special factors which might be likely to affect the productivity of their work in relation to that of males ; (*c*) that during the proceedings prior to 4th June 1947 and after evidence had been given in part the court directed and/or permitted the parties to confer with a view to reaching agreement contrary to the regulations ; and (*d*) that the parties could not agree which female employees, if any, within the applicant's establishment were employed on work specified in the decision sought to be varied.

On 14th December 1948, in that application, Judge *Foster* held that the work being performed by the applicant's female employees was work of the nature specified in reg. 6 (1) of the schedule to the *Women's Employment Act* 1942, and prescribed in respect of such female employees that they might be employed or continue to be employed on that work ; the hours during which they might be so employed ; the conditions of their employment ; and their rates of

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remuneration. The decision provided, *inter alia*, as follows:— "10. Where a female officer, other than those named in the schedule, would be entitled to payment in terms of this decision for work performed prior to the date hereof and is not in the employ of the Bank on such date, she shall not be entitled to receive such payment unless she make written application to the Bank therefor within nine calendar months from the date hereof . . . 12. Rates of pay prescribed in this decision for female officers shall operate on and from the 23rd day of September 1942, or from the date on which such female officer first came under the jurisdiction of the Women's Employment Board or the *Women's Employment Act* 1942, whichever is the later."

The applicant's secretary further deposed that the applicant had not given effect to the decision made by Judge *Foster* on 14th December 1948, and that the employees' organizations, and particularly the United Bank Officers' Association of New South Wales, and the applicant's female employees who were members thereof, intended, so he had been informed and believed, to endeavour to enforce and procure the enforcement of that decision against the applicant and the applicant feared early action to do so.

Williams J. granted (*a*) an order nisi for prohibition directed to Judge *Foster* and the employees' organizations named returnable before the Full Court of the High Court, and (*b*) leave to the applicant to file further affidavits.

Spender K.C. and *Louat*, for the prosecutor.

Spender K.C. As at the date when the award was made, that is 14th December 1948, the *Women's Employment Act* 1942 and the regulations made thereunder were invalid. The Act has not a terminal date. It was enacted for a special purpose which at the date of the award had exhausted itself. There was not any nexus between the Act and defence as at the relevant date. The title to the Act indicates quite a limited purpose, and is not of the same extent as the words which appear in the *National Security Act*. As at December 1948, under regs. 6 and 7 of the *Women's Employment Regulations* an employer seeking to carry on his business as he thinks fit, and irrespective of whether it was related to any defence project, could not do so if the regulations were valid, except by permission of a judge of the Commonwealth Court of Conciliation and Arbitration and subject to such conditions as he might make as to wages, daily and weekly hours, welfare, health, &c. Although

these matters are purely State matters, prima facie the provisions of State industrial legislation are excluded from dealing with them and are overridden. The Act and the regulations were designed for the protection of women in terms of the conditions under which they would be employed during war, and in the mobilization of all industry for purposes of war. The Act and regulations establish a complete licensing system for the employment of females throughout the Commonwealth subject to conditions as to the matters referred to in reg. 6, and although such provisions were necessary during the period of hostilities, they no longer apply and were not applicable at the date of the award which was three years and three months after the cessation of hostilities. The power is a far wider industrial power than that possessed by the Arbitration Court. The Act and regulations have been upheld throughout, speaking in general terms, on the basis that they constituted part of the total mobilization of the resources of man-power and of material resources to accomplish victory and to defeat our enemies (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1); *Reid* v. *Sinderberry* (2); *Australian Woollen Mills Ltd.* v. *The Commonwealth* (3); *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (4)).

[McTIERNAN J. referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte State of Victoria* (5).]

During the war it was essential to control all industry because so much industry dealt with war, e.g. the manufacture of weapons and munitions of war, supplies to the armed services and supplies of essential rationed goods to the civil community, and the decisions referred to above show that the power of the Commonwealth Parliament extends to the making of provision for that control. As the title of the Act, and also s. 6 (a), states it was designed to encourage the employment of women for the purpose of aiding in the prosecution of the war and was part and parcel of the overall scheme. It was designed for the purpose of fitting in with other regulations all of which had as their objective the total mobilization of resources. The important words are "the prosecution of the present war" (*Real Estate Institute of New South Wales* v. *Blair* (6)). That purpose has already been fulfilled. The grounds upon which the Act and regulations had been upheld during the war had entirely disappeared by December 1948.

(1) (1943) 67 C.L.R. 347, at pp. 356, 357, 375, 383, 398, 399.
(2) (1944) 68 C.L.R. 504.
(3) (1944) 69 C.L.R. 476, at pp. 486, 487, 495, 498, 500.
(4) (1945) 71 C.L.R. 545, at pp. 562, 576, 582.
(5) (1944) 68 C.L.R. 485.
(6) (1946) 73 C.L.R. 213, at p. 231.

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[DIXON J. referred to *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1) and *United States of America* v. *Carolene Products Co.* (2).]

The Act was for a specific purpose which has been exhausted. There is no nexus between the Act and the regulations thereunder as referred to in the schedule to the *Defence* (*Transitional Provisions*) *Act* on the one hand and the defence of the Commonwealth on the other hand (*Crouch* v. *The Commonwealth* (3)).

[DIXON J. referred to *Hume* v. *Higgins* (4).]

Although it is conceded that there must be some reasonable time for the winding up of defence legislation, that time is not to be extended indefinitely. A connection with defence merely as a matter of causation is not sufficient to bring the subject within the defence power (*Crouch* v. *The Commonwealth* (5)). The fact that certain conditions of a permanent or semi-permanent character have been brought about by the war does not establish any nexus between the legislation and defence so as to support exercise by by the Commonwealth of legislative measures which may properly fall within the powers of a State. A reasonable transitional time has already elapsed to enable the controls to be transferred to the States. In this case such a period would be but a short one, certainly not three years. Neither the Act nor the regulations were designed for the re-establishment in civilian life of members of the armed forces. The existing shortage of man-power was not, either *in toto* or in part, necessarily created by or due to the war. Section 5 of the *Women's Employment Act* 1942-1946 assists the prosecutor. It would seem that by virtue of the combined operation of s. 2 of the *National Security Act* 1946, s. 2 of the *Defence* (*Transitional Provisions*) *Act* 1946, s. 10A of the *Acts Interpretation Act* and s. 5 of the *Women's Employment Act*, the last-mentioned Act, the regulations under that Act and in the schedule thereto, and all altered regulations, were made to determine at midnight on 31st December 1946, that is to say prior to 1st January 1947 the date shown in s. 2 of the *Defence* (*Transitional Provisions*) *Act* 1946. If s. 6 of the last-mentioned Act applies then in any event all these regulations ceased to operate at midnight on 31st December 1947. Accordingly, the award could not be supported under the Act or the regulations made thereunder. Sub-sections (1) and (2) of s. 6 of the *Defence* (*Transitional Provisions*) *Act* 1946 are express provisions and no portion of those sub-sections is within s. 5 of the *Women's Employment Act* 1942. Section 6 of

(1) (1945) 71 C.L.R. 161, at p. 180.
(2) (1937) 304 U.S. 144, at p. 153 [82 Law. Ed. 1234, at p. 1242.]
(3) (1948) 77 C.L.R. 339, at pp. 345, 347.
(4) (1949) 78 C.L.R. 116.
(5) (1948) 77 C.L.R., at p. 356.

the last-mentioned Act provides its own regulation-making power. The result is that either that Act came to an end, or, as s. 6 of the *Defence (Transitional Provisions) Act* 1946 did not apply, there was no time limit under the *Women's Employment Act* at all. Section 28 of the *Commonwealth Conciliation and Arbitration Act* 1904-1947, as inserted by s. 8 of Act No. 10 of 1947, expressly provides that the jurisdiction of the Arbitration Court shall be exercised by not less than three judges, consequently it was not competent for one judge only to make the subject award.

Louat. For the purposes of the sources of legislative power, the purported investiture, by Statutory Rules 1944 No. 149, of the Arbitration Court with jurisdiction under the regulations of the *Women's Employment Act* must be treated as an exercise of the power conferred by s. 77 (1) of the Constitution. Those Statutory Rules were beyond power because s. 6 of the *Women's Employment Act* 1942 did not expressly authorize the exercise of the power contained in s. 77 of the Constitution. The regulation-making power conferred by s. 6 is express in its terms. The provisions applicable are only machinery provisions applicable to regulations made under that Act. The scope of the authority is defined. Neither of the two matters mentioned in s. 6 could be suggested to be an express authority of the kind which, it was said in *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (1), was required to exercise the powers contained in s. 77 of the Constitution.

Richardson, for the respondents other than the judge, upon a preliminary point. The prosecutor acquiesced in the jurisdiction of the court below, therefore he is not entitled to prohibition from this Court (*In the Matter of a Prohibition in the Mayor's Court of London*; *Broad* v. *Perkins* (2)). The arguments to be addressed to the Court on behalf of the intervenants in respect of grounds (i) and (ii) are adopted on behalf of these respondents.

Holmes K.C. (with him *Gowans* and *Macfarlan*), for the Commonwealth and the Attorney-General for the Commonwealth, intervenants by leave, tendered an affidavit by William Funnell, Secretary of the Department of Labour and National Service of the Commonwealth of Australia, who deposed to certain facts from information, records and figures available to him in the course of his duties in the Department.

(1) (1943) 67 C.L.R. 25, at pp. 40, 50-52.

(2) (1888) L.R. 21 Q.B.D. 533.

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LATHAM C.J. The result of the rules of evidence is that this affidavit is inadmissible, but the Court is aware of the substance of the facts which the affidavit seeks to establish, because it takes judicial notice of notorious facts. Among those notorious facts are the facts that a very large proportion of the men of Australia were enlisted in the services and were withdrawn from industry, and that women were used for the purpose of doing the work of the community—in many cases work which they had never done before. Accordingly, a problem was brought into existence which was dealt with by war measures. The Court is also aware of the notorious fact that a large demobilization has taken place and that the number of men in the services is now very much less than before, but that some men are still serving in Japan. These facts are sufficient to ground the argument upon which the respondents rely, but the affidavit is rejected.

Holmes K.C. Section 5 of the *Women's Employment Act* provides a terminal date for the regulations. The inference was that the operation of the Act as originally enacted was intended to be limited to the then present war similar to the provision in s. 19 of the *National Security Act* (*Victorian Chamber of Manufactures* v. *The Commonwealth* (1)). This matter is now controlled by the *Defence* (*Transitional Provisions*) *Act* 1946-1948. Section 6 (1) of that Act limits the operation of the regulations in a form different altogether from s. 19 of the *National Security Act*, namely, by limiting the operation to a prescribed time in respect of regulations set out in a schedule to that Act. A statement of the principle applicable in the circumstances in which the Legislature substituted for " *National Security Act* 1939-1943 " in s. 5 of the *Women's Employment Act* 1942, as amended, the words " *Defence* (*Transitional Provisions*) *Act* 1946 " appears in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (2). It is clear from s. 6 (1), (2) of the *Defence* (*Transitional Provisions*) *Act* that the only regulations to be made under that Act are regulations amending or repealing the regulations in the schedule to that Act, so that the word " made " as last appearing in s. 5 of the *Women's Employment Act* cannot bear its ordinary meaning and should be given the meaning " continued." Given that meaning it follows that regulations made under the *Women's Employment Act* were to be treated as regulations under the *Defence* (*Transitional Provisions*) *Act* 1946 and that these regulations expired at the prescribed time referred to in s. 6 (1)

(1) (1943) 67 C.L.R., at pp. 398, 399.

(2) (1948) 75 C.L.R. 495, at pp. 529, 530.

of the last-mentioned Act. That reference should now be read as *Defence (Transitional Provisions) Act* 1946-1948, having regard to the provisions of s. 10A of the *Acts Interpretation Act* 1901-1948. No contrary intention appears either in the *Women's Employment Act* 1942 or in the *Defence (Transitional Provisions) Act* of 1947 or of 1948. In substance the *National Security Act* was replaced by the *Defence (Transitional Provisions) Act* and this replacement was intended to apply to other relevant legislation. The difficulty arises from the fact that the power of making regulations under the *Defence (Transitional Provisions) Act* is a very different power from that which existed under the *National Security Act*. An alternative argument on the *Defence (Transitional Provisions) Act* is that the regulations under the *Women's Employment Act* are limited in point of time to the expiration of the period of the prosecution of the war, by a terminal date by reference to that period. If that period expires, then the regulations expire. That is a formula for the purpose of ascertaining a time. That time is ascertainable. A distinction should be made between the Act and the regulations, the latter, contained in the schedule, being the operative part of the Act. The expression " the prosecution of the present war " in s. 6 (*a*) of the Act indicates a period of time which is ascertainable ; it is not an indefinite period of time. That expression extends into the transition period and is still current (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1)). It is notorious that there are still large numbers of persons not yet fully demobilized and whilst that be so the " prosecution of the war " still continues. That expression must cover all of those matters which are concerned with demobilization and with re-adjustment in civil life, and therefore includes the transition period. Women are still engaged upon work formerly performed by men and which is being held available for men as and when they are demobilized or released from war-created duties, such as occupation forces, or employment, or are re-adjusted to civil life by way of rehabilitation courses or otherwise. That is a true nexus not only with defence but with the closer expression " the prosecution of the war." Even the completion of a treaty of peace would not affect this position. The defence power on 14th December 1948 was sufficient to support the Act and the regulations. When enacted they were within that power (*Victorian Chamber of Manufactures* v. *The Commonwealth* (2)) and from *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (3) ; *Dawson* v. *The*

(1) (1945) 71 C.L.R., at pp. 169, 171, 179, 182, 183.

(2) (1943) 67 C.L.R. 347.

(3) (1945) 71 C.L.R. 161.

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Commonwealth (1) and *Miller* v. *The Commonwealth* (2) it is deducible that they were within that power until at least about the end of 1946, and that this continued to be so until at least 1st May 1947 (*Hume* v. *Higgins* (3)). The control evidenced by the Act and regulations is not a control in perpetuity; it became necessary in time of war and is diminishing in the extent of its operation, because its operation must inevitably be limited by the effects of demobilization. The continued existence of the control as being within the defence power is justifiable so long as demobilization and rehabilitation remain incomplete, and until the men are back and ready to take over the work from the women. Though legislation when enacted, in respect of an emergency, has no terminal to it, it may lose its operation if the facts no longer justify its existence. Although as time goes on there must inevitably be a shrinkage, there is not any clear and unmistakable evidence that the Government was in error in the view that a necessity for the Act and regulations still existed in December 1948 (*Fort Frances Pulp and Power Co., Ltd.* v. *Manitoba Free Press Co., Ltd.* (4)). The definition in reg. 4 of the *Women's Employment Regulations* of the expression " The Court " referred to a specially selected judge of the Arbitration Court, that is to say a *persona designata*, and the circumstances that the section referred to the Arbitration Court is not decisive of the view that the judge was that Court (*Holmes* v. *Angwin* (5); *Medical Board of Victoria* v. *Meyer* (6)). It is a special jurisdiction conferred for a special purpose. Having regard to the great difference in the powers of the Arbitration Court under the *Commonwealth Conciliation and Arbitration Act* and the powers of the judge under this Act and these regulations, this Act is a special Act which is unaffected by the regulations. Indeed, if the proposition were sound that the *Commonwealth Conciliation and Arbitration Act* 1947 had repealed this Act, it must also have repealed the *Stevedoring Industry Act* 1947 which also gave special jurisdiction and powers to a judge of the Arbitration Court: see *Commonwealth Steamship Owners' Association* v. *Waterside Workers' Federation of Australia* (7).

[WILLIAMS J. referred to *Goonesinha* v. *De Kretser* (8).]

Regulation 10 of the *Women's Employment Regulations* still continues and *pro tanto* excludes the operation of s. 25 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1947. The

(1) (1946) 73 C.L.R. 157.
(2) (1946) 73 C.L.R. 187.
(3) (1949) 78 C.L.R., 116.
(4) (1923) A.C. 695, at pp. 706, 707.
(5) (1906) 4 C.L.R. 297, at pp. 302, 306, 307.
(6) (1937) 58 C.L.R. 62.
(7) (1946) 73 C.L.R. 66.
(8) (1945) A.C. 63.

Act has not been affected or impliedly repealed by the *Commonwealth Conciliation and Arbitration Act* 1947. Section 10A of the *Acts Interpretation Act* 1901, as amended, first operated when the *National Security Act* was amended in 1943, and again operated in 1946 when the new s. 19 was introduced into the *National Security Act*, and that was the terminal date of the provisions. The *Defence (Transitional Provisions) Act* 1946 itself amended s. 5 of the Act and substituted for the reference to the extended *National Security Act* a reference to itself. Upon the amendment of the *Defence (Transitional Provisions) Act* 1946 by the Act of 1947, s. 10A of the *Acts Interpretation Act* again operated, and operated yet again when the Act of 1947 was amended by the Act of 1948. It appeared on the face of the legislation as at 1942, that the extra provisions which were inserted in the *National Security Act* were not inserted in the *Women's Employment Act* but that the latter Act was tied to the former Act, so that, whatever happened to the *National Security Act* thereafter, s. 10A of the *Acts Interpretation Act* would operate on it. The answer to the suggestion that the regulations expired at midnight on 31st December 1946 is to be found in sub-ss. (1) and (2) of s. 10 of the *Defence (Transitional Provisions) Act* 1946 wherein s. 5 of the Act was amended and the citation of the Act was altered. These constitute an expression of intention by the legislature. The Act of 1946 came into operation immediately upon the expiration of 31st December 1946 and there was not any expiration of the regulations upon which the Act of 1946 could not operate. It is clear from reg. 4 that the expression "industrial authority" as used in reg. 10 includes the Arbitration Court. In any event regs. 9, 9A, 9AA, 9B, 9C and 9D, being means of recovery of payments due, remain in force because they are winding-up provisions and fall within the type of principle dealt with in *Hume* v. *Higgins* (1). Even if they were invalid the court would not grant prohibition, the question being purely hypothetical at this period of time whether they are going to be used or not. Section 77 (1) of the Constitution does not bear upon the matter. It relates to the judicial power of the Commonwealth and not to arbitration whereas the regulations do not deal in any way with the exercise of judicial powers but the enforcement provision of the award is by the Arbitration Court.

Spender K.C., in reply.

Cur. adv. vult.

(1) (1949) 78 C.L.R. 116.

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Wagner v. *Gall.*

ON REMOVAL under s. 40 of the *Judiciary Act* 1903-1948.

Upon the complaint of Claude Wagner, police officer of the State of Queensland, made on 12th January 1949, William Cheyne Gall, managing partner of the Premier Service Station, Stone's Corner, Brisbane, was charged in the Court of Petty Sessions, Brisbane, before the chief stipendiary magistrate, exercising federal jurisdiction, that on or about 16th November 1948 he contravened a provision of the *National Security* (*Liquid Fuel*) *Regulations* made in pursuance of the *National Security Act* 1939-1946 and in force by virtue of the provisions of the *Defence* (*Transitional Provisions*) *Act* 1946-1947, in that contrary to reg. 51 (1) (*e*) of those regulations he did obtain possession of ration tickets representing one hundred and nineteen gallons of motor spirit otherwise than in accordance with the said regulations contrary to the Acts mentioned.

The defendant pleaded not guilty.

Evidence given by an inspector of the Liquid Fuel Control Board in support of the complaint was that in the course of an interview the defendant admitted to him that a consumer had handed to him, the defendant, on 16th November 1948, motor-spirit ration tickets representing one hundred and fifty-eight gallons of motor spirit and had obtained thirty-nine gallons of motor spirit only.

No further evidence was given in support of the complaint and the case for the prosecution was thereupon closed.

Counsel for the defendant informed the magistrate that the defendant did not propose to call evidence but proposed to rely upon the following submissions to show that the *National Security* (*Liquid Fuel*) *Regulations* were inoperative and void on the dates relevant to the charge:—(i) that neither on 16th November 1948 nor on 12th January 1949, were the *National Security* (*Liquid Fuel*) *Regulations* in force; (ii) that s. 6 (1) of the *Defence* (*Transitional Provisions*) *Act* 1946-1947, in so far as it purported to keep those regulations in force to and beyond 16th November 1948, was *ultra vires* the Commonwealth Parliament and void; (iii) that the only power vested in the Commonwealth Parliament to keep those regulations in force was the defence power, and that that power did not extend to keep the regulations in force; (iv) that the said s. 6 (1) and the regulations considered together were not really connected with the defence power; and (v) that the period stipulated in s. 6 (1) of the *Defence* (*Transitional Provisions*) *Act* 1947 for keeping the regulations in force was unreasonable, and as a result the legislation was only ostensibly and not really related to defence.

The further hearing of the matter was adjourned and on 4th March 1949, upon an application made on behalf of the Attorney-General of the Commonwealth the High Court made an order under s. 40 of the *Judiciary Act* 1903-1948 removing the cause into the High Court.

Upon the cause coming on for hearing Frederick Henry Wheeler, the Assistant Secretary of the Commonwealth Department of the Treasury in charge of the General Financial and Economic Policy Branch of that Department, in an affidavit sworn by him on 31st March 1949, deposed substantially as follows :—

2. Apart from any supply difficulties which might now exist or might hereafter arise, the continuance in operation of the *National Security* (*Liquid Fuel*) *Regulations* was necessary by reason of the financial difficulties which arose from the fact that countries comprised within the Sterling Area were without adequate United States dollar funds to meet their essential requirements.

3. By Statutory Rule 1948 No. 165 notified in the Commonwealth *Gazette* on 6th January 1949, the following definition was inserted in the *Banking* (*Foreign Exchange*) *Regulations* :—" sterling area " means all parts of His Majesty's dominions (except Canada and Newfoundland), and includes all British mandated territories, all British protectorates and protected states, Eire, Iraq, Burma and Iceland.

4. He was informed and verily believed that at the present time physical supply difficulties had, temporarily at least, decreased.

5. The main difficulty in the obtaining of adequate supplies of liquid fuel was related to the shortage of dollar funds within the British Commonwealth and the other countries referred to.

6. This shortage of dollar funds was a direct result of the recent war. It arose from a depletion of the central gold and dollar reserves of the Sterling Area during the war, from the destruction during the war which had resulted in a gravely depleted dollar-earning capacity within the Sterling Area, and from the fact that the United States and Canada had been the main centre of supply to meet the shortages of the rest of the world in the reconstruction period.

7. During the war combined action was taken by the Sterling Area countries to conserve dollars to meet expenditure on war supplies from the Dollar Area and, since the cessation of hostilities, continuation of these dollar-conservation measures had been necessary to enable Sterling Area countries to finance essential dollar imports required for their post-war economic recovery. Such

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recovery was essential to the re-establishment of such countries upon a sound, economic basis.

8. As one of the members of the Sterling Area the Commonwealth of Australia was during the war period, and was still, obliged to restrict the importation of goods which involved expenditure in United States or Canadian dollars, and this was the principal means by which the Commonwealth was enabled to restrict dollar expenditure.

9. The dollar shortage which had for a long time prevailed and which still prevailed in the Sterling Area was a direct result of war-time expenditure and destruction. The main factors responsible for such dollar shortage were:—(*a*) depletion of the United Kingdom gold and dollar reserves (which were also the central reserves of the Sterling Area) because of heavy dollar expenditure on war supplies; (*b*) liquidation of the greater part of the readily mobilizable dollar assets of the Sterling Area to meet war expenditure; (*c*) reduction of the dollar-earning capacity of the Sterling Area because of—(i) War devastation; (ii) Concentration of resources on war production instead of on the production of dollar-earning exports and the provision of dollar-earning services; (*d*) increased dependence on the dollar area for essential supplies because of the slow recovery of production in Europe and Asia; (*e*) the sharp increase in North American prices; and (*f*) the inconvertibility of currencies which had meant that the Sterling Area could not use surplus holdings and earnings of non-dollar currencies to meet expenditure in the Dollar Area.

10. The gold and dollar reserves with which the United Kingdom entered the war were virtually exhausted during 1941 because of heavy expenditure on war supplies and the taking over of French dollar commitments for war supplies following the fall of France in 1940.

11. The *Lend-Lease Act* of the United States of America was passed in March 1941 to meet this situation but before any aid was available pursuant to this Act the United Kingdom's net gold and dollar reserves had sunk to £stg. 3 million. These reserves were later restored to some extent, primarily because of Lend-Lease aid and dollar expenditure of American troops in various parts of the Sterling Area. The operation of the *Lend-Lease Act* continued until the cessation of hostilities.

12. At the end of active hostilities the United Kingdom emerged with her productive structure gravely impaired and her external income from exports and overseas investments greatly reduced. With her overseas investments largely liquidated and her shipping

largely depleted exports were the only substantial means of payment for essential imports to the United Kingdom but such exports were only sufficient to pay for a small portion of such imports. It was in these circumstances that the United States of America made available to the United Kingdom a loan of 3,750 million dollars as temporary assistance for the United Kingdom. This loan became available on 15th July 1946 and it was used up in slightly over a period of twelve months. When these funds were exhausted the United Kingdom was faced with a renewed dollar crisis and the shortage of dollar funds in other countries in Western Europe was such that the rehabilitation of countries situated in that area was also gravely threatened.

13. It was in these circumstances that the Government of the United States of America, following the report of the Committee of European Economic Co-operation, formulated a programme to provide further dollar aid to the United Kingdom and other European countries. The Committee of European Economic Co-operation consisted of representatives of the Governments of the following countries :—

United Kingdom	Turkey
Austria	Italy
Belgium	Luxembourg
Denmark	Norway
France	Netherlands
Greece	Portugal
Iceland	Sweden
Ireland	Switzerland

14. This programme, which received legislative authority in the *Economic Co-operation Act* signed by the President on 3rd April, 1948, was expressly designed to assist the United Kingdom and other participating European countries in restoring some degree of financial stability and in recovering from the effects of the war. The declared policy of this Act was expressed in the Act as follows :— "Section 102. (*a*) Recognizing the intimate economic and other relationships between the United States and the nations of Europe, and recognizing that disruption following in the wake of war is not contained by national frontiers, the Congress finds that the existing situation in Europe endangers the establishment of a lasting peace, the general welfare and national interest of the United States, and the attainment of the objectives of the United Nations. The restoration or maintenance in European countries of principles of individual liberty, free institutions, and genuine independence rests largely upon the establishment of sound economic conditions,

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stable international economic relationships, and the achievement by the countries of Europe of a healthy economy independent of extraordinary outside assistance. The accomplishment of these objectives calls for a plan of European recovery, open to all such nations which co-operate in such plan, based upon a strong production effort, the expansion of foreign trade, the creation and maintenance of internal financial stability, and the development of economic co-operation, including all possible steps to establish and maintain equitable rates of exchange and to bring about the progressive elimination of trade barriers. Mindful of the advantages which the United States has enjoyed through the existence of a large domestic market with no internal trade barriers, and believing that similar advantages can accrue to the countries of Europe, it is declared to be the policy of the people of the United States to encourage these countries through a joint organization to exert sustained common efforts as set forth in the report of the Committee of European Economic Co-operation signed at Paris on September 22, 1947, which will speedily achieve that economic co-operation in Europe which is essential for lasting peace and prosperity. It is further declared to be the policy of the people of the United States to sustain and strengthen principles of individual liberty, free institutions, and genuine independence in Europe through assistance to those countries of Europe which participate in a joint recovery program based upon self-help and mutual co-operation: Provided, That no assistance to the participating countries herein contemplated shall seriously impair the economic stability of the United States. It is further declared to be the policy of the United States that continuity of assistance provided by the United States should, at all times, be dependent upon continuity of co-operation among countries participating in the program."

15. Australia had always held the bulk of her external financial reserves in sterling in London, and before the war purchased her net requirements of dollars without limit from the United Kingdom against payment in sterling. Because of the pattern of Australia's overseas trade and payments, Australia normally had a deficit on current account with the Dollar Area. Heavy annual dollar deficits were still being incurred by Australia.

16. Upon the outbreak of war, the Government of the United Kingdom introduced exchange control and instituted import restrictions, restrictions on internal consumption and other measures designed to conserve gold and dollar resources to meet essential commitments for war supplies from North America.

17. During August and September, 1939, there was a general exchange of views and information between the Governments of the United Kingdom and Australia regarding arrangements to control and conserve foreign exchange and to control export and import trade under war conditions.

18. On being advised of the measures to conserve foreign exchange then proposed by the Australian Government, the United Kingdom Government stated that it would continue to sell dollars to Australia against payment in sterling to the extent required to meet Australia's essential needs.

19. These exchanges became the basis of the working arrangements which operated throughout the war and which were still operating. These working arrangements have never been codified into a formal agreement, but are based on reciprocal obligations of the United Kingdom and Australian Governments. Under these arrangements the United Kingdom undertakes to provide dollars and other scarce foreign exchange against payment in sterling to the extent required to meet Australia's essential needs and Australia undertakes to exercise a rigorous economy in dollar expenditures and expenditures in other scarce foreign exchange. The degree of economy required to be exercised by Australia when incurring current and future dollar commitments varies, according to the amount of the central Sterling Area reserves of gold and dollars and the levels of current and prospective dollar income.

20. Liquid fuel was a key item in the Sterling Area dollar-conservation programme, and the consumption thereof had been restricted in both the United Kingdom and Australia since the early war period.

21. Supplies of liquid fuel were available to countries in the Sterling Area from British controlled sources. However, the United Kingdom Government had informed the Australian Government that supply of liquid fuel from these sources was by no means sufficient to meet the full consumption requirements of the Sterling Area, and that it was necessary that the substantial net deficiency be made up by imports of liquid fuel from dollar sources of supply. Because of this position economies in consumption of liquid fuel in any part of the Sterling Area represented a dollar saving irrespective of whether the particular country concerned obtained its supplies from dollar or sterling sources.

Weston K.C. (with him *Kerrigan*), for the defendant. The defendant did not receive the ration tickets in contravention of any of the Liquid Fuel Regulations. The regulations to be valid must

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show that they have " a real connection " or " a substantial association " or " a real nexus " with the defence power (*Crouch* v. *The Commonwealth* (1)). As to whether they have is a question of fact and that question of fact is a question of degree. There is no standard in relation to the grounds upon which a licence may be issued or in accordance with which ration tickets may be issued. The rationing under the regulations has nothing to do with the dollar shortage. Only a very small percentage of petrol in normal times comes from United States of America. The regulations only deal with the allocation or the distribution of petrol which is actually in Australia, after it has been allowed to come in through the Customs, and therefore have no relation to or effect upon the dollar shortage. *Sloan* v. *Pollard* (2) is not an authority for the proposition that the mere making of an agreement in war-time is sufficient to bring the matter within the defence power. The agreement in that case was made under the necessity of war, and the necessity for stability (3). There is no point of distinction between *Crouch* v. *The Commonwealth* (4) and the point now under consideration.

J. A. Lee (with him *Kearney*), for an intervenant, by leave. Normally when determining the validity or otherwise of certain regulations the Court is not concerned with the necessity of the regulations for the particular purpose. The affidavit filed on behalf of the Commonwealth alleges that a shortage of petrol is the reason for the existence of the Liquid Fuel Regulations. The mere existence of a shortage of a commodity is not a basis of internal rationing and cannot come within the defence power (*Crouch* v. *The Commonwealth* (5)). *Jenkins* v. *The Commonwealth* (6) is distinguishable, as the commodity in that case was wholly required for defence purposes. The mere statement that there is such a shortage will not justify the court in concluding that that shortage was necessarily due to anything connected with the war. The affidavit does not disclose it. It may well be, on the state of the evidence before the Court, that the shortage of petrol in sterling areas is due to facts which have no relation whatever to the war, and, if that be so, the mere existence of such a shortage of petrol and the fact that the Commonwealth is participating in the " dollar " agreement does not bring the agreement in any sense within the defence power.

(1) (1948) 77 C.L.R., at pp. 352, 357.
(2) (1947) 75 C.L.R. 445.
(3) (1947) 75 C.L.R., at pp. 461, 464, 465, 469, 474
(4) (1948) 77 C.L.R. 339.
(5) (1948) 77 C.L.R., at pp. 356, 357.
(6) (1947) 74 C.L.R. 400.

The facts in *Sloan* v. *Pollard* (1) are the direct converse of the actual circumstances now under consideration.

A. R. Taylor K.C. (with him *Holmes* K.C. and *Else Mitchell*), for the complainant. The order which was under consideration in *Crouch* v. *The Commonwealth* (2) was held to be invalid because there did not appear to be any connection between the terms of the order and the defence of the Commonwealth. The facts in this case as given by affidavit do show such a connection, and reliance is placed upon the preamble to the *Defence* (*Transitional Provisions*) *Act* 1946 and the preamble to the Act of 1947. It was not a new control which was imposed in 1946 or 1947 ; it was simply the continuance of a control which was found necessary and proper for purposes of defence during time of war. The manner in which such affidavits as the one now before the Court might be received was referred to in *Stenhouse* v. *Coleman* (3) ; *Australian Woollen Mills Ltd.* v. *The Commonwealth* (4) ; *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (5) ; *Jenkins* v. *The Commonwealth* (6) ; *Sloan* v. *Pollard* (1) and *Hume* v. *Higgins* (7). When promulgated the *National Security* (*Liquid Fuel*) *Regulations* were a valid exercise of the regulation-making power under the *National Security Act*. At that time a dollar crisis existed. The shortage of dollars and the requirement of dollars for war purposes would be sufficient to support the regulations. So far as the regulations originally were concerned, even if one were prepared to ignore all questions of shortage of shipping or requirements of petrol for war purposes, they would have been justified under the defence power at that time because they were part and parcel of a scheme which facilitated the purchase of war equipment for which dollar funds were required. Also that scheme was designed to conserve dollar funds in the hands of the Commonwealth's allies. Assuming that that arrangement was justified by reference to the defence power, then it was not an arrangement of such a nature that it could have been terminated immediately on the cessation of hostilities. That arrangement, and it is assumed that it was a scheme of rationing, was an integral part of the scheme for the conservation of dollar funds. Its continuance in the defence plan is justified on the grounds :—(*a*) that the Commonwealth's ability to obtain dollar funds is bound up with the position of the United Kingdom. The present shortage of dollars is a direct

(1) (1947) 75 C.L.R. 445.
(2) (1948) 77 C.L.R. 339.
(3) (1944) 69 C.L.R. 457, at pp. 468-472.
(4) (1944) 69 C.L.R. 476.
(5) (1945) 71 C.L.R. 161, at pp. 172, 173.
(6) (1947) 74 C.L.R. 400.
(7) (1949) 78 C.L.R. 116.

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result of the war, not merely historical, and the maintenance of these controls is part and parcel of a scheme for restoring the financial arrangements of the Commonwealth to a normal and peace-time basis. The Commonwealth was compelled to make the arrangement during war-time and is at present unable to withdraw therefrom; (*b*) that the arrangement as to rationing is directed, and may be said to be necessary to the supply of goods and services within the Commonwealth which are required for the restoration of a peace-time economy and which should involve the expenditure of dollar funds; (*c*) that the international arrangements referred to in the affidavit show that the arrangement is part of a plan and is the Commonwealth's contribution to a plan directly related to the establishment of peace after the war on a sound and lasting basis; and (*d*) that the arrangement is such that the Commonwealth cannot withdraw from it at this stage without adversely affecting reconstruction within the Commonwealth during the period of transition from war-time economy to peace-time economy. Rationing is an integral part of the plan to conserve dollars. In view of the evidence which has been given expressions used in *Hume* v. *Higgins* (1) could be applied to this case. The broad position is that Europe at the present time is under occupation and peace has not been restored there. Without co-operation on the lines suggested in the affidavit there is great danger of economic chaos in Europe and an immediate war. The dollar-conservation programme is an appropriate measure directed towards the establishment of a sound and lasting peace at the conclusion of the war and is sufficient to show that there was and is a necessary nexus between the regulation and the defence power. This form of control was introduced in 1940, so that the problem which confronted the legislature in 1946 and also in 1947 was whether the arrangement which had been carried out since 1940 should be terminated, or whether, to assist in the period of transition and to avoid losses, that arrangement, including the regulations, should be continued for some further period. The regulations were introduced in view of the known facts, that is to ensure that petrol, which was restricted and which was in short supply, should be distributed equitably. It should not be said that the failure to impose any limit on the discretion of the Controller is not a proper exercise of the defence power. The regulations themselves are merely an incident in the whole. There is a vast difference between *Crouch* v. *The Commonwealth* (2) and this case. In that case there was no connection shown, either by evidence or by the legislation itself or by any notorious facts,

(1) (1949) 78 C.L.R. 116.

(2) (1948) 77 C.L.R. 339.

between the Control of New Motor Cars Order and the defence power. The order was not a rationing order; it simply provided that one could not obtain a motor car without a permit, whereas these regulations are essentially rationing regulations. Other factors in that distinction, and which are controlling factors so far as discretion is concerned, are the preamble to the *Defence (Transitional Provisions) Act* 1946 and the preamble to the Act of 1947, the terms of reg. 15 and the regulations themselves, and the form of rationing introduced by the regulations. The controls which are set out by the regulations, particularly regs. 15, 15A, 16, 19, 20, 27, 27 (3) and 49, are appropriate to the carrying out of the scheme for the conservation of dollar funds. A lapse of time in itself after the cessation of hostilities is not a material factor; alone, mere lapse of time means nothing. It is not the function of the Court to determine whether the continuance of the regulations is necessary but only whether there is a real connection between the regulations and the defence power. Views expressed as to the statements (*a*) of objects in the regulations, and (*b*) in the preamble as distinct from the regulations are to be found in *R.* v. *The University of Sydney*; *Ex parte Drummond* (1); *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2); *South Australia* v. *The Commonwealth* (3); *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (4) and *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co. Ltd.* (5). The enacting of the *Defence (Transitional Provisions) Acts* shows that from time to time the Parliament, having regard to the protection of the interests of the Commonwealth, has considered the necessity of the continuance of the regulations. It is important that the regulations have been in force for some considerable time and are not now being promulgated for the first time (*Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (6); *Real Estate Institute of New South Wales* v. *Blair* (7); *Jenkins* v. *The Commonwealth* (8)). The discretion to issue licences under reg. 19, and the fixed rationing under regs. 19 and 20 is not a completely arbitrary and independent discretion (*Stenhouse* v. *Coleman* (9); *Reid* v. *Sinderberry* (10); *Shrimpton* v. *The Commonwealth* (11); *Swan Hill Corporation* v. *Bradbury* (12)). The form of

(1) (1943) 67 C.L.R. 95, at pp. 100-102.
(2) (1944) 69 C.L.R., at pp. 490, 491.
(3) (1942) 65 C.L.R. 373, at p. 432.
(4) (1945) 72 C.L.R. 37, at p. 64.
(5) (1923) A.C. 695, at p. 706.
(6) (1947) A.C. 87, at pp. 101, 102.
(7) (1946) 73 C.L.R. 213, at p. 231.
(8) (1947) 74 C.L.R., at p. 406.
(9) (1944) 69 C.L.R. 457, at pp. 466, 467, 472.
(10) (1944) 68 C.L.R. 504, at pp. 514, 523.
(11) (1945) 69 C.L.R. 613, at pp. 619, 620, 626, 627, 630, 632.
(12) (1937) 56 C.L.R. 746,, at pp. 757, 758.

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rationing is part of the general scheme outlined above and the continuance of the operation of the regulations is therefore justified under the defence power.

Kerrigan, in reply. It is conceded that the collateral facts do show to an extent that some control of imports from the dollar area is necessary for the purpose of stabilizing the Commonwealth's monetary position in the world, but those facts fall short of establishing that once the petrol is brought into the Commonwealth any system of rationing or distributing the petrol so imported would necessarily restrict the expenditure in dollars. Statistics have not been put before the court—as was done in *Sloan* v. *Pollard* (1)—to show a nexus between the effect of rationing and the importation of petrol. The basis of the judgments in *Sloan* v. *Pollard* (1) was that the agreement there under consideration was for a particular period, provided for a maximum amount of butter to be exported to the United Kingdom for war purposes, and was made at a time when, in the view of the Court, it was a proper exercise of the defence power. There is not any suggestion by the Crown that the number of gallons of petrol imported is fixed with reference to the number of gallons allowed to be distributed under the rationing system. It has not shown that the quantity of petrol imported is imported because that quantity only is permitted by way of rationing. Once the petrol is in the Commonwealth, dollars therefor have been expended and any rationing system could not affect the amount of dollars that have been required to bring the petrol into the Commonwealth. There are powers available to the Commonwealth which are appropriate and sufficient to carry out the arrangement for dollar conservation, but those powers do not include the defence power. The *Liquid Fuel Regulations* are not within the ambit of the defence power. The purpose of those regulations as disclosed on their face does not suggest that petrol has to be conserved for the immediate use of the armed forces or other establishment of defence. Nor were they promulgated for the purpose of granting priority for industries essential to defence, or of rehabilitating or re-establishing defence personnel in civilian occupation. Unless there be a shortage of petrol there is no need for rationing and such a shortage can be controlled by the exercise of powers other than the defence power. The rationing or otherwise of petrol in the event of a shortage is purely a question of State administration and economy. If the rationing of petrol is

(1) (1947) 75 C.L.R. 445.

a necessary and an appropriate part of the scheme for the conservation of dollars, and for that reason is within the defence power, then the rationing of every other commodity which incurs an expenditure of dollars would also be perfectly justifiable under the defence power. Declarations by Parliament by way of preambles to Acts, or of the executive by way of statements expressed in regulations, are entitled to the utmost respect, but they are not conclusive. It has not been proved that rationing of petrol was an integral part of a defence plan for conserving dollars. The conservation of dollars ceases before rationing begins. The scheme is a scheme to restrict consumption by restricting imports; there is not a word about rationing. As in *Crouch* v. *The Commonwealth* (1) the facts are insufficient to supply the nexus with the defence power. The further the day of the cessation of hostilities recedes so much more the defence power contracts. The offence charged is alleged to have taken place more than three years after the cessation of hostilities. The subject under consideration in *Hume* v. *Higgins* (2), was entirely different from the rationing of petrol. Regulation 15A is not on its face clearly connected with the scheme for the conservation of dollars. It pre-supposes that petrol is within the Commonwealth. There is not any immediate connection between the word "arrangements" in the preamble to the *Defence* (*Transitional Provisions*) *Act* 1946 and the arrangement put before the Court by way of collateral fact. In the circumstances the defendant should not in any event be called upon to pay costs.

Cur. adv. vult.

Collins v. *Hunter and Another.*

REFERENCE by *Dixon* J., to the Full Court.

An action brought by Patricia Mahon Collins against Robert George Hunter and Randolph Richard Tippett came on to be heard before *Dixon* J., and after hearing the parties his Honour reserved for the consideration of the Full Court the question whether the plaintiff was entitled to any and what relief by way of declaration of right or injunction or whether on the other hand, the action should be dismissed.

The reference was substantially as follows:—

1. This action came on to be heard before me in Melbourne on 11th and 12th April, 1949, when it appeared that its determination depended upon the validity and the operation of regs. 30A to 30AF of the *National Security* (*War Service Moratorium*) *Regulations* in

(1) (1948) 77 C.L.R. 339. (2) (1949) 78 C.L.R. 116.

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so far as the *Defence (Transitional Provisions) Act* 1946-1948 purports to maintain them in force.

2. The defendant Randolph Richard Tippett had obtained a warrant in purported pursuance of regs. 30A and 30AB authorizing and requiring the delivery to him of the possession of a certain dwelling house.

The defendant Robert George Hunter is a constable of police who was charged with the duty of executing the warrant.

After the warrant was granted and before an attempt was made to execute it, the plaintiff Patricia Mahon Collins, a married woman, had obtained possession of the dwelling house in the circumstances hereinafter stated and had entered into actual occupation.

The purpose of the action is to establish that the warrant has no lawful operation justifying the defendants or either of them in entering the dwelling house, dispossessing the plaintiff or otherwise disturbing her in her possession or occupation and substituting the defendant Tippett as the occupier.

The relief claimed by the plaintiff is (*a*) a declaration that she is entitled to retain possession of the premises; (*b*) an injunction restraining the defendants and each of them from breaking and entering the premises or ejecting the plaintiff from the premises or taking possession thereof or otherwise interfering with her possession of the premises; (*c*) a declaration that regs. 30A, 30AA and 30AC are void, or alternatively certain more limited declarations as to their invalidity; (*e*) such further or other relief as to the court may appear proper.

4. The following facts appeared in evidence. The premises in question consist of a dwelling house erected upon a piece of land situated in Mont Albert Road, Canterbury in the State of Victoria. For some years one Lade had been registered under the *Transfer of Land Act* as the proprietor of an estate in fee simple in the land. He died on 2nd July 1948. By his last will he appointed one Spence his executor. To him probate of the will was granted and on 22nd November 1948 there was duly entered in the Register Book a memorandum notifying such appointment, whereupon Spence was deemed to be the proprietor of the land.

Up to 14th February 1949 the dwelling was tenanted but upon that date a caretaker was placed in charge of the premises which otherwise were unoccupied. For a period of twelve years one Frederick George Wood had been the person to whom the rent of the dwelling house had been ordinarily paid and, generally, he ordinarily acted as agent in relation to the dwelling house, but the firm of Sydney Arnold & Co. were appointed some time in January 1949

by Spence to act as agents for the purpose of selling the property. In conjunction with Wood they held an auction sale on 9th March 1949. In the meantime the defendant Tippett proceeded under reg. 30A. Tippett is a protected person within the meaning of reg. 30A, who fell within the description contained in reg. 30 (1) (*b*). On 2nd March 1949 he served upon Sydney Arnold & Co. a written notice addressed to them as the persons who ordinarily acted as agents in relation to the dwelling house, notifying them that he thereby applied to the Police Magistrate in the Court of Petty Sessions at Camberwell in accordance with reg. 30A for a warrant authorizing and requiring the delivery of possession to him of the dwelling house. The notice named ten o'clock in the forenoon of 3rd March 1949 as the time for hearing the application.

On 2nd March Sydney Arnold & Co. informed Spence of the service of the notice upon them and of the time and place of hearing. Spence decided not to oppose the application. Next day, but at what time of day did not appear, Spence received the actual notice from Sydney Arnold & Co.

On 3rd March 1949 the application of the defendant Tippett was heard in the Court of Petty Sessions at Camberwell constituted by a stipendiary magistrate, Mr. F. E. Williams.

A rival application under reg. 30A in respect of the same dwelling house was made by another protected person and the two were heard at the same time. The stipendiary magistrate decided that a warrant should issue in favour of Tippett and he gave his reasons. In the register of convictions, orders and other proceedings in the Court of Petty Sessions at Camberwell for 3rd March 1949 the magistrate caused an entry to be made under the column " Decision Memo. of Conviction, or Order " as follows :—" Order made that a warrant issue authorizing and requiring the delivery of possession of the premises to the applicant." Tippett was named in the register as the applicant. On 7th March 1949 the stipendiary magistrate signed and issued to Tippett a warrant addressed to " Sergeant Calaby and all other Constables and Peace Officers acting for the Central Bailiwick " which so far as material was as follows : " I a Stipendiary Magistrate sitting alone in Federal Jurisdiction at Camberwell in pursuance of the powers conferred on me by Regulation 30A and 30AB of the said Regulations do authorize and require you forthwith to deliver full and peaceable possession of the said dwelling house to the said Randolph Richard Tippett."

At the auction sale, which was held at two o'clock in the afternoon of 9th March 1949, the auctioneer announced that since the

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auction had been arranged an ex-serviceman had obtained an order for possession and he said that the premises were offered subject to that tenancy, stating that the former rent had been thirty-five shillings a week.

Both Tippett and the plaintiff bid at the auction. They bid up to £2,200. When the bidding, which began at £1,500, rose to £2,200, a ballot was held. The plaintiff was the successful party in the ballot. On that day she paid a deposit of £250 to Sydney Arnold & Co. and signed a contract of sale in which the price was filled in as £2,200. The contract was expressed to be subject to the consent being obtained of the Treasurer of the Commonwealth or that of any other person or authority whose consent was required to contracts for the sale of land.

At some date that did not appear the price in the contract was amended to £1,720 and the alteration was initialled by the parties.

A consent to the transaction was given under ss. 37 or 39 and 53 of the *Prices Regulation Act* 1948 (Vict.), but not until after the writ issued, namely, on 30th March 1949.

On 9th March 1949 the plaintiff went into possession and occupation of the premises. On the following day, 10th March, Tippett came to the premises and found the plaintiff there in occupation. After some discussion he left and returned with the defendant Hunter, a constable of police. The plaintiff's husband arrived with her solicitor and in the result the defendants agreed not to execute the warrant until the afternoon of the following day, 11th March. On the following morning, 11th March, the writ in the action was issued and an interim injunction restraining the defendants entering the premises and dispossessing the plaintiff was obtained *ex parte* from *Rich* J. by the plaintiff, pending the hearing of an application for an interlocutory injunction for which leave was given to serve short notice.

The application for the interlocutory injunction came before *Dixon* J. on 24th March 1949, when directions were given for an early trial and the injunction was continued.

On 31st March 1949 the plaintiff paid the balance of purchase money under the contract of sale and on 5th April 1949 a transfer of the land to her by Spence was duly registered and she became the registered proprietor thereof for an estate in fee simple.

The plaintiff's husband is a protected person falling under the description contained in reg. 30 (1) (*b*) and she is a protected person falling under the description contained in reg. 30 (1) (*c*) (ii).

Each party reasonably required the dwelling house for his or her own occupation.

The plaintiff's husband accompanied her in occupying the dwelling.

5. On the part of the plaintiff it was contended—

(1) that, in so far as the *Defence (Transitional Provisions) Act* 1946-1948 would give regs. 30A to 30AF the force of law at any time material to this case, it is invalid, and the said regulations are invalid, on the grounds that (*a*) it is beyond the power conferred by s. 51 (vi.) of the Constitution to adopt such regulations or to give them force of law at such time or at all; (*b*) to provide that a protected person referred to in sub-reg. (1) of reg. 30 should be placed in occupation of a dwelling house, the property of another person, as his tenant, involves the acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution but the terms provided by reg. 30AD (2) are not just and the purpose is not one in respect of which the Parliament has power to make laws;

(2) that, even if in material respects the regulations are in valid operation, the warrant is void and is of no force as against the plaintiff or against her occupation or ownership of the land, on the grounds that—(*a*) the service of the notice of application upon Sydney Arnold & Co. did not satisfy the requirements of reg. 30A (3) and amounted to no service; (*b*) the warrant is one which to be valid must show upon its face the lawful constitution of the court and the existence of all facts and the fulfilment of all conditions upon which the authority to grant the warrant depends, but nevertheless the warrant does not show that the Court of Petty Sessions at Camberwell was constituted by a Stipendiary Magistrate or that notice of application was duly served as required by reg. 30A (3) or that Tippett was a protected person referred to in sub-reg. (1) of reg. 30 or that, (the warrant being dated 7th March 1949), there was any hearing other than a hearing on 3rd March 1949 or any proof to the Court or Magistrate that on 7th March the dwelling house was unoccupied or any inquiry as to the fact;

(3) that on the proper interpretation of the regulations a warrant under them does not authorize, and the warrant obtained by Tippett does not purport to authorize—(*a*) the forcible entry of occupied premises; (*b*) the forcible dispossession of a person in occupation of a dwelling house who is a stranger to the application for the warrant;

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(*c*) the dispossession by force or otherwise of a protected person referred to in sub-reg. (1) of reg. 30; (*d*) the dispossession by force or otherwise of an occupier who is in as owner under a title subsequent to the warrant, whether depending on a contract of sale not yet completed or on transfer; (*e*) the dispossession of such an occupier if a protected person referred to in sub-reg. (1) of reg. 30;

(4) that if on the proper interpretation of the regulations they intend that a warrant under them shall authorize entry or dispossession in any of the foregoing cases, the regulations are to that extent void as beyond the legislative powers of the Commonwealth.

The question reserved for the consideration of the Full Court was whether the plaintiff was entitled to any and what relief by way of declaration of right or injunction or, on the other hand, the action should be dismissed.

Ashkanasy K.C. (with him *L. Jones*), for the plaintiff. The *Defence* (*Transitional Provisions*) *Act* 1948 is invalid so far as it purports to re-enact regs. 30A to 30AF of the *National Security* (*War Service Moratorium*) *Regulations* as being, at the date of the writ, (i) not an exercise of the defence power conferred by s. 51 (vi.) of the Constitution; and (ii) an acquisition of property otherwise than on just terms. The material part of these regulations was considered and upheld in *Real Estate Institute of New South Wales* v. *Blair* (1), but although the reasoning in that case supports this plaintiff's case, an examination of that case shows that it can and should be distinguished on three grounds: (i) it was decided when the regulations operated by virtue of a different Act, namely, the *National Security Act* 1939-1946, which, at the date of that case, was to expire on 31st December 1946, and which had, in substance, been in operation since long prior to the termination of hostilities: see (2). The regulations there under consideration were identical in form with the regulations adopted by the *Defence* (*Transitional Provisions*) *Act*, but the Act upon which they had depended was a very different Act dealing with a subject matter relating to defence, but a different subject matter—the former dealing with the prosecution of the war and the other, in effect, dealing with transition from war to peace. The reasoning in *Real Estate Institute of New South Wales* v. *Blair* (1) cannot be applied to the present and very different Act. It is not the regulations themselves under review: they are, as a matter

(1) (1946) 73 C.L.R. 213.

(2) (1946) 73 C.L.R., at pp. 223, 231-236.

of words, unchanged. It is essentially whether the exercise of the power of transition from war to peace by the enactment of these regulations as existing in March 1949, was a valid exercise of the defence power. The regulations under consideration in that case then related to the situation in May 1946, nine months after the surrender by the Japanese in Tokio Bay and during the peak period of demobilization. This action was brought three and one-half years after that surrender and demobilization has been completed (*Real Estate Institute of New South Wales* v. *Blair* (1)). At the date that that case was decided the regulations only applied to a discharged serviceman and his dependants within two years (originally one year) after his discharge. They have since been progressively extended until they now apply four years after discharge: see the *Defence (Transitional Provisions) Acts* of 1946, 1947 and 1948 and Statutory Rules 1948 No. 55 (*Real Estate Institute of New South Wales* v. *Blair* (2)). It is not contended that provision may not be made under the defence power for the rehabilitation of discharged servicemen (*Attorney-General for the Commonwealth* v. *Balding* (3)). It is an entirely different matter, however, to invoke the compulsory transfer of proprietary rights from citizens to discharged servicemen for an indefinite period. This is quite unjustified. Such a power as is contained in these regulations should be limited to the "immediate aftermath" (*Real Estate Institute of New South Wales* v. *Blair* (4)) of hostilities and applied only "for a reasonable period after discharge"—in respect of which, it is submitted, a period of one year is ample. To continue it for the period of a "housing shortage" is to prolong the power indefinitely. After the "immediate aftermath" these matters are matters for the States. The fact that a discharged serviceman three and one-half years after the conclusion of hostilities is not satisfactorily housed is now simply due to the housing shortage and not because of his war service. Nor do the regulations say that his right is to be in any way based on the fact that his unsatisfactory housing is a result of or contributed to by his war service. The only condition is that for a specified period during his service the discharged serviceman was required to live away from home. It is necessary to determine whether the provisions of the regulations under consideration constitute a classification of property for purposes for which the Parliament may make laws (*Real Estate Institute of New South Wales* v. *Blair* (5)). The determination of this

(1) (1946) 73 C.L.R., at pp. 225, 236.
(2) (1946) 73 C.L.R., at p. 225.
(3) (1920) 27 C.L.R. 395.
(4) (1946) 73 C.L.R., at p. 236.
(5) (1946) 73 C.L.R., at pp. 223, 236.

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matter involves a consideration of the following questions: (*a*) Do the regulations provide for acquisition?; (*b*) Is it an acquisition of property?; (*c*) Is it for a purpose in respect of which the Parliament has power to make laws?; (*d*) Must the acquisition be by the Commonwealth to be within s. 51 (xxxi.) of the Constitution?; (*e*) If so, is this in substance, in any event, such an acquisition?; and (*f*) Do the regulations provide just terms?. The broadest meaning of the word "acquisition" must, in the context, be cut down. The references to "property," "just terms," "from any State or person," and to its being "for any purpose" &c., all justify limiting the word to cases where the primary purpose is to get property as such by a process of compulsion or, possibly, by agreement. The words "get property as such" were intended to exclude cases where an alteration of rights of property was an incident only of the execution of some other legislative purpose. The acquisition of possession was the pith and core of the regulations under consideration and is therefore "an acquisition." The regulations give "possession" to the applicant, which is a form of property (*Minister of State for the Army* v. *Dalziel* (1); *Minister of State for the Army* v. *Pacific Hotel Pty. Ltd.* (2)). Whether the relationship is a tenancy or not is immaterial. The declaration in reg. 30AD that he is "deemed to be a tenant" does not qualify that in any way, and take from the conglomeration of rights which constitute ownership what is normally the most vital of them—possession and the right to possession. Mere billeting may not give any possessory right and may not be an acquisition of property (cf. *Australasian United Steam Navigation Co. Ltd.* v. *The Shipping Control Board* (3)). In this case what the applicant obtains is clearly the exclusive right to occupy, that is, a complete possessory title to continue for an indefinite period in the future; therefore it is a proprietary right. What the applicant acquires is property. If it is within the defence power it fulfils the requirement that it must be for a purpose in respect of which the Parliament has power to make laws. If not, then the legislation is invalid (*Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (4); *Grace Brothers Pty. Ltd.* v. *The Commonwealth* (5)). If s. 51 (xxxi.) of the Constitution is limited to acquisition by the Commonwealth, then legislation for any other acquisition, even on just terms, would be ultra vires, since the grant of this express power would preclude resort to an implied

(1) (1944) 68 C.L.R. 261.
(2) (1944) 68 C.L.R. 310 (note).
(3) (1945) 71 C.L.R. 508.
(4) (1943) 67 C.L.R. 314, at pp. 317, 318
(5) (1946) 72 C.L.R. 269, at p. 290.

power as in the case of the Constitution of the United States of America, and there is no power except that conferred by s. 51 (xxxi.). But in any event it is not limited to acquisition by the Commonwealth. The Commonwealth can legislate for the acquisition of property otherwise than by the Commonwealth but subject to the express requirement that it must be on just terms. The power is not expressly so limited and there is no reason to imply any such limitation (*McClintock* v. *The Commonwealth* (1)). In a matter of this kind regard should be had to the pith and substance of the matter. In substance this is an acquisition by the Commonwealth. The Commonwealth, recognizing a moral obligation to discharged servicemen and their dependants, satisfies that obligation by giving them a right as against other citizens. It is equivalent to the Commonwealth taking from a particular citizen and giving to a particular discharged serviceman or dependant. If s. 51 (xxxi.) of the Constitution be not limited to acquisition by the Commonwealth then the requirement as to just terms must apply. Are the terms just ? A fair economic rent on a " letting " property is not necessarily just compensation for driving people from their home. The condition laid down is : What is fair compensation to the person from whom the property was taken ? Even if there be a fair economic rent, unless there be provision for adequate compensation it is not just terms. The Act is legislation by reference. The regulations deal with terms of compensation by further reference : see reg. 30AD (2) (*a*). At the time of the *Defence* (*Transitional Provisions*) *Act* 1948, the rent of the subject property was governed by the *Landlord and Tenant Act* 1948 (Vict.) which provides, *inter alia*, for the pegging of rent as at 31st December 1940, or first rent thereafter ; that a Fair Rents Board, in determining the " fair rent," was to have regard, among other things, to certain specified factors ; that determinations under the preceding *National Security* (*Landlord and Tenant*) *Regulations* should be deemed to be made under that Act and subject to that Act to be of full force and effect accordingly. The relevant Acts of the other States contain similar provisions. The regulations were substantially identical with the foregoing : see reg. 19. By reg. 30AD (2) (*a*), which applies to this case, the rent so fixed is the *upper limit* of the rent which may be agreed upon or fixed. Accordingly, the " rent " was limited : (i) by reference to a rental paid nine years ago ; (ii) by determinations which had regard to a capital value similarly remote and other factors of a transient nature or personal to the then parties and either no longer operative or irrelevant to determine

(1) (1947) 75 C.L.R. 1, at pp. 24, 35, 36.

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just terms between the applicant and the owner; and this was without the incorporation of any of the rights under the terms of the tenancy then existing by the landlord against the tenant. Moreover: (*a*) there was no compensation for the period *until* the applicant entered into possession; (*b*) there was no provision for compensation for the immediate loss suffered by the owner by reason of his being unable to use the premises himself or to put them to the best use; and (*c*) whilst the owner could apply for an increase in rent (probably only after six months, s. 25) such increase, (i) would be affected by *hardship* in respect of the applicant or any other person and the other matters referred to in s. 21 of the *Landlord and Tenant Act* 1948 (Vict.) and equivalent legislation in other States, and (ii) would be dependent upon the State law (over which the Commonwealth has no control) remaining unchanged or not being changed adversely to the owner. In any event, legislation for acquisition upon terms which are not fixed but are subject to change by an independent legislature, is not legislation for acquisition upon just terms, even though it happened that at the same moment the terms fixed by the independent legislature were just. The nature and method of determination of the "rent" make the situation quite distinct from the situation which would exist in respect of a commodity the price of which is pegged. Whether such pegged price is then a just price may be a subject for controversy: see *United States* v. *John J. Felin & Co. Inc.* (1). As to the use of decisions of the Courts of the United States of America respecting matters involving just compensation see *Grace Brothers Pty. Ltd.* v. *The Commonwealth* (2). Just terms involve "the full content of 'compensation', as compensation is understood in English law," (*Bank of New South Wales* v. *The Commonwealth* (3)); "a full monetary equivalent of his loss" (*Commissioner of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (4)) and represents the value to the owner of the thing taken (*Minister of State for the Army* v. *Parbury, Henty & Co. Pty. Ltd.* (5)) when put to its most advantageous use (*Minister of State for Home Affairs* v. *Rostron* (6)). Upon no test can the provisions in the legislation now under consideration be regarded as providing just terms for the taking from a person of a dwelling house required by that person for use as a family home or the like, for which rent fixed as and by the machinery of the regulations provide no compensation. When an order is made the protected

(1) (1947) 334 U.S. 624 [92 Law. Ed. 1614].
(2) (1946) 72 C.L.R. 269.
(3) (1948) 76 C.L.R. 1, at p. 343.
(4) (1947) 74 C.L.R. 358, at p. 373.
(5) (1945) 70 C.L.R. 459.
(6) (1914) 18 C.L.R. 634.

person has to continue paying the rent indefinitely, or as long as the regulations exist, whether or not he is using the house. It is "consensual" and he may therefore have to remain a tenant indefinitely. For these reasons the Act and regulations which are enacted are ultra vires and constitutionally void.

(Counsel proceeded to deal with matters relating to the validity of the warrant and the service of notice of hearing, which are not material to this report).

A. R. Taylor K.C. (with him *Wardle*), for the defendant. The broad principle upon which the decision of every member of the Court in *Real Estate Institute of New South Wales* v. *Blair* (1) appears to be rested is that the defence power authorized legislation after the cessation of hostilities which was directed to the provision of housing accommodation for discharged members of the forces. That principle is equally available to the defendant in this case. The regulations which were before the Court in *Real Estate Institute of New South Wales* v. *Blair* (2) and which were then accepted by the Court as valid, as justifiable under the defence power, are the very regulations, subject to some minor differences, which are now before the Court. The observations of *Dixon* J. in that case (3) were not related to the ambit of the defence power but were directed to the ambit of the regulation-making power under the *National Security Act*. No point of distinction can be raised based upon a proper understanding of those observations. These regulations, in the very form, are enacted by the *Defence (Transitional Provisions) Act*, so one is not concerned with any limit as to the power of making regulations. *Real Estate Institute of New South Wales* v. *Blair* (2) is not limited to the temporary provision of some housing facilities to meet a temporary war-time emergency existing during and immediately after hostilities. It is conceded that the question is essentially one of degree (*Real Estate Institute of New South Wales* v. *Blair* (4) but unless it be shown as a matter of degree that the legislation is so remote from the problem that there cannot be said to be any possible connection, then the legislation must be held to be valid. It is true that the period of protection for discharged servicemen has been increased to four years and that it is now the year 1949, but the problem is the same problem, there has not been any alleviation, or very little, of the housing shortage. The problem is exactly the same, and it is attacked in exactly the same

(1) (1946) 73 C.L.R., at pp. 221, 229-231, 235.
(2) (1946) 73 C.L.R. 213.
(3) (1946) 73 C.L.R., at pp. 231, 232.
(4) (1946) 73 C.L.R., at p. 225.

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way by the regulations. The present time is the "immediate aftermath" within the meaning of that expression as used in *Real Estate Institute of New South Wales* v. *Blair* (1), and the fact that more than two years have elapsed since that case was decided does not affect the matter. Mere lapse of time has no effect if the purpose be the same, the problem be the same, and the means to solve the problem are exactly the same. As to the consideration and effect of the regulations in particular cases—see *Real Estate Institute of New South Wales* v. *Blair* (2). It is notorious that there is still a gravely acute shortage of houses, and doubtless the primary cause was the diversion of labour and war materials for war purposes. It is of some importance to consider, in determining whether or not the regulations are valid, that the regulations are directed to unoccupied dwelling houses. They are not directed to the taking of premises from other subjects who require those premises for the accommodation of themselves. A protected person has not a right to take an occupied house, but merely a right to apply that exists only in respect of unoccupied dwelling houses. What constitutes (a) an "unoccupied" house was considered in *Morrisby* v. *Winter*; *Taylor v. Winter* (3), and (b) a house "about to become unoccupied" was considered in *Ex parte Smith*; *Re Gilchrist* (4) and *Lowen* v. *McLellan* (5). A protected person is not given a right to acquire property, nor is the Commonwealth given a right to acquire property. Such a person is given the right to make an application which is then heard by the appropriate tribunal on its merits. He may be successful by establishing hardship. The purpose of the regulations is to deal with cases of hardship in the case of protected persons, that is protected persons who at the end of the war were still suffering hardship in the matter of obtaining a home. Thus there is a real nexus with the defence power. Cases of such hardship still exist. The extension of the period from two to four years did not alter the essential nature of the legislation. It is still, in its essential nature, the same thing and it is still a defence measure (*Real Estate Institute of New South Wales* v. *Blair* (6)). The question of its reasonable cause is not a matter of law, nor a matter for the court, it is a matter for the legislature and the lapse of time must be immaterial. Unless that be so there cannot be any connection between legislation and the defence power. The Commonwealth does not take to itself any power to acquire

(1) (1946) 73 C.L.R., at p. 236.
(2) (1946) 73 C.L.R., at pp. 220-222, 229.
(3) (1946) V.L.R. 471.
(4) (1947) 75 C.L.R. 631 (note); (1947) 47 S.R. (N.S.W.) 443; 64 W.N. 148.
(5) (1948) V.L.R. 37.
(6) (1946) 73 C.L.R. 213.

property. As to " pith and substance " compare (*a*) the position as to forfeitures under the *Customs Act* and the transfer of property from the subject to the Commonwealth after judicial process; (*b*) a compulsory sale under the Prices Regulations upon tender of the fixed price; (*c*) the powers conferred upon the Joint Coal Board by the regulations made under the *Coal Industry Act* to direct a producer to supply coal to a particular individual at the fixed price, irrespective of other contractual arrangements; and (*d*) the transfer under the *Bankruptcy Act* of property from a bankrupt to the Official Receiver. The Commonwealth cannot by any act of its own vest property in a protected person or anybody else, because it depends on the final determination of the magistrate who sits judicially and is quite independent of the Commonwealth. Similarly, no act of a protected person can bring about an acquisition; he may make an application and, if successful, he will get a tenancy or whatever it may be. The regulations are not a law with respect to the acquisition of property but they are a law which substantially exists for the purpose of establishing priorities in relation to unoccupied houses. In any event an acquisition is not directed to the carrying out of any purpose for the Commonwealth; it is directed to enable discharged members of the forces to occupy homes for their own purposes. In principle there is no distinction between the effect of these regulations and the effect flowing from the making of a sequestration order under the *Bankruptcy Act*. *McClintock* v. *The Commonwealth* (1) does not apply to this case because no power at all is given by these regulations either to the Commonwealth or to any person or body other than the Commonwealth to acquire property. There are two quite similar features present in this case which are not found ordinarily in law with respect to the acquisition of property, namely, (i) that neither the Commonwealth nor the protected person is invested with a power to acquire property, and (ii) the obtaining of a tenancy, whatever that expression may mean, is entirely dependent upon the independent discretion of a judicial officer who is not subject to any direction by the Commonwealth. Those features tend to brand the legislation contained in the regulations as being not a law with respect to the acquisition of property, but substantially a law with respect to the establishment of priorities to occupy what are in fact unoccupied houses (*Morrisdale Coal Co.* v. *United States* (2)). In that case, if the word " acquisition " had appeared in the Fifth Amendment, the result would have been the same.

(1) (1947) 75 C.L.R., at p. 36.

(2) (1922) 259 U.S. 188 [66 Law. Ed. 892].

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Regulation 30AD purports expressly to create a successful applicant a tenant upon entry. He becomes a tenant of the owner of the dwelling house and gets an interest in the land. It should not be assumed that the legislature, in making this provision, intended to give to protected persons a licence merely to reside on land or in dwelling houses, which licence would come to an end immediately upon the determination of the regulations. It is significant and important that the regulation adopts the word "tenant" used by the Act and also that a successful protected person must pay rent. It was intended that protected persons should have some interest in the land, an interest in the nature of a tenancy. He gets the right to exclusive possession. Even if there be an acquisition of property, just terms are provided, the amount to be paid under reg. 30AD being the rent agreed upon or, in default of agreement, as settled by the magistrate. The tenant could be ejected for non-payment of rent. The owner is put in the same position as any other landlord. On the basis of the tenancies and on the assumption that the legislation is within s. 51 (xxxi.) of the Constitution, the terms are completely just (*Grace Brothers Pty. Ltd.* v. *The Commonwealth* (1); *McClintock* v. *The Commonwealth* (2)). If it had not been for special circumstances the almost unanimous opinion of the justices in *United States* v. *John J. Felin & Co. Inc.* (3) would have been that the maximum price would have been deemed just compensation.

(Counsel proceeded to deal with matters relating to the validity of the warrant and the service of the notice of the hearing, which are not material to this report).

Ashkanasy K.C., in reply.

Cur. adv. vult.

June 6.

The Court delivered the following written judgment:

These three matters raise questions with respect to the scope of the defence power after the actual fighting in a war has ceased. The questions relate to the sufficiency of the power to sustain the continuance in operation of:—

(i) The *Women's Employment Regulations*;
(ii) The *National Security* (*Liquid Fuel*) *Regulations*;
(iii) Regs. 30A to 30AF of the *National Security* (*War Service Moratorium*) *Regulations*.

(1) (1946) 72 C.L.R., at pp. 279, 280, 285, 290, 295.
(2) (1947) 75 C.L.R., at p. 26.
(3) (1947) 334 U.S. 624 [92 Law. Ed. 1614].

The fighting in the recent war ceased in September 1945, over three years ago. The power of the Commonwealth Parliament to make laws with respect to defence is contained in s. 51 (vi.) of the Constitution—a power to make laws with respect to—" The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth " and s. 51 (xxxix.) with respect to—" Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

Section 51 (vi.) authorizes legislation with respect to the subjects of preparation for war, the organization, management and supply of armed forces and the conduct of war-like operations. During the actual course of war in the sense of prosecution and continuance of hostilities defence necessities may reasonably be considered to require extensive and detailed control of the community by the Commonwealth in relation not only to war service and war supplies, but also to industry in general, food, clothing and housing, and financial, economic and social conditions. Apart from the defence power, control of these matters is in most respects outside Commonwealth legislative power and within State legislative power. Such matters come within Federal power because legislation with respect to them is legislation upon " incidents in the exercise of " the power with respect to defence: see *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1). All these matters when dealt with during the actual course of a war are related to the prosecution of defence activities.

But laws cannot be supported as laws with respect to defence unless it appears that they are laws upon the subject of defence or the incidents of defence in the sense stated and therefore have a real connection with defence. This proposition was applied during hostilities in *Victorian Chamber of Manufactures* v. *The Commonwealth* (2), and *Crouch* v. *The Commonwealth* (3) provides an instance of its application after the cessation of hostilities.

When actual hostilities have ceased the scope of application of the defence power necessarily diminishes, but the cessation of hostilities leaves behind various matters which can legitimately be made the subject of Commonwealth legislation as being incidental to the execution of the defence power in the past. This Court has already held that after hostilities have ceased laws may be sustained

(1) (1914) A.C. 237, at p. 256.
(2) (1943) 67 C.L.R. 413.
(3) (1949) 77 C.L.R. 339.

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under the defence power as valid because they deal with conditions which have been brought about by the exercise of the defence power itself (*Dawson* v. *The Commonwealth* (1); *Miller* v. *The Commonwealth* (2); *Real Estate Institute of New South Wales* v. *Blair* (3); *Sloan* v. *Pollard* (4); *Hume* v. *Higgins* (5); *Jenkins* v. *The Commonwealth* (6). Thus Federal regulation of matters which are brought within Federal power only by reason of the defence power need not necessarily cease with the actual fighting.

It is upon this footing that the Parliament enacted first the *National Security Act* 1946 which fixed 31st December 1946 as the date when the operation of the *National Security Act* 1939-1943 should terminate and then followed it by the enactment of the *Defence* (*Transitional Provisions*) *Act* 1946. That statute took certain of the regulations which were originally made under the *National Security Act* and continued them in operation for a further period of twelve months. Many other regulations were revoked or allowed to expire. Those which were selected for continuance were retained almost unchanged. By the *Defence* (*Transitional Provisions*) *Acts* 1947 and 1948 the operation of many of these regulations was further extended for two further periods of twelve months each. In the cases now before us the continued operation of the *Liquid Fuel Regulations* and of regs. 30A to 30AF of the *War Service Moratorium Regulations* confessedly rests upon the *Defence* (*Transitional Provisions*) *Act* 1946-1948 and we think that there is no other enactment upon which the *Women's Employment Regulations* can depend for their continuance in force. Accordingly the first question which arises in relation to each set of regulations is whether the statute in so far as it purported to continue them in operation was validly enacted.

The substantial argument in support of the regulations, the validity of the continuance of which is now challenged, is that the defence power authorizes, beyond the period of obvious war emergencies, laws which are directed to dealing with the consequences of war. The Constitution does not confer upon the Commonwealth Parliament any power in express terms to deal with the consequences of war, but there are some consequences which undeniably fall within the scope of the legislative power with respect to defence. Repatriation and rehabilitation of soldiers is an obvious case. Rebuilding of a city which had been destroyed

(1) (1946) 73 C.L.R. 157.
(2) (1946) 73 C.L.R. 187, at pp. 211, 212.
(3) (1946) 73 C.L.R. 213, at pp. 221, 225, 227, 229, 236.
(4) (1947) 75 C.L.R. 445, at pp. 449, 461, 464, 465, 471.
(5) (1949) 78 C.L.R. 116.
(6) (1947) 74 C.L.R. 400.

or damaged by bombing would be another case. Laws relating to such matters would, however, be valid not merely because they dealt with consequences of a war, but because such laws can fairly be regarded as involved incidentally in a full exercise of a power to make laws with respect to defence.

The effects of the past war will continue for centuries. The war has produced or contributed to changes in nearly every circumstance which affects the lives of civilized people. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject. Nearly all the limitations imposed upon Commonwealth power by the carefully framed Constitution would disappear and a unitary system of government, under which general powers of law-making would belong to the Commonwealth Parliament, would be brought into existence notwithstanding the deliberate acceptance by the people of a Federal system of government upon the basis of the division of powers set forth in the Constitution. We proceed to state reasons why the Court should not ascribe an operation so far-reaching and, indeed, revolutionary, to the defence power.

On the other hand, this Court, in discharging the duties imposed upon it by the Constitution, should be careful now and in the future (as it has been in the past in the many decisions with respect to the defence power) not to take a narrow view of the problems with which the Commonwealth Government has to deal when it is entrusted with the supreme responsibility of the defence of the country.

The solution of the difficulties thus presented cannot be achieved by the application of any mechanical hard and fast rule. It is not possible to do more than lay down general principles and to apply them to the circumstances, varying in time and place, which are to be found in a modern community. In stating and in applying the principles we do not forget that in contemplation of law a state of war still exists, although armed conflict has long since been at an end. But this Court has never subscribed to the view that the continued existence of a formal state of war is enough in itself, after the enemy has surrendered, to bring or retain within the legislative power over defence the same wide field of civil regulation and control as fell within it while the country was engaged in a

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conflict with powerful enemies. The Court has not, of course, put out of consideration the fact that a state of peace has not yet been brought about by treaty or otherwise or the fact that enemy territory is still in Allied occupation. But we have treated these as but circumstances to be considered, that is, as factors in a total situation governing the practical application of the legislative power with respect to defence. They are, however, factors which can have little bearing upon the question whether any of the three regulations now challenged still remain in valid operation. It is a question which must depend upon that aspect of the defence power which authorizes legislation on matters incidental to the termination of hostilities, to the dis-establishment and disposal of arrangements set up in the course of prosecuting the war and to the restoration of the country to conditions of peace. In winding up the arrangements made for war and restoring a community organized for war to a state in which it can resume peaceful courses the legislature may continue for a space this or that war-time control. For it may be incidental to defence to continue the control and regulation of a particular subject matter for a time after the cessation of hostilities and also to maintain such control while legislative provision is being made for the necessary re-adjustment. The sudden removal of all controls is not demanded by the collapse of enemy resistance. Given regulations or controls may no longer find a justification in the considerations which the active prosecution of the war supplied. Yet the very fact that the controls or regulations have been established may create a situation which must be maintained for a reasonable time while some other legislative provision is made. But the Court must see with reasonable clearness how it is incidental to the defence power to prolong the operation of a war measure dealing with a subject otherwise falling within the exclusive province of the States and unless it can do so it is the duty of the Court to pronounce the enactment beyond the legislative power.

No one doubts that the defence power will justify some legislation directed to the transition period between war and peace and some legislation which operates even after the full establishment of peace. But it does not place within Federal legislative authority every social, economic or other condition that might not have arisen except for the war. Where a state of facts exists which though outside the chief or central purpose of the power, namely, the armed defence of the country, is from a practical point of view entirely due to war, legislation to deal with it may fall within the defence power. For in that event such legislation may well be incidental

to the exercise of the power. Examples have already been given in the case of the returned soldier (whether wounded or ill or not) and the destroyed city. But there are many matters which result from a plurality of causes of which the war is one. To point to the war as a contributory cause can hardly be enough. The recent war has produced some changes in almost every part of our lives. This fact does not mean that the whole life of man is to be regarded as a war consequence. It is obvious that to determine whether any given attempt to continue laws or regulations in force for an extended period after the end of hostilities is valid, it is necessary to consider in detail the nature and application of the particular measure. The present cases afford examples in the *Women's Employment Regulations*, the *Liquid Fuel Regulations* and regs. 30A to 30AF of the *War Service Moratorium Regulations*.

R. v. *Foster*; *Ex parte Rural Bank of New South Wales.*

In this matter the challenge is to the *Women's Employment Regulations* contained in the schedule to the *Women's Employment Act* 1942-1946, which, it is said, can no longer be sustained under the defence power of the Commonwealth Parliament. The *Women's Employment Regulations* were originally made as regulations under the *National Security Act* 1939-1940—Statutory Rules 1942, No. 146. In 1943 in the case of *Victorian Chamber of Manufactures* v. *The Commonwealth* (1), it was held that the regulations were valid as a means of getting women to work during the war in war industries and in essential civilian employment: see also *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria*; *State of Victoria* v. *Foster* (2) and *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (3).

The question arises with respect to an order made on 14th December 1948 by his Honour Judge *Foster* in the exercise of powers conferred by the regulations relating to the remuneration and working conditions of female employees of the Rural Bank of New South Wales. The regulations deal with what was, when they were adopted, a pressing war emergency arising from a deficiency of male labour. Regulation 6 (1) is in the following terms:—" (1) Where an employer proposes to employ, is employing, or has at any time since the second day of March, 1942, employed, females on work—(a) which is usually performed by males; (b) which, within the establishment of that employer, was performed by males at any

(1) (1943) 67 C.L.R. 347.
(2) (1944) 68 C.L.R. 485.
(3) (1945) 71 C.L.R. 545.

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time since the outbreak of the present war; or (c) which, immediately prior to the outbreak of the present war, was not performed in Australia by any person, the employer shall, unless an application in relation to that employment has already been made (whether prior to the date of disallowance of Statutory Rules 1942, No. 548, or after the commencement of this regulation), or a decision in respect of that work is in force, forthwith make application to the court for a decision in accordance with this regulation." The "court" means "the Commonwealth Court of Conciliation and Arbitration as constituted of a judge of that court designated by the Chief Judge for the purpose of these regulations": reg. 4.

Regulation 6 provides that the court shall consider the employer's application and decide whether the work specified in the application is work specified in sub-reg. (1) and if so whether females may be employed or continue to be employed on the work. It is also provided that if the court decides that females may be employed or continue to be employed on the work it shall decide matters of hours, special conditions as to safety, health and welfare, and whether the employment of females should in the first place be on probation, and that the court may fix rates of remuneration.

The regulations therefore provide that before an employer can employ females upon any of the work specified in reg. 6 (1) he must obtain a decision from the court that females may be so employed. The work specified is plainly work in respect of which difficulties in obtaining the necessary labour existed or were expected by reason of the existence of war conditions. If the regulations are still validly in operation they produce the result that no employer may in the year 1949 employ any women upon, *inter alia*, work which immediately prior to the outbreak of the war in September 1939 was not performed in Australia by any person. Accordingly, if a completely new industry is now established in Australia women cannot be employed in it unless a decision that they may be so employed is given by the court. They also produce the result that in 1949 no employer without having obtained such a decision may employ or continue to employ women upon work which was usually performed by males or upon work which within his establishment was performed by males at any time since 3rd September 1939. At a time when the conduct of war was deemed by Parliament and the Government to require the distribution and allocation of available labour so as to obtain the maximum of productive result for the manufacture of war supplies and essential civilian requirements, the relation of such provisions to defence is not difficult to understand. But all the reasons which provided at the time a foundation

for this exercise of the defence power have now disappeared. What new factors or what situation came into existence which would form a ground justifying under the defence power legislation continuing the operation of the *Women's Employment Regulations* ? It is open to much doubt whether the legislature has expressed sufficiently an actual intention to continue them in operation after 31st December 1946. By the combined operation of s. 5 of the *Women's Employment Act* 1942, s. 19 of the *National Security Act* 1939-1946 that is the s. 19 substituted by Act No. 15 of 1946, and s. 10A of the *Acts Interpretation Act* 1901-1948, we think that it is clear that the *Women's Employment Regulations* must have come to an end on 31st December 1946, unless some fresh provision were enacted expressing an intention to continue them further. Such a provision is found by those supporting the present operation of the regulations in the amendment made in s. 5 of the *Women's Employment Act* by s. 10 (1) and the Third Schedule of the *Defence (Transitional Provisions) Act* 1946-1948. The amendment so made consisted in the omission in s. 5 of the *Women's Employment Act* of the words "*National Security Act* 1939-1940" and the insertion of the words "*Defence (Transitional Provisions) Act* 1946." It is unnecessary to consider whether this amendment was adequate for the purpose claimed for it. Let it be supposed that it was and that the continuance from year to year since the end of 1946 of the *Women's Employment Regulations* rests upon the *Defence (Transitional Provisions) Acts* of 1946, 1947 and 1948. The order or determination in this case was made on 14th December 1948 and the authority to make it could only be derived from the effect of the *Defence (Transitional Provisions) Act* 1947 in extending the operation of the *Women's Employment Regulations*. We cannot see how this could be validly done under the defence power. The regulations are not addressed to any problem of post-war re-adjustment. The amendment made by the *Defence (Transitional Provisions) Act* 1947 in the date for the termination of the *Defence (Transitional Provisions) Act* 1946 would operate to continue the *Women's Employment Regulations* into the third year from the time of the cessation of hostilities. It would so operate without any legislative attempt to deal with the situation which they created. The extension of the period of the regulations means nothing but a postponement of the time when a statutory regulation no longer appropriate to existing circumstances terminates. It has no bearing upon the winding up, disposal or re-adjustment of the system of regulation or control established for war purposes or upon the situation arising therefrom except

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that it tends to perpetuate the latter and postpone indefinitely the former.

It is argued for the respondents that there is still a lack of man power which is due to the war. It follows from what has already been said that the mere fact that the lack of man power is a war consequence is not sufficient to bring the matter within the scope of the defence power, particularly after hostilities have ceased. Lack of man power may continue for many years. It is common knowledge that expansion of industry, which is now substantially upon a civilian as distinguished from a military basis, and various changes in industrial conditions which are quite unconnected with the war have had a great deal to do with the difficulty of obtaining labour to do all the work which is required. Problems with respect to women's employment may, like many other problems, have become aggravated by the war, but in December 1947 (when, it is said, the *Defence (Transitional Provisions) Act* did purport to extend the operation of the regulations until 31st December 1948) they had become part of the ordinary social, economic and industrial complex of the community.

The continuance in operation in 1948 of the *Women's Employment Regulations* was obviously not connected with the prosecution of the war, and it is not incidental to any winding-up process or to any endeavour to restore conditions which might be regarded as part of the peace-time organization of industry.

The Defence (Transitional Provisions) Act 1947 therefore should be held to be invalid in so far as it extended (if it did extend) the operation of the *Women's Employment Regulations* to 31st December 1948.

The conclusion that the regulations can no longer be supported under the defence power does not mean that the matters sought to be governed by the regulations cannot be dealt with under existing legislative powers. By an award in an inter-State industrial dispute in a case falling within s. 25 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 the Court of Conciliation and Arbitration and in other cases a conciliation commissioner can determine conditions of employment for women, and in other cases State laws or tribunals can deal with this subject. Difficulties and inconveniences in relation to such a matter may arise, but they will, in the future as in the past, be due in large measure to the particular division of industrial powers between Commonwealth and States which is the effect of s. 51 (xxxv.) of the Constitution.

Wagner v. *Gall.*

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In this case the validity of the *Liquid Fuel Regulations* is challenged. These regulations were originally made under the *National Security Act* 1939-1940 and were continued in operation after the end of 1946 year by year by the *Defence (Transitional Provisions) Acts* 1946, 1947 and 1948. The regulations provide for the rationing of liquid fuel. They apply to petrol, which is perhaps the most important form of liquid fuel. They embody a scheme for the issue of licences and ration tickets so as to control the distribution of liquid fuel in Australia by requiring production of a licence and surrender of ration tickets upon purchase or other disposition of such fuel. Licences and ration tickets are issued at the discretion of the Liquid Fuel Board constituted under the regulations. W. C. Gall was prosecuted before a Court of Petty Sessions at Brisbane for an offence against reg. 51. He pleaded not guilty. Evidence was heard for the prosecution. Counsel for the defendant stated that he did not propose to call evidence, but contended that the *Liquid Fuel Regulations* were inoperative and void on the date of the alleged offence, namely 16th November 1948. Proceedings in the Court of Petty Sessions were adjourned and an order was made by this Court under s. 40 of the *Judiciary Act* 1903-1948 removing the cause to the High Court. The evidence showed that Gall did do the acts charged against him, and, if the regulations were in operation upon the relevant date, he was guilty of an offence.

The argument which has been submitted in support of the enactment continuing the regulations in force is based entirely upon considerations arising from the world dollar shortage and the need for restricting Australian dollar expenditure. Nearly all liquid fuel is imported and a great quantity of it must be paid for in American dollars, which can in practice be obtained for Australian requirements only in co-operation with the Government of the United Kingdom. Inter-governmental arrangements provide for allocation under United Kingdom control of dollars to Australian requirements. In order to provide imports which must be paid for with dollars it is therefore not only desirable but practically necessary to control all dollar expenditure from Australia. The argument is that the importation of liquid fuel must be restricted because it cannot be obtained in sufficient quantities except by the expenditure of dollars. The limitation upon importation means a shortage of supplies to consumers. Such a shortage of supplies makes rationing consequentially necessary or desirable and rationing may be used as a method of limiting consumption. Accordingly, so it is claimed, the

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rationing of liquid fuel falls within Commonwealth legislative power. The regulations, it is said, enable the rationing to be carried out. It will be seen that there is no analogy in the present case to that of *Sloan* v. *Pollard* (1). The decision in that case was founded upon an agreement made by the Commonwealth Government during the war in the course of its prosecution. By the agreement the Government undertook to supply essential commodities (butter and cheese) to Great Britain for a period that had not expired when hostilities ceased. To carry out the agreement it was necessary to control the local disposition and use of another commodity (cream) in Australia.

It is conceded for the defendant that during active hostilities and for some reasonable period thereafter the supply of petrol for the armed services and essential civilian requirements and the distribution of petrol within Australia were matters of the first importance for purposes of defence. But it is said that these conditions have now disappeared and that the continuance of the regulations in operation by virtue of the *Defence (Transitional Provisions) Act* 1946-1947 is merely an attempt to control internal trade which no longer has any relation to defence.

There is no attempt to support the continuance in force of the regulations on the grounds that the control of liquid fuel is necessary or desirable in order to ensure sufficient stocks for the armed services and for the security of the country generally. The power to continue them is defended as an incident or consequence of a dollar shortage which is attributed to the war.

The *Liquid Fuel Regulations* deal only with the control of the disposition and distribution of petrol after it has come into Australia. They do not profess to deal with the control of the amount of petrol which is imported. That of course can be done under other powers of the Commonwealth. They do not deal with the control of exchange or the expenditure of dollars upon liquid fuel or for any other purpose. The argument for the validity of the regulations depends upon no closer relation between the operation of the regulations and the dollar shortage than can be seen in the fact that the rationing of any commodity may be employed so as to reduce the amount of that commodity which is used. The method and means of sale and distribution inside Australia of imported commodities cannot itself affect the quantity of imports or the expenditure upon imports, although a restriction of consumption may re-act upon the demand for the importation of a commodity. The rationing of petrol and other liquid fuel may be used

(1) (1947) 75 C.L.R. 445.

both to allocate liquid fuel in short supply and at the same time to reduce the consumption of such fuel and as a consequence to reduce the amount of that fuel imported. But these facts fall far short of showing any sufficient connection with defence purposes. It is too remote to be incidental to defence.

Under the legislative power over trade and commerce the Parliament may authorize and indeed has authorized restrictions upon importation. The restriction may be for any reason: *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1). But it would be impossible to hold that as an incident of this power the Parliament could enter what is prima facie the province of the States and control the domestic distribution or consumption of a commodity because a restriction on importation made a regulation of the basis of distribution and the purposes of consumption desirable or just. Still less would it be possible to treat the reduction in the demand for an imported commodity that may be effected by rationing as a ground for regarding the control of consumption as incidental to the restriction on importation.

Rationing, it is said, is necessitated—or may reasonably be thought to be necessitated—by the restriction of importation which is due to the shortage of dollars which is due to the war. But such a connection is too remote to support a system of rationing as an incident of defence, just as it would be too remote if the power relied upon was the power to make laws with respect to trade and commerce with other countries. No doubt the dollar shortage is, at least in part, and probably in large part, a consequence of the war. But it cannot be held that any action taken to deal with a matter which is a war consequence can be supported under the defence power. The argument that any state of affairs that can be traced to the war as a cause can be dealt with under the defence power by direct or indirect measures must be rejected for reasons which have already been sufficiently stated.

The invalidation of these regulations will not reduce the power of the Commonwealth Government to co-operate with the Government of the United Kingdom in relation to problems arising from the dollar shortage. The Commonwealth Parliament by suitable legislation and the Commonwealth Government by administrative action can completely control imports into Australia. The power of the Commonwealth enables it to determine how many dollars can be spent from Australia in buying either liquid fuel or other imported commodities. Federal control of dollar expenditure abroad is not in question. What is in question is an attempt to deal with internal

(1) (1938) 59 C.L.R. 170.

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trading in commodities long after hostilities have ended. The power to control imports into Australia which is conferred by the power to make laws with respect to trade and commerce with other countries and the power with respect to taxation do not enable the Commonwealth Parliament to make laws with respect to the use and consumption of goods simply because they are imported goods or because they have been subject to customs taxation. The distribution and use and price of petrol within Australia can be controlled under State legislation. But these subjects can no longer be said to have such a relation to subjects of defence as to authorize the continuance in operation of the *Liquid Fuel Regulations*. Accordingly the *Defence* (*Transitional Provisions*) *Act* 1947 should be held to be invalid in so far as it purports to extend the operation of the *Liquid Fuel Regulations* to 31st December 1948.

Collins v. *Hunter and Ors.*

This case comes to the Full Court upon a reference by *Dixon* J. Mrs. Patricia Mahon Collins issued a writ in the High Court claiming a declaration that she was entitled to possession of certain premises and an injunction restraining the defendants from disturbing her possession. The defendant R. Tippett, who is a " protected person " under the *War Service Moratorium Regulations*, has obtained a warrant dated 7th March 1949 from a stipendiary magistrate under regs. 30A and 30AB of the *National Security* (*War Service Moratorium*) *Regulations* authorizing and requiring the delivery to him of the possession of a certain dwelling house. The defendant R. G. Hunter is a constable of police charged with the duty of executing the warrant. The plaintiff Mrs. Collins, however, purchased the dwelling house from the previous owner after the warrant had been granted and entered into possession before it had been executed. Many questions were raised with respect to the validity of the warrant, but the first contention on behalf of the plaintiff was that regs. 30A to 30AF were no longer in operation.

The regulations show all the marks of hasty improvisation with little, if any, appreciation of the problems involved in the legal relationship of landlord and tenant. Reference is made to some of the more obvious defects of the regulations in *Real Estate Institute of New South Wales* v. *Blair* (1). In the present case it has been argued with much force that another defect in the regulations is that they do not permit the eviction of a protected person who remains in occupation under the regulations and refuses to pay rent

(1) (1946) 73 C.L.R. 213.

—see reg. 30AD, creating a tenancy but fixing no term therefor and no conditions of tenancy. But this and the other defects to which reference has been made only provide ground for criticism of the policy of the regulations and have no bearing upon their relation to the defence power of the Commonwealth Parliament.

The regulations which in a revised form now stand as regs. 30A to 30AF of the *War Service Moratorium Regulations* were adopted in an earlier form on 28th June 1945 by Statutory Rules 1945, No. 101. They took their actual inception in Statutory Rules 1942, No. 437, which was gazetted on 14th October 1942. Their present form is due to Statutory Rules 1946, No. 86, No. 87 and No. 125. But the definition of " discharged member of the Forces " contained in reg. 28A is important in the operation of these regulations and it has been amended so that the regulations now cover protected persons whose discharge was four years ago or less instead of two years or less : Statutory Rules 1947, No. 99 and 1948, No. 55 : cf. Statutory Rules 1948, No. 109 as to reg. 30. By the *Defence (Transitional Provisions) Acts* 1946, 1947 and 1948 the operation of the regulations was extended to 31st December 1949.

The *War Service Moratorium Regulations* provide that a protected person (a specially defined class of discharged servicemen and certain dependants) may obtain a warrant of possession under which he may be authorized to occupy a dwelling house which is unoccupied or about to become unoccupied, and that he shall pay a rent determined in the manner provided by the regulations. In *Real Estate Institute of New South Wales* v. *Blair* (1), this Court held that so far as servicemen themselves were concerned regs. 30A to 30AF were validly adopted in their present form in May and July 1946. It is contended that in all relevant particulars the position in March 1949 was the same as at that date and that the extension from two to four years of the period within which a serviceman must be discharged to be a protected person made no difference. It is argued for the defendants, who support the regulations, that there is a shortage of housing due to the war and, further, that the provision of houses for discharged personnel and their dependants has a real and substantial connection with defence which continues after fighting has ceased. On the other hand, it is admitted that it is within the Commonwealth power to acquire land and provide " war service homes " for discharged servicemen and their dependants (*Attorney-General for the Commonwealth* v. *Balding* (2)) but it is argued that provisions under which a discharged serviceman or his dependants may be given possession of

(1) (1946) 73 C.L.R. 213.

(2) (1920) 27 C.L.R. 395.

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homes against the will of the owner cannot at this time be upheld as a defence measure.

The protected persons who under reg. 30A may obtain a warrant of possession in respect of a dwelling house which is unoccupied or about to become unoccupied are protected persons referred to in sub-reg. (9) of reg. 30: see reg. 30A (1). The protected persons referred to in the first-mentioned sub-regulation are defined by the following provisions in that sub-regulation :—" (9) For the purposes of this regulation, a person shall not be deemed to be a protected person unless he is—(*a*) a member of the Forces who—(i) is; or (ii) was, for a total period of not less than twelve months during his period of war service, required, by reason of his war service, to live in premises other than premises occupied by him, or by a member of the household to which he belongs, as a home; (*b*) a discharged member of the Forces who was—(i) immediately prior to his discharge; (ii) for a continuous period of not less than three months during the period of six months immediately prior to his discharge; or (iii) for a total period of not less than twelve months during his period of war service, so required; (*c*) a female dependant of a member or a parent of a member and that member—(i) is; or (ii) was, for a total period of not less than twelve months during his period of war service, so required; or (*d*) a female dependant of a discharged member or a parent of a discharged member and that member was—(i) immediately prior to his discharge, ceasing to be engaged on war service or death, as the case may be; (ii) for a continuous period of not less than three months during the period of six months immediately prior to his discharge, ceasing to be engaged on war service or death, as the case may be; or (iii) for a total period of not less than twelve months during his period of war service, so required."

In reg. 28A " protected person " is defined as meaning " a member of the Forces, discharged member of the Forces, female dependant of a member, female dependant of a discharged member, parent of a member or parent of a discharged member." All these terms are defined in other provisions of reg. 28A. The effect of regs. 28A, 30 and 30A is that the benefits of reg. 30A can be claimed only by a person who is a protected person within the definition contained in reg. 28A and who also falls within the limited class of protected persons described in reg. 30.

But a protected person, as a result of amendments adopted on 7th May 1948, may now be a member of the forces who has been discharged from the Defence Force or has ceased to be engaged on

war service for a period up to four years or may be a female dependant or a parent of such a person.

The terms of reg. 30 show that the regulations were designed to deal with service personnel and certain of their dependants whose domestic life was disturbed by reason of a member of the forces being required by his war service to live in premises other than his ordinary home.

When in May and July 1946 the provisions now represented by regs. 30A to 30AF were reframed in their present form the period over which, as the law then stood, they were to operate was a short one. The *National Security Act* 1946 had been passed on 18th April 1946, though the date of its commencement was 16th May 1946. The new s. 19 which it inserted in the *National Security Act* 1939-1943, under which the regulations were made, provided that all regulations made thereunder should cease to have effect at midnight on 31st December 1946. The period from his discharge limited in the definition of discharged servicemen was two years, not four. In *Real Estate Institute of New South Wales* v. *Blair* (1) part of the argument in support of the validity of the regulations was that they continued in force until 31st December 1946 and that a tenancy could be created thereunder until that date. Hostilities had not ceased until 2nd September 1945. It was in these circumstances that the Court decided that regs. 30A to 30AF were not ultra vires. It was considered that they fell within that aspect of the defence power which enables the Federal legislature to provide for the re-establishment in civil life of persons who have served with the defence forces upon discharge (per *Latham* C.J. (2)). *Rich* J. said :—" I do not think that it is beyond the scope of the defence power to provide reasonable facilities for enabling men of the fighting services to re-establish themselves in civil life during a reasonable time after they have been discharged ; and, in existing circumstances, I do not think that the temporary continuance of the provisions which have been challenged, in the form in which they now stand, is, in its application to discharged servicemen, outside the scope of the defence power." (3). *Williams* J. said :—" During hostilities legislation under the defence power requiring householders to billet members of the forces, and probably also members of their families, could be valid. And during the period of demobilization legislation to the same effect might be valid. By analogy to billeting, legislation passed in war-time requiring citizens to allow members of the forces and their families to reside in

(1) (1946) 73 C.L.R., at p. 218.
(2) (1946) 73 C.L.R., at p. 221.
(3) (1946) 73 C.L.R., at p. 225.

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unoccupied houses could also be valid. We are now in a period when the defence power is contracting. In my opinion the operation of the defence power in peace-time could not be wide enough to authorize legislation, otherwise than under s. 51 (xxxi.), to make dwelling houses owned by individuals available as dwelling houses for discharged members of the forces. But the present regulations can, I think, be justified as an exercise of the defence power during hostilities and the immediate aftermath. They are of temporary duration and any statutory rights they create would not continue after their expiration." (1). *Starke* J. and *Dixon* J. confined themselves to the case of discharged servicemen and treated the regulations as within the defence power because " they secure in certain cases dwelling houses for members and discharged members of the armed Forces required by reason of war to live in premises other than premises occupied by them or by members of their household as a home " : per *Starke* J. (2). *Dixon* J. pointed out that the direction of the defence power had been changed : its direction was no longer towards sustaining the conflict but towards measures calculated to liquidate the organization for war and restore the conditions of peace (3).

It will be seen that the adoption of regs. 30A to 30AF in their present form was sustained as a temporary measure intended to operate for the brief remainder of the life of the *National Security Act* substantially on the ground that they made a provision incidental to the rehabilitation of soldiers, sailors and airmen on discharge. " The fact that the regulations do not show an adequate appreciation of the nature (or even of the existence) of many problems which are involved in the relation of landlord and tenant " (per *Latham* C.J. (4)), was put on one side as a consideration not going to validity. But it was recognized that to place the serviceman in occupation of another man's dwelling against his will, if for the moment it was unoccupied or about to become unoccupied, was to take an extreme course and this was weighed as a consideration going to validity. But it was considered sustainable under the defence power as a provision *ad interim*. What the Court is now called upon to decide is whether it is incidental to the defence power to extend the operation of such an interim measure into the fourth year after the cessation of hostilities. What is in issue is the validity of the *Defence (Transitional Provisions) Act* 1948 in so far as it would extend the operation of regs. 30A to 30AF to 31st December 1949.

(1) (1946) 73 C.L.R., at p. 236.
(2) (1946) 73 C.L.R., at p. 227.
(3) (1946) 73 C.L.R., at p. 231.
(4) (1946) 73 C.L.R., at p. 221.

The question depends upon a matter of degree, as is not infrequently the case when it is claimed that a provision is incidental to the purpose or subject matter of a legislative power. But we have reached the conclusion that the attempt to continue the operation of regs. 30A to 30AF for so great a length of time cannot be supported as an exercise of the power to make laws with respect to defence. It loses sight of the exceptional character of the remedy they contain and of the necessity of basing it, as a matter of legislative power, upon the exigency created by demobilization and discharge. To treat the provision as one constitutionally capable of indefinite continuance is to mistake the difficulties which servicemen share with other members of the community in a prolonged housing shortage for the more immediate and urgent necessities which are set up by demobilization and discharge at the end of hostilities. Just as in the prosecution of actual war the extent of the application of the defence power is measured by reference to the emergency, so, when its direction is changed by the cessation of hostilities and it is pointed at the dis-establishment of the organization of the community for war and the restoration of the conditions of peace, the application of the power must be measured by the exigencies that are involved.

Regulations 30A to 30AF make a provision of a peculiar and of a drastic nature. It is a provision which is not based on s. 51 (xxxi.) of the Constitution and yet it proceeds *in invitos* against the owners of dwelling houses and places the protected person in occupation as a so-called tenant. Section 51 (xxxi.) confers a power for the acquisition of property for purposes which, no one doubts, would include the housing of discharged servicemen. Again, regs. 30A to 30AF do not deal with the question whether in a competition for housing or accommodation servicemen are to be preferred to others. They do not for instance confer a priority upon a serviceman as an applicant for a lease in the same way as he is given a preference in employment (for a limited period) under the *Re-establishment and Employment Act* 1945. It is true that they do enable the owner, an expression including a lessee, to resist the claim of the protected person on the ground of hardship to himself or some other person. But otherwise they are simply based on the fact that a dwelling is or is about to become unoccupied for however short a time. Any protected person may then obtain it, whatever may be his personal situation. To continue these extreme provisions years after the real demobilization is over and to do so in favour of protected persons whose discharge took place as long ago as four years cannot be considered as incidental to the defence power.

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Accordingly, the *Defence (Transitional Provisions) Act* 1948 should be held to be invalid in so far as it purports to continue the *War Service Moratorium Regulations* 30A to 30AF in operation to 31st December 1949.

This conclusion does not in any way prevent the Commonwealth from making legislative provision under which homes may be provided for discharged defence personnel so far as is thought proper whether those homes are freehold (as under the *War Service Homes Acts*) or leasehold. Further, tenants have the protection of State laws, which have recently been extensively amended in their favour. State Parliaments could, if they thought proper, enact provisions the same in substance as those contained in the *War Service Moratorium Regulations* with respect to protected persons. Indeed, this has been done in Victoria by the *Landlord and Tenant Act* 1948, Part V, which reproduces regs. 28 to 30D of the *War Service Moratorium Regulations*. This part of the Victorian Act has not yet been proclaimed, but it can be proclaimed whenever thought proper and be kept in operation for such period as the State Parliament may determine. Accordingly, this decision with respect to the *War Service Moratorium Regulations* need not in any way prejudice the rights of protected persons with respect to unoccupied dwellings if the State Parliaments are prepared to maintain them.

Thus there are means of dealing with all the subjects to which the three sets of regulations relate apart altogether from the defence power.

The conclusion that all the challenged regulations are no longer in operation for the reasons stated makes it unnecessary to consider arguments on other points which were raised in each case.

In *R.* v. *Foster & Ors.*; *Ex parte Rural Bank of New South Wales* the Rural Bank obtained an order nisi for prohibition restraining his Honour Judge *Foster* and certain banking organizations from proceeding upon an order made by the learned judge under the *Women's Employment Regulations*. As those regulations are held to be invalid, the order for prohibition should be made absolute.

In *Wagner* v. *Gall*, where the defendant is being prosecuted for a breach of the *Liquid Fuel Regulations*, the result of holding those regulations to be invalid is that the complaint should be dismissed.

In *Collins* v. *Hunter & Ors.* the result is that, the *War Service Moratorium Regulations* 30A to 30AF being no longer in operation, the defendant Tippett has no right to obtain possession of the house at present occupied by the plaintiff, and there should be

judgment for the plaintiff for declarations of invalidity and injunctions as sought in the statement of claim.

The Rural Bank did not raise the question of the validity of the regulations until after many months of conferences and other proceedings with the respondent associations. In this case the order should be made absolute, but without costs.

In the criminal proceedings in *Wagner* v. *Gall* the defendant has succeeded and the complaint should be dismissed (without costs), but, as the Attorney-General removed the proceedings to the High Court, the defendant should have his costs in this Court.

In *Collins* v. *Hunter & Ors.* the plaintiff has succeeded and is entitled to have her costs of the action, including the proceedings before the Full Court. That order is duly made. But the contest has been between two " protected persons " and it is suggested by the Court that the Commonwealth authorities might give consideration to the propriety of relieving the parties of some or of all the liability for costs legitimately incurred.

R. v. *Foster and Others*; *Ex parte Rural Bank of New South Wales.*

Order absolute without costs.

Wagner v. *Gall.*

Complaint dismissed. No order as to costs of proceedings in the Court of Petty Sessions. Complainant to pay defendant's costs of proceedings in the High Court.

Collins v. *Hunter and Another.*

(*a*) *Declared that regs.* 30A *to* 30AF *inclusive of the National Security (War Service Moratorium) Regulations are void.*

(*b*) *Declare that the plaintiff is entitled as against the defendants to retain possession of the premises referred to in the statement of claim.*

(*c*) *Enjoin the defendants and each of them from breaking and entering the premises or ejecting the plaintiff from the premises or taking possession thereof or otherwise interfering with her possession of the premises.*

Defendant Tippett to pay plaintiff's costs of action, including costs of proceedings in the Full Court.

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R. v. *Foster and Others*; *Ex parte Rural Bank of New South Wales*:

Solicitor for the prosecutor, *E. R. Payne.*

Solicitors for the respondents other than the judge, *Dawson, Waldron, Edwards & Nicholls.*

Solicitor for the Commonwealth and the Attorney-General for the Commonwealth, intervenants, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Wagner v. *Gall*:

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

Solicitors for the defendant, *Power & Power*, Brisbane, by *Gill, Oxlade & Broad.*

Solicitor for the intervenant, *F. C. Sinclair.*

Collins v. *Hunter and Another*:

Solicitors for the plaintiff, *Walter Kemp & Townsend*, Melbourne.

Solicitor for the defendant, *G. A. Maling.*

J. B.