REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN COMMUNIST PARTY AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

H. C. OF A. 1950-1951.

SYDNEY, 1950, *Nov.* 14-17, 20-24, 27, 28, 30; *Dec.* 1, 4, 6-8, 11-15, 18, 19.

THE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA AND HEALY . PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

MELBOURNE, 1951, *Mar.* 9.

Latham C.J., Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

THE AUSTRALIAN RAILWAYS UNION AND BROWN . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

BULMER AND OTHERS (SUING FOR THE BUILDING WORKERS' INDUSTRIAL UNION) AND PURSE . . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

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AUSTRALIAN COMMUNIST PARTY v. THE COMMONWEALTH.

THE AMALGAMATED ENGINEERING UNION AUSTRALIAN SECTION AND ROWE . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

THE SEAMEN'S UNION OF AUSTRALIA AND ELLIOTT . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

THE FEDERATED IRONWORKERS' ASSOCIATION OF AUSTRALIA AND McPHILLIPS . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

THE AUSTRALIAN COAL & SHALE EMPLOYEES' FEDERATION AND WILLIAMS . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

Constitutional Law (Cth.)—Powers of Commonwealth Parliament—Defence—The Constitution—Laws of the Commonwealth—Execution and maintenance—Conciliation and arbitration—Public service—Judicial—Acquisition of property—Incidental power—Defence power—Exercise—Existence of war—Requirement—Preparation against risk of war—Enemies—Actual or potential—External and internal—Overthrow or dislocation of established system of government—Alleged revolutionary party—Use of treasonable or subversive means—Dislocation in industries vital to security and defence—Dissolution of party—Bodies of persons

or persons—Unlawful association—Declaration by Governor-General—" Satisfied "—Forfeiture to Commonwealth of property of party and declared persons—Declared persons—Ineligibility to hold office in an industrial organization relating to vital industry—Freedom of " intercourse " among the States—Statute—Preamble—Recitals—Allegations of fact—Effect—Facts—Necessity—Desirability—Proof—Validity of statute—Severability—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*vi.*), (*xxxi.*), (*xxxv.*), (*xxxix.*), 52, 61, 71, 92—*Judiciary Act* 1903-1948 (*No.* 6 *of* 1903—*No.* 65 *of* 1948), *s.* 18—*Commonwealth Conciliation and Arbitration Act* 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949)—*Acts Interpretation Act* 1901-1948 (*No.* 2 *of* 1901—*No.* 79 *of* 1948), *s.* 15A—*Communist Party Dissolution Act* 1950 (*No.* 16 *of* 1950).*

Held by *Dixon, McTiernan, Williams, Fullagar* and *Kitto* JJ. (*Latham* C.J. dissenting) that the *Communist Party Dissolution Act* 1950 is *ultra vires* the Parliament of the Commonwealth and invalid. It cannot be supported under s. 51 (xxxix.) read with s. 61 of the Constitution or under an implied power to make laws for the preservation of the Commonwealth and its institutions from internal attack and subversion, because its provisions do not prescribe any rule of conduct or prohibit specific acts or omissions by way of attack or subversion, but deal directly with bodies and persons named and described, the Parliament itself purporting to determine, or empowering the Executive to determine, the very facts upon which the existence of the power depends. Nor can the Act be supported under s. 51 (vi.) of the Constitution : in the state of ostensible peace existing at its commencement the scope of the defence power does not extend to cover such legislation as was held valid in *Lloyd* v. *Wallach*, (1915) 20 C.L.R. 299.

* The material paragraphs of the preamble are set out in the judgment of *Latham* C.J. at *post* (pp. 133-134).

The following is a summary of the material sections of the *Communist Party Dissolution Act* 1950 :—

Section 4.—(1.) The Australian Communist Party is declared to be an unlawful association and is, by force of this Act, dissolved. (2.) The Governor-General shall, by instrument published in the *Gazette*, appoint a receiver of the property of the Australian Communist Party. (3.) Upon the day upon which that instrument is so published, the property of the Australian Communist Party shall, by force of this Act, vest in the receiver named in the instrument. Section 5.—(1.) This section applies to any body of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State—(*a*) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act was, or purported to be, affiliated with the Australian Communist Party ; (*b*) a majority of the members of which, or a majority of the members of the committee of management or other governing body of which were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party ; (*c*) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time, within that period, promoted, the spread of communism, as so expounded ; or (*d*) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who—(*i*) were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist

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Held by *Webb* J. that the Act was invalid in the absence of evidence by the defendants in support of s. 4.

Held also by *Dixon, McTiernan, Fullagar* and *Kitto* JJ. (*Williams* and *Webb* JJ. expressing no opinion on the point) that the provisions of s. 9 (2) and s. 10 of the Act could not be supported under s. 51 (xxxv.) and (xxxix.) of the Constitution or as legislation with respect to the public service of the Commonwealth, because s. 9 (2) authorized the " declaration " of a person irrespective of his being or proposing to become a servant of the Commonwealth or an officer of an industrial organization registered under a law of the Commonwealth.

Recitals 4 to 9 inclusive in the preamble to the *Communist Party Dissolution Act* 1950 referred to the alleged aims, objects and activities of the Australian Communist Party. In motions brought to obtain declarations that the Act was invalid and for appropriate injunctions the plaintiffs denied the allegations.

Held, upon a case stated, (A) by *Latham* C.J., *Dixon, McTiernan, Williams, Fullagar* and *Kitto* JJ. (1) that the decision of the question of the validity or invalidity of the provisions of the Act did not depend upon a judicial determination or ascertainment of the facts or any of them stated in the recitals, and (2) that the plaintiffs were therefore not entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act was outside the legislative power of the Commonwealth; and (B) by *Webb* J., (1) that the decision of the question of the validity or invalidity of s. 4 of the Act, which declared the Australian Communist Party to be an unlawful association and dissolved it, depended upon a judicial determination or ascertainment of the facts without any limitations by the

Party or of the Central Committee or other governing body of the Australian Communist Party, or are communists; and (ii) make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin. (2.) Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association. (3.) The Executive Council shall not advise the Governor-General to make a declaration under the last preceding sub-section unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security, and two other persons appointed by the Governor-General. (4.) A body of persons declared to be an unlawful association under sub-section (2.) of this section may, within twenty-eight days after the publication of the declaration in the *Gazette*, apply to the appropriate court to set aside the declaration, on the ground that the body is not a body to which this section applies. Section 6.—(1.) Subject to this section, a body of persons in respect of which a declaration has been made under this Act shall, by force of this Act, upon the expiration of twenty-eight days after the publication of the declaration in the *Gazette*, be dissolved. (2.) Where the body applies to the appropriate court to set aside the declaration, the body shall not be dissolved upon the expiration of twenty-eight days after the publication of the declaration in the *Gazette*, but, if the court dismisses the application, the body shall, by

recitals, and (2) that the plaintiffs were entitled to adduce evidence to establish that s. 4 was outside the legislative power of the Commonwealth.

The exercise of the defence power; the judicial power; facts of which the Court may take judicial notice; notorious facts; the delegation of decision to a designated person; the effect of recitals in statutes; and the admissibility of evidence for the purpose of establishing the validity or invalidity of a statute, discussed.

CASE STATED.

An action was brought in the original jurisdiction of the High Court against the Commonwealth of Australia, Robert Gordon Menzies, the Prime Minister of the said Commonwealth for the time being, John Armstrong Spicer, Attorney-General of the said Commonwealth for the time being, William John McKell, the Governor-General of the Commonwealth, and Arnold Victor Richardson the receiver of the property of the Australian Communist Party, by the Australian Communist Party, Ralph Siward Gibson and Ernest William Campbell, who sued on behalf of and for the benefit of all the members of the Australian Communist Party; the Waterside Workers' Federation of Australia and James Healy; the Australian Railways Union and John Joseph Brown; Edwin William Bulmer (who sued for the Building Workers' Industrial Union) and Frank Purse; the Amalgamated Engineering Union, Australian Section, and Edward John Rowe; the

force of this Act, be dissolved upon the day upon which the court dismisses the application. Section 7.—(1.) A person shall not knowingly—(*a*) become, continue to be, or perform any act as, an officer or member of an unlawful association; (*b*) carry or display anything indicating that he is or was an officer or member, or is or was in any way associated with, an unlawful association; (*c*) contribute or solicit anything, as a subscription or otherwise, to be used directly or indirectly for the benefit of an unlawful association; or (*d*) in any way take part in any activity of an unlawful association or carry on, in the direct or indirect interest of an unlawful association, any activity in which the unlawful association was engaged, or could have engaged, at the time when it became an unlawful association. (2.) A person shall not, after the dissolution of an organization or a body of persons by this Act, knowingly—(*a*) do any act or thing which is calculated or intended to maintain that organization or body of persons in existence; (*b*) continue, or assume or pretend to continue, any of the activities of that organization or body; or (*c*) do any other act which assumes or pretends that that organization or body has not been dissolved. Section 8.—(1.) The instrument under this Act declaring a body of persons to be an unlawful association shall appoint a receiver of the property of that body. (2.) Upon the day upon which that instrument is published in the *Gazette*, the property of that body shall, subject to this section, vest in the receiver named in the instrument. Section 9.—(1.) This section applies to any person—(*a*) who was, at any time after the specified date and before the date upon which the Australian Communist Party is dissolved by this Act, a member or officer of the Australian Communist Party; or (*b*) who is, or was at any time after the specified date, a communist. (2.) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged,

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Seamen's Union of Australia and Eliot Valens Elliott; the Federated Ironworkers' Association of Australia and Leslie John McPhillips; and the Australian Coal and Shale Employees' Federation and Idris Williams, for a declaration that the provisions of the *Communist Party Dissolution Act* 1950 were *ultra vires* and void, and for injunctions restraining the defendants from acting thereunder to the prejudice of the plaintiffs.

The said actions were respectively numbered 11, 12, 13, 14, 15, 16, 17 and 18 of 1950.

Upon the actions coming on to be heard *Dixon* J. stated a case, raising questions of law for the Court pursuant to Order XXXII., rule 2, and reserving such questions for the consideration of the Full Court pursuant to s. 18 of the *Judiciary Act* 1903-1948, which was substantially as follows:—

1. All the above-mentioned eight actions were commenced by writ of summons on 20th October 1950 but after the hour at which the *Communist Party Dissolution Act* 1950 (No. 16) was assented to. The object of each of the actions is to obtain a declaration that the provisions of that Act are *ultra vires* and void and injunctions restraining the Commonwealth and the Ministers named as defendants from acting thereunder to the prejudice of the plaintiffs.

2. In the action No. 11 of 1950 the Australian Communist Party, an unincorporated body, is named as a plaintiff under that title but the plaintiffs Gibson and Campbell as well as suing on their

or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, make a declaration accordingly. (3.) The Executive Council shall not advise the Governor-General to make a declaration under the last preceding sub-section unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security, and two other persons appointed by the Governor-General. (4.) A person in respect of whom a declaration is made under sub-section (2.) of this section may, within twenty-eight days after the publication of the declaration in the *Gazette*, apply to the appropriate court to set aside the declaration on the ground that he is not a person to whom this section applies. Section

10.—(1.) A person in respect of whom a declaration is in force under this Act —(*a*) shall be incapable of holding office under, or being employed by, the Commonwealth or an authority of the Commonwealth; (*b*) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth; and (*c*) shall be incapable of holding an office in an industrial organization to which this section applies or in a branch of such an industrial organization. (3.) Where the Governor-General is satisfied that a substantial number of the members of an industrial organization are engaged in a vital industry, that is to say, the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry or the power industry, or any other industry which, in the opinion of the Governor-General, is vital to the security and defence of Australia, the Governor-General may, by instrument published in the *Gazette*, declare that industrial organization to be an indus-

own behalf are described in the writ as suing on behalf of and for the benefit of all the members of the Australian Communist Party. It is the body mentioned in s. 4 of the Act and in various other parts of the Act.

3. Of the remaining seven actions, one (No. 14 of 1950) differs from the others because the plaintiffs or some of them sue on behalf of the members of a trades union, namely the Building Workers' Industrial Union, which is not an industrial organization registered under the law of the Commonwealth or a State and so may fall within the application of s. 5 of the Act. The plaintiffs have therefore a direct interest in impugning the validity of s. 5.

4. In each of the six actions Nos. 12, 13, 15, 16, 17 and 18 of 1950 there are two plaintiffs, viz. an industrial organization of employees registered under Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 and a person being the holder of one of the more important offices in the organization. In actions Nos. 12, 13 and 16 the general secretary, in action No. 17 the national secretary and in action No. 18 the general president are respectively plaintiffs. These five persons are or were at all material times members of the Australian Communist Party and so may fall within the application of s. 9 (1) (*a*) of the Act. The plaintiff organizations are all concerned with vital industries within the meaning of s. 10 (3) of the Act. In action No. 15 a member of the Commonwealth Council of the organization is the co-plaintiff.

trial organization to which this section applies. Section 11.—(1.) If, upon the making of a declaration in respect of a person under this Act, that person holds any office referred to in sub-section (1.) of the last preceding section or is employed by the Commonwealth or by an authority of the Commonwealth, that person shall, by force of this Act, be suspended from the office or employment. (2.) Unless an application has been made to the appropriate court to set aside the declaration, the office held by that person shall, by force of this Act, become vacant, or that person shall cease to be so employed, as the case may be, upon the expiration of the twenty-eighth day after the day upon which the declaration was published in the *Gazette*. (3.) If an application is made to the appropriate court to set aside the declaration, the suspension effected by sub-section (1.) of this section shall continue until the making of an order by the court upon the application. (4.) If the court sets aside the declaration, the suspension of the person concerned shall cease, but, if the court dismisses the application the office held by that person shall, by force of this Act, become vacant, or that person shall cease to be so employed, as the case may be, upon the day upon which the court dismisses the application. Section 12.—(1.) Upon the publication under sub-section (3.) of section ten of this Act of an instrument declaring an industrial organization to be an industrial organization to which that section applies, any office in that industrial organization or in a branch of that industrial organization held by a person in respect of whom a declaration is in force under this Act shall, by force of this Act, but subject to this section, become vacant. Section 14. A contract or agreement shall not be made by the Commonwealth or by an authority of the Commonwealth with a person in respect of whom a declaration is in force under this Act under which a fee or other remuneration is

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He is a communist within the definition of that word in s. 3 and would fall within s. 9 (1) (*b*) of the Act.

5. In all eight actions the plaintiffs attack the validity of the Act and of its separate provisions upon the grounds: (i) that its provisions are outside the scope of any legislative power of the Commonwealth and are not brought within any legislative power by the statements contained in the preamble because, amongst other reasons, the statements or some of them are not in accordance with fact; (ii) that provisions of the Act conflict with Chapter III. of the Constitution; (iii) that provisions of the Act conflict with s. 92 of the Constitution; (iv) that provisions of the Act conflict with s. 51 (xxxi.) of the Constitution.

6. In all eight actions, by pleading and by affidavit, the plaintiffs have denied the statements of fact contained in the fourth, fifth, sixth, eighth and ninth recitals of the preamble to the Act. In actions Nos. 11, 12, 15, 16, 17 and 18 the denials take the form of specific traverses of the statements in such recitals, in actions Nos. 13 and 14 of a general denial of the allegations contained in the preamble other than the first three recitals thereof.

The plaintiffs propose to adduce evidence in support of these denials with a view to establishing that the Act is outside legislative power of the Commonwealth and void.

In action No. 11 in addition to making the denials already mentioned the plaintiffs have filed an affidavit made by the plaintiff Ralph Siward Gibson on 30th October 1950 stating with respect to the statements respectively contained in the fourth, fifth, sixth,

payable in respect of the services of that person. Section 15.—(1.) It shall be the duty of the receiver of an unlawful association to take possession of the property of the association, to realize that property, to discharge the liabilities of the association and to pay or transfer the surplus to the Commonwealth. Section 18. The receiver of an unlawful association may direct that any disposition of property of the association within one year before the date upon which the association was dissolved shall be void as against the receiver and the disposition shall be so void accordingly but nothing in this section affects the rights of a purchaser, payee or encumbrancee in good faith and for valuable consideration or the rights of a person making title in good faith and for valuable consideration through or under a person who is not a purchaser, payee or encumbrancee in good faith and for valuable consideration. Section 26. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for giving effect to this Act and in particular for prescribing penalties for not exceeding Five hundred pounds or imprisonment for six months for any offence against the regulations. Section 27. Where the Governor-General is satisfied that the continuance in operation of this Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a Proclamation accordingly and thereupon this Act shall be deemed to have been repealed.

eighth and ninth recitals of the preamble what contrary matters they desire to shew by evidence. A copy of the affidavit accompanies this case and is part of it. The contents of the said affidavit are hereinafter set forth.

7. It appeared to me that the questions whether the evidence described in par. 6 of this case is receivable for the purpose of affecting the validity of the Act and whether the validity or invalidity of the Act depends upon the issues of fact raised by the plaintiffs' denials of the recitals of the preamble ought to be decided before any evidence is given and accordingly that within the meaning of Order XXXII., rule 2 it would be convenient to have them so decided. It further appeared to me that if the Full Court should be of opinion that such evidence is not so receivable or that the validity or invalidity of the Act does not so depend the question whether the provisions of the Act are or are not valid ought to be decided before any evidence is given or any question or issue of fact tried.

I therefore gave directions for raising such questions for the decision of the Full Court.

8. In support of the contention that s. 92 affords the plaintiffs protection from the provisions of the Act certain facts were deposed to in affidavits filed for the plaintiffs and these facts the defendants did not dispute.

Except in action No. 11 of 1950 there is little difference in the material circumstances deposed to as they affect the respective plaintiffs or in the form in which the facts are stated. What is stated in one case will, so far as I can see, suffice for the determination of the others. Accordingly I annex as part of this case a copy of pars. 6, 7 and 8 of the affidavit of James Healy made on 20th October 1950 and filed in action No. 12 of 1950 wherein the Waterside Workers' Federation of Australia and the said James Healy are plaintiffs. The said paragraphs are hereinafter set forth. In action No. 11 of 1950 in which the plaintiffs sue on behalf of the members of the Australian Communist Party as well as themselves the material circumstances are stated in pars. 13 and 14 of an affidavit made by Ralph Siward Gibson on 20th October 1950. A copy of pars. 13 and 14 is annexed as part of this case. The said paragraphs are hereinafter set forth.

9. The writs, pleadings, affidavits and orders in these actions are to be available to the Full Court if the Full Court should see fit to refer to them.

The questions for the opinion of the Full Court were as follows :—

1. (a) Does the decision of the question of the validity or invalidity

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of the provisions of the *Communist Party Dissolution Act* 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth ? 2. If no to either part of question 1 are the provisions of the *Communist Party Dissolution Act* 1950 invalid either in whole or in some part affecting the plaintiffs ?

Paragraphs 6, 7 and 8 of the affidavit of James Healy as referred to in par. 8 of the case stated were as follows :—

6. The said Union has a membership of approximately twenty-seven thousand spread throughout the various States of the Commonwealth and is engaged in and a substantial number of the members thereof are engaged in a vital industry within the meaning of that term as contained in the said Act.

7. The membership of the said organization is necessarily spread throughout the various States of the Commonwealth and the affairs and business and activities of the organization are organized upon an Australia-wide and inter-State basis.

8. (a) The general business and activities and duties of the plaintiff this deponent as such General Secretary of the organization include *inter alia* the conduct of substantial inter-State correspondence with the various branches of the organization in all the States and the distribution inter-State to members of literature relating to the affairs of the Union including the distribution inter-State to members of the Union of the official newspaper of the Union ; the travelling backwards and forwards from one State to another and between the States and from State to State for the purpose of and to attend the affairs of the various branches in relation to each other and in relation to the Union as a whole and to represent the Union in the various States of the Commonwealth in various disputes of an inter-State industrial character and nature ; the compiling of logs of claims for its members throughout the Commonwealth and the attending in and travelling to the various States of the Commonwealth to negotiate with employers engaged in inter-State trade and commerce for the settlement of claims and disputes ; the appearing for and on behalf of the Union in the various States before divers Boards and Tribunals established in connection with the industry with which the Union is concerned and the travelling between the States for the said purposes ; the travelling into and between the States for the purpose of preventing

and settling by negotiation and conciliation and arbitration of industrial disputes of an inter-State character and nature and which extend beyond the limits of more than one State and which arise in the industry from time to time; the travelling to and from and into and between the States from time to time to address the members of the organization on matters vital to and of interest in and importance to the members of the organization in the various States and travelling into and between the various States for the purpose of investigating their industrial claims of an inter-State character and to examine and ascertain in the various States the needs wants and requirements of members in their relations with associations of employers and which are of an inter-State nature and character; the travelling into and between the various States to appear before the Commonwealth Court of Conciliation and Arbitration and to assist and instruct others to appear before the said Court in the various States from time to time in connection with the prosecution of claims for awards and variations of the same for the benefit of members in the Commonwealth and for the purpose of prosecuting for breaches of the Act and awards and recovery of penalties in the various States and to oppose and contest claims of an inter-State industrial nature and character by employer associations and other industrial organizations and bodies brought before the said Court in the various States; the travelling to and from and into and between the States to appear before the Commonwealth Court of Conciliation and Arbitration for the various purposes for which the said Court is established to deal with industrial matters and industrial disputes of an inter-State character and nature which concern the Union and its members in the various States and which extend or are likely to extend beyond the limits of more than one State; travelling into and between the States of the Commonwealth for the purpose of industrial meetings of an inter-State nature with other organizations similarly registered under the said Act and their representatives and whose business activities and duties are of an inter-State character and nature and which have aims and objects similar to or similar in interest with those of the Union and the travelling inter-State and between the States from time to time to attend the executive conferences and meetings of the executive and governing bodies of the branches as by the said rules provided. (b) The business and the activities and duties of the Union include and relate to the business and duties and activities of the General Secretary of the Union as in the previous sub-section set forth.

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Paragraphs 13 and 14 of the affidavit of Ralph Siward Gibson as referred to in par. 8 of the case stated were as follows :—

13. The work of the Party includes the raising of funds, the promulgation of its teachings by means of literature and printed works, radio lectures and newspapers throughout the Commonwealth and throughout each of the States. The raising of funds relates to the purposes of making payments by all members of the Party throughout Australia to the Central Committee, to finance the educational work of the Party, to pay expense allowances, wages and salaries of Party officials and to defray election expenses and to secure and pay for wireless broadcasts and the dissemination throughout the Commonwealth of Party propaganda and to finance throughout the Commonwealth and the States lecture tours.

14. The work of the Party and the development and achievement of its aims and objects involve correspondence between the members in various States of the Commonwealth, social and political intercourse between the various States of the members of the Party, the necessity for members to travel between the States frequently and from time to time for the purposes of the Party and for the purposes of disseminating throughout the Commonwealth by trained speakers and lecturers, the doctrines and teachings of the Party and the political objectives of the Party and for the purpose of competing and assisting at all Commonwealth and State Elections held from time to time and for the purposes of raising funds as in the preceding paragraph set forth and including the sale, transmission and distribution by the Central Committee to various State and District Committees of pamphlets, leaflets and other literature relating to the Party and its activities.

Omitting formal parts, the contents of the affidavit of Ralph Siward Gibson referred to in par. 6 of the case stated were as follows :—

1. I am one of the above-named plaintiffs.

2. I desire to give and call oral evidence in this action on behalf of myself and the members of the Australian Communist Party to rebut allegations contained in the preamble to the *Communist Party Dissolution Act* 1950 and to describe the activities in which the Party has been engaged.

3. I deny, and desire to submit evidence to rebut, the allegations that the Party in accordance with the basic theory of Communism as expounded by Marx and Lenin or at all engages or has engaged in activities and/or operations designed to assist or accelerate the coming of a revolutionary situation in which the Party acting as a revolutionary minority would be able to seize power and

establish a dictatorship of the proletariat. I desire to call evidence to show on the contrary :—

(a) that revolutionary situations arise, not from the activities or operations of the Party, but from the nature of the development of capitalism itself, with its crises and wars ; and that this view is in accordance with the teachings of Marx and Lenin ;

(b) that the activities of the Party are designed, not to accelerate the coming of a revolutionary situation, but to convince and organize the working class so that when such a situation arises it will be able to take power ;

(c) that the Party, while leading the struggle to end capitalism, also leads the struggle for the best possible living conditions while capitalism remains ; and that all teachers of Communism from Marx onwards have advocated this course ;

(d) that the Party, far from aiming to seize power as a revolutionary minority, states clearly that the emancipation of the working class must be the act of the working class itself, supported by the majority of all toiling people ;

(e) that the Party adheres to the clause in its Constitution which states : " The method pursued by the Australian Communist Party to realize its objective is the democratic method, that is, the winning of the majority of the Australian people " ;

(f) that the aim of the Party is precisely to substitute the rule of the majority in the interests of the majority for the minority rule of big business which exists today ;

(g) that the Party has consistently fought, and fights now, to defend and to extend the democratic liberties of the people, and upholds the statement of Lenin : " There is no other road to socialism but the road through democracy, through political liberty ".

4. I deny, and desire to submit evidence to rebut, the allegation that the Party engages or has engaged in activities or operations designed to bring about the overthrow and/or dislocation of the established system of government in Australia and the attainment of economic industrial or political ends by force violence intimidation and/or fraudulent practices. I desire to call evidence to show, on the contrary :—

(a) that the threat to the established system of government in Australia comes in fact from the development of fascist laws and actions inspired by monopoly capitalists

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at home and abroad who are the bitter enemies of Communism;

(b) that the Party, while upholding socialist democracy as far superior to capitalist democracy, is in fact leading the fight to preserve Australia's established democratic liberties and institutions against the forces of fascist repression, thought control and police tyranny;

(c) that the *Communist Party Dissolution Act* is in itself an extreme threat to the established rights and traditions of the Australian people;

(d) that force and violence are created, not by the Party, but by capitalism, the most violent system of history, which has given birth to fascist terror, colonial oppression on a vast scale, and above all to imperialist wars of unparalleled violence;

(e) that the Party aims to abolish all violence through the abolition of capitalism and the establishment of socialism, and finally communism, which create the conditions for lasting civil and international peace;

(f) that the Party declares the teaching of all history to be that minority ruling classes will defend their rule by force where possible and believes that the working people must be prepared for forceful resistance by the monopoly capitalists to the ending of their power and must be prepared to overcome this resistance;

(g) that the dictatorship of the proletariat, as conceived by the world teachers of Communism and by the Australian Communist Party, involves the use of violence as the sanction of the laws of socialist society against dispossessed exploiters resisting the advent of the new order and brings a much richer and fuller democracy to the masses of the people;

(h) that the Party has never advocated violence, and in fact in Australia today calls for violence come, not from the Party or its members, but from those who desire to stop the peaceful existence of the Party and the progressive movement of the people;

(i) that, far from engaging in fraudulent practices, the Party holds high moral principles and demands that these be practised in real life;

(j) that the Party utterly rejects the view that socialism can be won by fraud or conspiracies, and bases its morality

on the needs of the working class struggle which demands above all the telling of the truth to the people.

5. I deny, and desire to submit evidence to rebut, the allegation that the Party is an integral or any part of the world communist movement or any movement which in the King's Dominions or elsewhere engages or has engaged in espionage or sabotage or activities and operations of a treasonable or subversive nature or engages or has engaged in activities or operations similar to those or having an object similar to the object of those referred to in the last two preceding paragraphs. I desire to call evidence to show, on the contrary :—

(a) the Party is an Australian party, which has sprung from the democratic traditions of the Australian working people, and has further developed and strengthened those traditions ;

(b) the Party is a part of the world-wide revolutionary movement of the working class which has come into existence in all countries by reason of the need of the working class of every land for a party which would consistently defend and advance its interests ;

(c) the Party is an entirely independent organization, controlled and financed by its own members inside Australia ;

(d) the Party, in accordance with the teachings of Marx and Lenin, completely rejects the methods of espionage or sabotage as contrary to the interests of the working class and the socialist movement ;

(e) the Party carries on the most patriotic activities, fighting for the people's liberties and living standards, and for peace. The Party has shown in its thirty years of existence that it alone has consistently fought for an independent, peaceful and prosperous Australia ;

(f) the Party leads the struggle against the real authors of treasonable and subversive activities, the Federal Government and its wealthy monopolist supporters, who aim to sacrifice Australian lives and independence in an American war of conquest ;

(g) the Party is inspired by the high patriotic aim of creating a socialist Australia in which there will be end to poverty, unemployment and war ; in which there will be economic security, adequate leisure and rapid material and cultural progress for all ; in which Australia's resources will be developed and its population increased and decentralized ;

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in which there will be no classes or class struggles; in which a united Australian people will work freely and enthusiastically for the common good, living in lasting peace with the people of other lands;

(h) Communist Parties throughout the world have been foremost fighters for their people, while Quislings and traitors have sprung from the ruling landlord and capitalist classes of society.

6. I deny, and desire to submit evidence to rebut, the allegations that the activities or operations of or encouraged by the Party or its members or officers and other persons who are or may be Communists are designed to cause by means of strikes or stoppages of work or any means and have by those means or any means caused dislocation, disruption or retardation of production or work in vital or any industries. I desire to call evidence to show, on the contrary:—

(a) that the Party and its members in the trade unions work to defend and improve the conditions of workers in industry by the best and most effective means in any given situation;

(b) that strikes are caused by the very conditions which exist under capitalism and which existed long before the formation of the Party;

(c) that the aim of the Party in industrial struggles is to help organize the workers to win their just demands as speedily as possible; and that Communist leadership in trade unions has in fact resulted in the winning of living and working conditions of great importance to the Australian working class, only part of which have been gained by strike action;

(d) that the Party aims also in the course of industrial struggles to help the workers learn from their own experiences the need to remove the basic cause of their discontent, capitalism, and the way to remove it;

(e) that the Party, while it aims to give leadership in trade unions, stands for the fullest trade union democracy, for the complete right of trade union members to decide their own affairs and for their fullest participation in all trade union activity;

(f) that the Party carries out a fighting program against depression, which, whenever it comes, causes many times the loss of production caused by all strikes combined;

(g) that socialism, for which the Party fights, leads to an unparalleled rise in production and to the disappearance of strikes with the disappearance of the conditions which cause them.

7. I deny, and desire to submit evidence to rebut, the allegation that it is necessary for the security or defence of Australia or for the execution and maintenance of the Constitution and laws of the Commonwealth that the Party or bodies alleged to be connected with it should be dissolved and their property forfeited or that members or officers of the Party or persons who are Communists should be disqualified from employment by the Commonwealth or from holding office in any industrial organization whether engaged in a vital industry or not. I desire to call evidence to show, on the contrary :—

(a) that the activities and operations of the Party are designed to preserve and further the independence, freedom, prosperity and peaceful existence of the Australian people ;

(b) that the Party leads the fight against the only Power which threatens Australian independence—American Imperialism—which seeks to dominate Australia economically, politically, militarily and culturally ;

(c) that the Party is opposed to the Federal Government's war policy, which is aggressive and imperils the security and defence of Australia ;

(d) that security and defence depend above all on the preservation of peace, and that the whole work of the Communist Party centres on the struggle to preserve peace through effective outlawing of the atom bomb, simultaneous disarmament, loyal observance of the United Nations' Charter and the stopping of all aggressive interventions in the affairs of other countries ;

(e) that the Party seeks to defend Australia's security and independence by demanding a policy of friendship with all peoples and in particular with the Soviet Union and People's Democracies, which desire a lasting peace in order to advance their best plans of peaceful economic construction and to raise the living standards of their people ;

(f) that the real threat to the Constitution and laws of the Commonwealth comes from the people wanting war and fascism in our midst, against whom the Party wages the most determined and resolute struggle.

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8. In support of the propositions outlined above, I desire to adduce oral evidence and to refer to the works of Marx and Lenin and other leading writers on Communism and to the writings of leading members of the Party. Such quotations are too numerous to include in this affidavit in the time available for its preparation.

Upon the case stated coming on for hearing, the Federated Ship Painters' and Dockers' Union, the Sheet Metal Workers' Union and the Federated Clerks' Union of Australia (New South Wales Branch) and Maurice John Rodwell Hughes—being actions respectively numbered 39, 40 and 41 of 1950—applied for and were granted leave to intervene.

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

G. E. Barwick K.C. (with him *A. R. Taylor* K.C., *W. J. V. Windeyer* K.C., *Stanley Lewis* K.C., *R. Ashburner*, *B. B. Riley*, *M. V. McInerney*, *C. I. Menhennitt*, *G. H. Lush* and *B. P. Macfarlan*), for the defendants.

A review of the *Communist Party Dissolution Act* 1950 shows its limited nature, the very definite result which it seeks to produce.

The character of the Act is summed up as follows :—It disbands the Australian Communist Party (s. 4). It makes provision for the realization of that Party's property and the payment of its debts (ss. 4 (2), 15, 17, 18, 19) ; for obtaining possession of, and the preservation of, that property (ss. 21, 22) ; for judicially resolving questions with respect to that property (s. 16), and for its forfeiture (preamble, ss. 4 (3), 15 (1)). The Act takes steps to prevent the reformation of the Party, either overtly or covertly (s. 7), both by direct command (s. 7) and by preventive disposal of its funds (s. 15 (1)). The Act authorizes the disbanding of any bodies, other than registered unions, which—(i) (a) affiliate with the Party, (b) are likely to be controlled or used by communists, or by others, for communist purposes (s. 5 (1)), and (ii) whose continued *existence* may, in the view of the Governor-General, be prejudicial to the defence and security of the country, or the execution and maintenance of the Constitution, or of the laws of the Commonwealth (s. 5 (2)). The Act authorizes steps which will preclude persons—(a) who are or have been communists (s. 9 (1)), and (b) who may be engaged or likely to engage in subversive activities prejudicial to the defence of the country or to the execution and maintenance of the Constitution and of the laws of the Commonwealth (s. 9 (2)), from (i) being in office or employment under,

or making any contracts with the Commonwealth or any Commonwealth authority, and (ii) holding office in any industrial organization which is closely connected with industries vital to the defence of the country. The Act provides machinery for judicial review of the " qualification " of the bodies, or persons (ss. 5 (4) (6), 9 (4) (5) (6)), and commits to the Governor-General the identification of the bodies or persons whose existence or conduct is prejudicial to the defence of the Commonwealth or the execution or maintenance of the Constitution and of the laws of the Commonwealth, and requires—(i) that there shall be material before the Governor-General on which his declaration as to bodies or persons is founded (ss. 5 (3), 9 (3)), and (ii) that that material shall have been considered by an appropriate committee before it is acted upon by the Governor-General. The preamble of the Act—(a) indicates powers which the Parliament considered itself to be exercising; (b) states some evils which the Parliament considered to exist and for which it had provided a remedy; (c) states reasons of the Parliament for enacting the substantive provisions; and (d) states the necessity—(i) for a law upon the subject matter of the Act as a means of the defence of the country, the execution and maintenance of the Constitution, and of the laws of the Commonwealth, and (ii) for the particular provisions actually made in the Act for dealing with the subject matter thereof. The Act is preventive as distinct from punitive. It is preventive in relation to conduct likely to prejudice the defence of the country, the execution and maintenance of the Constitution, and of the laws of the Commonwealth. It is directed to prevention of an apprehended danger. The Act recognizes the force and strength which organization brings and the great capacity to do harm. In so far as the Act depends on any transient situation it is limited in operation to the continuance of that situation (s. 27). According to the doctrine of the Court it would, in any event, cease to be operative on the passing of the situation (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1); *Crouch* v. *The Commonwealth* (2); *Hume* v. *Higgins* (3); *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (4); *Re Reference on the Validity of War-Time Leasehold Regulations* (5).) The disbanding of the Associations is final. So far as persons are concerned as distinct from the organization the Act provides for the revocation of declarations as to the persons and the revocation

(1) (1945) 71 C.L.R. 161, at pp. 170, 171, 180.
(2) (1948) 77 C.L.R. 339, at p. 351.
(3) (1949) 78 C.L.R. 116, at p. 133.
(4) (1923) A.C. 695, at pp. 706, 707.
(5) (1950) 2 D.L.R. 1.

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of the declarations as to the industry. Therefore, the Act as to the persons, even whilst it is still on foot, does provide for an adjustment of the Act to the changed circumstances as they may arise. The general validity of the Act, other than some parts of it, is placed, *firstly*, on the defence power conferred by s. 51 (vi.) of the Constitution, and, *secondly*, on the power of making laws in respect of the maintenance of the Constitution or the execution of the laws, whether that power be derived from a combination of s. 51 (xxxix.) and s. 61 of the Constitution, or whether it be a power which comes from or arises from the very existence of the Commonwealth itself as a body politic. The defence power is effective to cover two broad categories of law, namely, the making of laws which are *ex facie* or essentially laws of defence themselves, and the making of laws for the matters which, though not essentially matters of defence, may be conceivably connected with defence. The Act in its entirety is, upon its face, a law with respect to defence apart from its recitals and apart from any current circumstances. Alternatively, the Act, apart from s. 4, is such an Act, and having regard to the recited reasons for the enactment, s. 4 is an Act with respect to defence. Section 4 is the only one which in effect requires the recitals. Alternatively, having regard to the recited reasons for the Act, it is an Act with respect to defence. Alternatively, the Act is valid as dealing with matters which, in the current circumstances as judicially known, are within the ambit of the defence power. Again, alternatively, the Act is valid as dealing with matters which Parliament has asserted are dealt with for the defence of the country, which statement of Parliament is not contradicted or shown to be untenable by any judicial knowledge. In dealing with the defence power the Court has, on numerous occasions, pointed out that it is a power which according to the circumstances authorizes more or less legislative interference with matters which otherwise might have been wholly dealt with by the States. The defence power, even in times of peace in the sense that they were not times of actual hostility, will support many activities (*Adelaide Society of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1); *Burns* v. *Ransley* (2); *Koon Wing Lau* v. *The Commonwealth* (3); *Hume* v. *Higgins* (4)). The Act is *in toto* essentially a defence Act, without the recitals at all; with those recitals it is essentially a defence Act, and, in any case, without the recitals, simply upon what the Court would know of judicial knowledge, a sufficiently rational connection can be seen

(1) (1943) 67 C.L.R. 116, at p. 132.
(2) (1949) 79 C.L.R. 101, at p. 110.
(3) (1950) 80 C.L.R. 533.
(4) (1949) 78 C.L.R., at p. 133.

between the situation and the law to bring it within power. The principal factors in the public situation as at the date of the passing of the Act, namely, 20th October 1950, of which the Court would take judicial knowledge are as follows: (a) it was not a time of peace in the sense of a time of tranquility and absence of hostile intent; (b) it was a period of uneasy apprehension of international conflict; (c) in these days wars do not begin with a declaration of war—that is an outmoded requisite; (d) these days of tension were days of tension between Powers with which this Commonwealth is closely and inevitably associated, and what is called in the *Subversive Activities Act* 1949 (U.S.A.)—"the most powerful existing communist totalitarian dictatorship" (*R.* v. *Sharkey* (1)); (e) that period of tension and apprehension was no mere passing short phase; it has extended down at least to the time of the passing of the Act and beyond and shows no real sign of abatement; (f) that Power with whom the tension existed has expanded its effective borders since the cessation of hostilities in World War II and has greatly extended its influence, which is communistic, into and over neighbouring States, which can now fairly be regarded as satellite States; (g) now included in those satellite States is China, an area coming closer to the Commonwealth's territorial position; (h) that period of tension, so far from abating, had a manifestation, in that at the date of the passing of the Act the Commonwealth had forces in the field and that in the Commonwealth its armed forces were being strengthened; (i) the Commonwealth was engaged in a programme of munition expansion and the development of secret weapons; (j) Great Britain and United States of America, with whom the Commonwealth was in close association, were likewise strengthening their defences in an abnormal way; (k) the forces opposed by the Commonwealth in the field, before, at and after the date the Act was passed, were communist-supported forces; (l) at the time of the passing of the Act a possible extension of the conflict was expected, an expectation which, so far, has proved correct in that today other communist forces are opposed to the Commonwealth's army and air force; (m) so far from this being a time of peace there exist in the Commonwealth and elsewhere very many signs of armed conflict, including the issuing of casualty lists; (n) communism is basically a world movement, not by chance, but by its very nature, in the sense of being above the national interest; (o) communists "march together", whether they be integrated into a world organization, or be a group of national organizations, they march in line, in

(1) (1949) 79 C.L.R. 121, at pp. 142, 164, 165.

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policy and objective; (p) communists of necessity sympathize with the aims and ambitions of Soviet Russia, which is the great communist State; (q) communists at the time of the passing of the Act did and still do disapprove of the Commonwealth's intervention in Korea—see Gibson's affidavit, pars. 4 (g), 5 (b) (f), 7 (b) (c) and (e), which demonstrates that this is common notorious knowledge; (r) in modern days espionage and sabotage have had greater significance than aforetime and are not limited to times of war: they are often most important in times of preparedness; (s) fifth-column activities, including the dislocation and destruction of production or work in vital industries, are nowadays frequently used by an enemy and have become recognized features of warfare: such activities frequently commence, indeed from their nature are bound to commence, prior to the outbreak of hostilities, and are most effective or likely to be effective in pre-belligerency days; and (t) success in warfare in these days depends more and more on industrial efficiency and industrial potential, particularly in the heavy industries of a country. Therefore the crippling of vital industries before armed conflict is just as important, if not more effective, than their destruction during actual hostilities. The foregoing facts are in the Court's knowledge as notorious facts, of which it is entitled and indeed bound to take judicial notice. The principle and extent of judicial knowledge is shown in *Holland* v. *Jones* (1); *R.* v. *Foster* (2); *Farey* v. *Burvett* (3); *Stenhouse* v. *Coleman* (4); *R.* v. *Vine Street Police Station Superintendent*; *Ex parte Liebman* (5); *Re the Pacific and the San Francisco* (6); *Taylor* on *Evidence*, 12th ed. (1931), pp. 3-23. Under those conditions the Parliament might rationally think that the then state of the country called for the disbanding of the Communist Party and the preventing of communists from influencing the industrial policy of unions closely associated with the vital industries of the country. *Ex facie*, it is essentially a matter of defence, or defence law, quite independently of the recitals and merely upon the enacting provisions of the Act. Unlike the regulations under consideration in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (7), the Act goes no further really than disbanding the Party and dealing with property which really belongs to it, having due regard to the rights of third parties, nor, unlike that case, has the Party any innocent activities. Sections 5 and 9 are similarly constructed

(1) (1917) 23 C.L.R. 149, at p. 152.
(2) (1949) 79 C.L.R. 43, at p. 52.
(3) (1916) 21 C.L.R. 433, at pp. 442, 443.
(4) (1944) 69 C.L.R. 457, at p. 469.
(5) (1916) 1 K.B. 268, at pp. 274, 275.
(6) (1917) 33 T.L.R. 529, at p. 530.
(7) (1943) 67 C.L.R. 116.

sections addressed to the subject of defence and are equally applicable to the matter of maintaining the Constitution and the laws of the Commonwealth. Section 5 (2) is plainly a law with respect to defence. A law which enables the Governor-General to make a declaration on his being satisfied that the continued existence of a body of persons would be prejudicial to the defence and security of the Commonwealth is a law with respect to defence. A law which gave the Governor-General power to make a declaration if he was satisfied or of opinion that the continued existence of a body of persons was prejudicial to the execution or maintenance of the Constitution or of the law would be a good law with respect to that topic (*Lloyd* v. *Wallach* (1); *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (2); *O'Flanagan* v. *Macfarlane* (3); *Ex parte Walsh and Johnson*; *In re Yates* (4); *Ex parte Walsh* (5); *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (6)). The cases show that the decision of that sort of matter is not essentially a judicial matter. It is by its very statement a matter of defence; conduct and activities prejudicial to defence constitute essentially a defence criterion. If that submission be right the law is a law with respect to defence and the consequences that flow on that criterion, subject to what was said in the *Jehovah's Witnesses Case* (7), is essentially a matter for the Parliament; thereafter it is exactly in the same category as the aliens were in *Ex parte Walsh and Johnson* (8), in the view of all the Court, that the law being an immigration law it did not matter that its operation depended upon the opinion of a Minister. The extent of the law was essentially a matter for Parliament. Three ideas run through the cases: *first*, that a law which depends for its operation on the opinion of the Minister or the Governor-General as to a matter within the competence of the Commonwealth Parliament is a valid law at any time; *second*, that a law may be made to operate upon the opinion of a Minister or the Governor-General if the consequences which are attached to his opinion are related to the power; and *third*, that it is only in time of stress or emergency that a law may be made to depend for its operation on the opinion of a Minister or the Governor-General. The first two ideas are correct (*Jehovah's Witnesses Case* (9)). A law does not cease to be a law with respect to defence because the

(1) (1915) 20 C.L.R., at pp. 303, 305, 309.
(2) (1916) 22 C.L.R., at pp. 273, 275, 277, 281.
(3) (1923) 32 C.L.R. 518.
(4) (1925) 37 C.L.R., at pp. 58, 60, 61, 66, 67, 69, 132.
(5) (1942) A.L.R. 359.
(6) (1943) 67 C.L.R., at pp. 135, 136, 150, 151.
(7) (1943) 67 C.L.R. 116.
(8) (1925) 37 C.L.R. 36.
(9) (1943) 67 C.L.R., at pp. 152, 153, 161, 162, 166, 167.

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consequences are heavy, and it is nothing to the point that it makes an inroad upon property or personal liberty. The power to determine whether a person is acting prejudicially is clearly not a judicial power. Conduct—activities prejudicial to defence—is essentially a defence criterion. The designation of the conduct is sufficiently specific. As defence essentially includes preparedness, the prejudicial acts include sabotage, espionage and " fifth column " activities. The existence of a state of war was not essential to the validity of the laws in question in the cases mentioned above except as to the consequences which flowed by the law upon the particular opinion or satisfaction. In this case the consequences are commensurate—not disproportionate, fantastic or capricious. So long as Parliament is dealing with such matters as sabotage, espionage, " fifth column " activities, and other activities prejudicial to defence, the necessity for such measures and the precise form of prevention are entirely matters for the Executive. The connection between the provisions of the Act and the defence of the Commonwealth are obvious. A law, the criterion for which is a matter for defence, made by Parliament is a defence law. If Parliament makes the opinion of the Governor-General as to a matter of defence the criterion of its operation then that equally is a law with respect to defence, as Parliament has full power over the subject matter. The nature of the provision as to the subject matter which Parliament makes is for Parliament and not for the Court. A good deal more than the satisfaction as to the prejudicial nature of the person's conduct was left to the Minister in *Ex parte Walsh* (1). Sections 5 and 9 are clearly, *ex facie*, at the very heart of the defence power.

Section 4 is sufficiently bound up with ss. 5 and 9 and the text of the Act is sufficient to establish that s. 4 is equally valid without any assistance from the recitals or the situation. If s. 4 is not *ex facie* defence it is so when regard is had to the recitals. The recitals are a statement of Parliamentary reasons for the declaration. Section 4 is, *ex facie*, a law of defence because it is at the heart of defence to dissolve those bodies of which Parliament forms the view that their continued existence is prejudicial to the security and safety of the Commonwealth. The Act would be a law of defence even if cognizance had to be taken of the consequences, because the consequences in this case are commensurate and are quite different from the consequences in the *Jehovah's Witnesses Case* (2). Even without the recitals, but with the matters that are within judicial knowledge, the Act would be a good measure of

(1) (1942) A.L.R. 359.

(2) (1943) 67 C.L.R. 116.

defence. Only a possible logical, not factual, connection with defence need be shown (*Australian Woollen Mills Ltd.* v. *The Commonwealth* (1); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (2); *Dawson* v. *The Commonwealth* (3); *Miller* v. *The Commonwealth* (4); *American Communications Association* v. *Douds* (5)). It must be simply a rational, logical connection, as between facts that must be common to every suit and that would always be common as between all parties. Such facts would be facts that would be judicially known.

[DIXON J. referred to *Fierstein* v. *Conaty* (6).]

In the circumstances the situation, as outlined, and as would be known to the Court in October 1950, was such that it could not be said that Parliament could not rationally think that measures to disband the Australian Communist Party were not called for. Each of the facts referred to above is notorious, and, considered together, the conclusion is inescapable that there is a possible logical connection between that situation and the Act. Included in the material of which the Court will take judicial notice is such material in the recitals as is not inconsistent with any known facts, known by judicial notice. The matter was notorious and was within judicial knowledge. A statement contained in recitals in a statute is known to the Court (*South Australia* v. *The Commonwealth* (7); *Farey* v. *Burvett* (8); *Pankhurst* v. *Kiernan* (9)); and see *Unlawful Associations Act*, 1916-1917. Although in 1950 there was not a situation of general war, neither was it a situation of complete peace. Times of emergency might very well call for much the same measures as might be called for during a state of actual hostilities (*Fernando* v. *Pearce* (10); *Ex parte Walsh and Johnson* (11)) shows that a law which made the criterion the opinion of the Minister, e.g., the existence of a body prejudiced to defence, would be a good law of defence. If any of the foregoing submissions be correct, then the validity of the Act does not depend upon the judicial determination of the objective truth of the existence of any of the objective facts in the recitals. The power to pass the Act can be traced to s. 51 (xxxix.) of the Constitution, so it can be regarded as something that comes from the

(1) (1944) 69 C.L.R. 476, at p. 490.
(2) (1945) 71 C.L.R., at pp. 179, 181.
(3) (1946) 73 C.L.R. 157, at p. 173.
(4) (1946) 73 C.L.R., at pp. 202, 203.
(5) (1949) 339 U.S. 382, at pp. 391-392, 392, 397, 399, 405, 418, 424-431 [94 Law. Ed. 925, at pp. 939-940, 940, 943, 944, 947, 954, 957-961.]
(6) (1930) 41 Fed. Rep. (Second Series), 53.
(7) (1942) 65 C.L.R., at p. 432.
(8) (1916) 21 C.L.R. 433.
(9) (1917) 24 C.L.R. 120.
(10) (1918) 25 C.L.R. 241, at p. 250.
(11) (1925) 37 C.L.R., at pp. 57-71, 97, 127, 132.

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construction of the Constitution itself (*Burns* v. *Ransley* (1); *R.* v. *Sharkey* (2)). Those cases support the proposition that the Commonwealth has legislative power to maintain the Constitution, legislative power with respect to the execution and maintenance of the Constitution and the laws of the Commonwealth. Sections 5 (2) and 9 (2) of the Act are laws with respect to that matter. It is *ex facie* a law directed to the matter because it makes the criteria of the Governor-General's action his view that the conduct or execution or the existence is prejudicial to the maintenance of the Constitution and the laws of the Commonwealth. The provisions are not punitive, but are merely preventive (*R.* v. *Hush*; *Ex parte Devanny* (3)). The forfeiture of the property of persons who have put themselves outside the law is a well-recognized feature of the law: *Chitty's Law of the Prerogatives of the Crown* (1820), p. 213. The recitals of the Act show clearly that the reason for the " unlawfulness " includes an apprehension of danger to the constitutional fabric. It is for Parliament to determine the " necessity ", that is to say, the need or desirability of the particular legislation; it is for the Court to determine the existence or non-existence of " power ".

Preambles and statements as to the necessity for certain legislative action may not be conclusive, but will be treated by the Court with respect (*South Australia* v. *The Commonwealth* (4); *R.* v. *University of Sydney*; *Ex parte Drummond* (5); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (6); *Andrews* v. *Howell* (7); *Pankhurst* v. *Kiernan* (8); *Farey* v. *Burvett* (9)), and will only be overborne by clearly contradictory judicial knowledge (*Abitibi Power and Paper Co. Ltd.* v. *Montreal Trust Co.* (10); *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (11); *Re Reference on the Validity of War-Time Leasehold Regulations* (12)). It must be accepted as conclusive that the statement on the Act was Parliament's belief and shows its motive or reason: *Craies* on *Statute Law*, 4th ed. (1936), pp. 41, 43. The recitals in the Act are (a) conclusive as to Parliament's reason or motive for the declaration in s. 4, but, of course, the Court still has to determine for itself whether, even

(1) (1949) 79 C.L.R., at pp. 109, 111, 115, 116, 120.
(2) (1949) 79 C.L.R., at pp. 135, 145, 148, 157, 158, 163.
(3) (1932) 48 C.L.R. 487, at pp. 506, 509.
(4) (1942) 65 C.L.R., at pp. 432, 453.
(5) (1943) 67 C.L.R., at pp. 102, 113.
(6) (1945) 71 C.L.R., at pp. 172, 173, 177, 179, 180, 185.
(7) (1941) 65 C.L.R. 255, at pp. 265, 275, 286.
(8) (1917) 24 C.L.R., at pp. 134, 135.
(9) (1916) 21 C.L.R. 433.
(10) (1943) A.C. 536, at p. 548.
(11) (1947) A.C. 87, at pp. 101-103.
(12) (1950) 2 D.L.R., at pp. 11, 17, 22, 28, 41.

with that reason, the legislation is within power, and (b) persuasive, and only to be overpassed if the " known " facts contradict it or show it to be mala fide, or absurd, as to (i) the powers being exercised, and (ii) the " emergency " or " necessity " in that sense from such provisions. Secondly, the recitals afford material, persuasive but not conclusive, which the Court will have in mind when considering whether there is any logical connection between the legislation and the power. The issue *qua* validity can never be the objective truth of the facts and circumstances in which the law was made. The connection is a logical one—could the view be rationally held—could the law conceivably aid (cf. *American Communication's Association* v. *Douds* (1))—could Parliament rationally entertain its solemnly expressed view of the public situation (cf. *Lloyd* v. *Wallach* (2)). The uses the defendants make of any recital or any part of any recital are : (i) to supply Parliament's reason for the enactment only if the Court was of opinion that there was no relevant material within judicial knowledge justifying the Act as a whole, that is to say, in substance, and (ii) to supply the Parliament's persuasive view as to the rational relationship between the legislation and the powers to which Parliament points only in case the Court is of opinion that there is sufficient material within judicial knowledge to show that relationship, and if the arguments as to the Act being essentially one of defence are not accepted. The preamble was used in that way in *Pankhurst* v. *Kiernan* (3). Evidence in denial of the preambles is inadmissible. Also, evidence tending to show or deny a factual as distinct from a rational connection of the legislation with the power is inadmissible.

[DIXON J. referred to *Sloan* v. *Pollard* (4).

MCTIERNAN J. referred to *Wagner* v. *Gall* (5) and *Reid* v. *Sinderberry* (6).]

The case is quite different from that in which it may be necessary to ascertain how the law will operate on the facts in order to determine its real nature, as was the position in *Morgan* v. *The Commonwealth* (7) ; *Attorney-General for Alberta* v. *Attorney-General for Canada* (8) ; *Sloan* v. *Pollard* (9) and *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (10).

[WILLIAMS J. referred to *Jenkins* v. *The Commonwealth* (11).]

(1) (1949) 339 U.S., at pp. 391, 392, 405, 423-424, 433 [94 Law. Ed., at pp. 939, 940, 947, 957, 962].
(2) (1915) 20 C.L.R., at pp. 305, 309, 313.
(3) (1917) 24 C.L.R., at pp. 129, 130.
(4) (1947) 75 C.L.R. 445.
(5) (1949) 79 C.L.R. 43, at p. 57.
(6) (1944) 68 C.L.R. 504.
(7) (1947) 74 C.L.R., at p. 427.
(8) (1939) A.C. 117, at p. 130.
(9) (1947) 75 C.L.R. 445.
(10) (1937) 56 C.L.R. 390, at p. 418.
(11) (1947) 74 C.L.R. 400.

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The significance of " good faith " in statutes like this (see s. 18) appears in *Bacon's Abridgment* (1832), pp. 266, 272. " Good faith " in connection with these forfeitures means without an intent to avoid forfeiture, without an intent to prevent or circumvent the forfeiture.

F. W. Paterson and *E. A. H. Laurie* (with them *E. F. Hill* and *M. N. Julius*), for the Australian Communist Party, Gibson and Campbell.

E. A. H. Laurie. These plaintiffs are entitled to show that the allegations set out in the preamble are either false objectively or manifestly untrue. It can be shown that the basic theory of communism as expounded by Marx and Lenin does not lead to the engagement in activities or operations designed to accelerate the coming of a revolutionary situation, &c. That is not to be found in the basic theory. The truth or otherwise of the various allegations could have been determined in accordance with normal practices of law by proceedings under the *Commonwealth Crimes Act*, which deals with unlawful associations. If the recitals be true, which is denied, the *Communist Party Dissolution Act* is not an Act with respect to defence. The means are not plainly adapted to that end, but, on the contrary, the scope of the Act is so wide in its implications in the existing circumstances that it cannot be said to be an Act in respect of defence. Without the recitals, the operation and real purpose of the Act is directed against the working class and particularly against the Australian Communist Party and the trade union movement. The Court is entitled to and should receive evidence of the Party, as to the nature of the Party as an organization, before it can decide what in fact is the real purpose of the Act, and whether or not, in the existing circumstances, there is a sufficient connection with defence. Part of that evidence would be in rebuttal of the allegations in the preamble. The mere fact that it refers to the Governor-General being satisfied about a matter relating to security and defence does not make the Act, *ex facie*, a law in respect of defence. The operation of the Act shows that it does something quite out of keeping with what is necessary for defence (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)). Whether or not an Act is a law with respect to defence depends upon the operation of the Act as a whole in the circumstances that exist at the time (*Ex parte Walsh* (2)). The Court cannot

(1) (1943) 67 C.L.R. 116. (2) (1942) A.L.R. 359.

without evidence, decide what is or what are the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin (s. 5 (i) (*c*) (*d*) (ii)), nor as to the real scope of the Act. Judicial notice of what they are will not be taken by the Court (*Schneiderman* v. *United States* (1)). The recitals are necessary in order to establish the validity of the Act relating to defence. Before the real object of the Act can be established, and as to whether or not it has any relation to defence, evidence would be necessary to show what are the activities that are prohibited in s. 7 (i) (*d*). The evidence might show a prescription of activities over such a wide field that the Act cannot be said to be related to defence. After dissolution, it would be an offence for any person to engage in any innocent activity formerly carried on by the dissolved body (*Jehovah's Witnesses Case* (2)). In that case facts were found as to the activities of the organization there concerned and were referred to the Court by way of case stated. The Court could not have taken judicial notice of these facts. The Act is too wide to be an Act with respect to defence. In order to establish just what is the effect of the Act, it is necessary to know what the activities are ; that is a matter of evidence. The Court, and not the Parliament, should decide whether or not the objects and purposes of the Act are such that it is brought within the particular power. The curial area in deciding whether a matter is in respect of defence is to have regard to the operation of the Act in all the known circumstances. A consideration of the Act and all its ramifications and operations shows that it does not relate to the subject matter of defence. The activities and the objects of the organization should be examined because it might in fact be found upon examination that the objects were such that there was not any logical connection with defence. The affected organization, as here the Australian Communist Party, is entitled to give evidence on those matters. The evidence in *Milk Board* v. *Metropolitan Cream Pty. Ltd.* (3) was evidence receivable by the Court, but it was not disputed evidence. It would not be an exercise of the defence power to dissolve the Party unless its activities were capable of being prejudicial to the defence of the Commonwealth. The Party is entitled to give evidence to show that its activities are not of that nature. The Act, by s. 27, concedes that it was introduced to meet a situation which was of some terminable duration and yet the seizure, disposal and transference of property under s. 15 is final : see *Jehovah's Witnesses*

(1) (1942) 320 U.S. 118, at p. 136 [87 Law. Ed. 1796].
(2) (1943) 67 C.L.R., at p. 165.
(3) (1939) 62 C.L.R. 116.

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Case (1). To deprive the Party of its property permanently is not a proper exercise of the power : it goes too far for defence purposes. It is an arbitrary seizure of property permanently by the Crown. The alleged reasons which appear in the recitals are totally baseless. Section 4 is the key section to the Act. Sections 5 and 9 are consequential in that they deal with various supposed mischiefs if s. 4 is to operate. Those three sections are not severable. The fact that an appeal to a court lies only under s. 5 (1) and s. 9 (1) and not in respect of the opinion of the Governor-General may give rise to the anomalous position that on appeal the organization or a person may be found to be not an organization or person to which s. 5 (1) or s. 9 (1) respectively applies, but nevertheless the " satisfaction " of the Governor-General would still remain. Section 5 would operate with respect to a very large and wide number of organizations of different types, for example, the Australasian Council of Trade Unions, the Trade and Labour Councils, some municipal councils, and the Australian Peace Council—the policy of which organizations coincide at some point or another with the policy of the Australian Communist Party—if the Governor-General made a declaration or was satisfied that its operations were likely to be prejudicial to the defence and security of the Commonwealth. Thus normal political activities in the community could be struck at as a result of s. 5, merely on the basis of the existence within those organizations of some persons who were associated at some time with the Australian Communist Party and the fact that those persons were influencing the policy. That has not any relation to defence. The Court may inform itself by judicial knowledge of various matters and it may inform itself by evidence. It informs itself by evidence of the existence of objective facts. The Court had regard to the facts in *Wagner* v. *Gall* (2). The Court has not regarded preambles to statutes as conclusive (*South Australia* v. *The Commonwealth* (3) ; *R.* v. *University of Sydney* ; *Ex parte Drummond* (4) ; *Bank of New South Wales* v. *The Commonwealth* (5)). The mere insertion of the recitals does not bind the Court. The Court should inquire as to what were the facts and what were the objective facts. One of those facts would be that as shown by the recitals the Parliament holds a certain opinion or opinions. In order to determine the validity or otherwise of the Act there should be an inquiry into the objects and activities of the Australian Communist Party and

(1) (1943) 67 C.L.R. 116.
(2) (1949) 79 C.L.R., at pp. 57-61.
(3) (1942) 65 C.L.R., at p. 432.
(4) (1943) 67 C.L.R. 95.
(5) (1948) 76 C.L.R. 1, at pp. 186, 187.

whether there is any real connection between these objects and activities and defence. The truth or otherwise of the recited fact in *Pankhurst* v. *Kiernan* (1) was not determined by the Court because it was not challenged. Matters which the Court should take into account and the requirement as to evidence when considering legislation of this nature were discussed in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2); *Block* v. *Hirsh* (3); *Chastleton Corporation* v. *Sinclair* (4). In the last-mentioned case it was held that the courts are not bound by statements in Acts and are entitled to take judicial notice of facts and to conduct a judicial investigation on evidence by whatever means found necessary to establish what the facts were. The Court should give its opinion on the validity of an Act apart from any proceedings *lis inter partes*. Where the matters are put in issue by the pleadings the Court has regard to what the facts are and inquires, not just by matters of judicial notice but where necessary by the taking of evidence, and it forms its own conclusion as to what are the real facts (*Borden's Farm Products Co. Inc.* v. *Baldwin* (5)). The particular questions involved in this case were considered in *Schneiderman* v. *United States* (6).

[LATHAM C.J. referred to *American Communications Association* v. *Douds* (7).]

Statements made by various members of the Court from time to time dealing with the question of what is the relation that has to be established between the particular Act and the power appear in *Victoria* v. *The Commonwealth* (8); *Bank of New South Wales* v. *The Commonwealth* (9); *Victorian Chamber of Manufactures* v. *The Commonwealth* (10); *Dawson* v. *The Commonwealth* (11); *Real Estate Institute of New South Wales* v. *Blair* (12). These cases show, *inter alia*, that the statement relied on in relation to *Farey* v. *Burvett* (13) conceivably has been cut down to some extent and that there must be a real substantial and rational connection with defence on the basis of objective facts. An opinion held by Parliament is not necessarily rational. Statements of fact in preamble to an Act are at best only prima-facie evidence and can be rebutted (*Craies* on *Statute Law*, 4th ed. (1936), pp. 41,

(1) (1917) 24 C.L.R. 120.
(2) (1939) A.C., at pp. 130, 131.
(3) (1920) 256 U.S. 135, at p. 154 [65 Law. Ed. 865, at p. 870].
(4) (1923) 264 U.S. 543, at p. 546 [68 Law. Ed. 843].
(5) (1934) 293 U.S. 194, at p. 209 [79 Law. Ed. 281, at p. 288].
(6) (1942) 320 U.S. 118 [87 Law. Ed. 1796].
(7) (1949) 339 U.S. 382 [94 Law. Ed. 925].
(8) (1942) 66 C.L.R., at pp. 506-509.
(9) (1948) 76 C.L.R., at p. 162.
(10) (1943) 67 C.L.R., at p. 418.
(11) (1946) 73 C.L.R., at p. 179.
(12) (1946) 73 C.L.R., at p. 224.
(13) (1916) 21 C.L.R. 433.

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43; *Sloan* v. *Pollard* (1); *Wagner* v. *Gall* (2); *Dunedin Corporation* v. *Massey* (3); *Wigmore* on *Evidence*, 3rd ed. (1940), vol. 4, pp. 708, 714, pars. 1352, 1353). Omitting the recitals, the Act, looking at its operation without evidence, is not an Act in respect of defence. Evidence might be given by or on behalf of a party to attempt to establish a real connection between the Act and the power. If the recitals are in fact immaterial then, without any such evidence before the Court, the Court would say that the operation of the Act showed that there was not any real connection between the statute and the power. The recitals do not establish such a connection and they do not exclude the plaintiffs from giving evidence to show that such a connection does not exist. As to recital No. 9, the Court has never considered itself bound by a legislation that the Government regards the law as necessary for the purpose of the power. The other recitals are recitals of fact and are governed by the same rules as other recitals of fact appearing in the statute and are only prima facie and controvertible. Recitals of fact are never conclusive, whether in a Federal or unitary constitution. The effect of the recitals is to prevent the Government from relying on any other facts. The recitals in some sense bind the Government and do not bind anybody else in any sense. The effect of the recitals may be to enable or require the Court to enter into a wider field of inquiry than it would have had to undertake if there had not been any recitals. In the absence of recitals the Court might have had to inquire into the subject matter of recitals Nos. 7 and 8, and it might have taken judicial notice of certain facts. It would certainly not have had to enter upon an inquiry with regard to recitals Nos. 4, 5 and 6. In so far as the facts are to be considered in determining the validity of the statute, the Court, by reason of the presence in the statute of recitals relating to matters of fact, is precluded from considering any other supposed matter of fact, even so far as that evidence is produced by one side to litigation but not in so far as it is produced by the other side in litigation. The persons who are rebutting the recitals may bring such evidence as they desire. The ninth recital is not really a recital of fact; it is a recital of the opinion that Parliament has formed on the basis of the assertions of fact. It is not within the ambit of the defence power, even in war time, for Parliament to dissolve an association and deprive it of its property permanently. Even in war time Parliament cannot make it an offence for members of an association to associate to

(1) (1947) 75 C.L.R. 445.
(2) (1949) 79 C.L.R., at p. 56.
(3) (1884) 2 N.Z.L.R. 385.

carry on activities that are unrelated to defence and security. It is not denied that there can be suppression of an association's activities that are prejudicial to the defence and security of the Commonwealth. If an association has one lawful activity then, although unlawful activities may be stopped, the association itself cannot be suppressed, although the unlawful activities may be punished. Section 7 of the Act applies to actual advocacy which has not any relation to the organization or body in question. Section 7 (2) (*b*) could be construed as meaning that no person who was in any way associated with it shall, after dissolution of an organization which nominated candidates for Parliament, knowingly nominate candidates for Parliament. To deprive an organization of property permanently for matters which are a temporary state of affairs is outside the ambit of the defence power. No property can be forfeited by Parliament. The mere existence of a state of war cannot be said to justify extraordinary war powers. The supervision of the Court goes only to the question as to who are the persons, whether the persons come within a particular clause, whether they are within the group. The matters of substance, as to whether a person is in fact acting or likely to act in a manner prejudicial to defence, are not subject to the supervision of the Court at all. Cases like *Ex parte Walsh* (1) show that the power of preventive detention is a power given to the Minister which is in respect of defence. If powers to act on the opinion of the Minister exist in time of peace persons could be detained and organizations destroyed by the Executive on the basis of suspicion. The statement in *Ex parte Walsh and Johnson* (2) is wrong. It is giving to the Minister a matter which should be for the control of the courts. There is not, in fact, any public situation at the present time to justity the Act. It is not enough to say a thing is notorious, therefore it is a fact. All matters of notoriety are not facts. Before the Court can hold that a matter is a notorious fact, it must find that it is a fact and not merely a widely held opinion or belief. Many of the matters mentioned on behalf of the defendants are not facts but are notorious in the sense that they are widely believed and are not matters of which the Court would take judicial notice. Reliance can be placed only on incontrovertible facts. Many, if not all, the matters so mentioned are controvertible and are not like the fact referred to in *R.* v. *Sharkey* (3). A state of peace—not apprehension and international tension—was said to exist in 1946 (*Dawson* v. *The Com-*

(1) (1942) A.L.R. 359.
(2) (1925) 37 C.L.R., at p. 97.
(3) (1949) 79 C.L.R. 121.

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monwealth (1)). In order to show that there is a real connection between the Act and the power the Court must be satisfied that facts existed. The alleged facts are not facts and the Court cannot take judicial notice of them as facts. The Court may take judicial notice of the fact that in the international situation the United Kingdom has not found it necessary to adopt legislation of this type (*Miller* v. *The Commonwealth* (2), see also *Reid* v. *Sinderberry* (3)). The Commonwealth is either at war or at peace; there is not any intermediate state (*Dawson* v. *The Commonwealth* (4)).

F. W. Paterson. The Act is invalid because its operation (a) interferes with the free working of the political organization of the Commonwealth; and (b) destroys or substantially interferes with the political rights of the electors of the Commonwealth. The Commonwealth Parliament has no power to destroy those rights of the electors. The Commonwealth can find the Act invalid without hearing evidence because:—(i) Judicial power is conferred on the legislature and for the Executive contrary to the provisions of Chapter III.—the Judicature provisions—of the Constitution; (ii) ss. 4 and 5 contravene the conventions of the Constitution; (iii) it is inconsistent with the maintenance of the constitutional integrity of the several States; (iv) s. 92 of the Constitution is infringed; (v) it is not authorized by the defence power; (vi) it is not authorized as incidental to the exercise of the Executive power; and (vii) it is not authorized by the defence power and the Executive power taken together.

Alternatively, unless evidence is heard the Court cannot hold the Act to be valid, in whole or in part, under the defence power and the Executive power, or valid as not contravening s. 92. Evidence is admissible to show, *inter alia*, (a) the nature of the theories and practices of the Australian Communist Party; (b) the nature of the activities (including doctrines) prohibited by s. 7 of the Act; (c) the nature and content of the inter-State activities of the Party for the purpose of determining whether it falls within the categories excepted from the protection of s. 92: such evidence would have to be led by those supporting the legislation; (d) the truth or falsity of each and every allegation contained in recitals 3 to 9 inclusive of the preamble; (e) whether circumstances exist which make the legislation valid as an exercise of the defence power and/or Executive power;

(1) (1946) 73 C.L.R. 157.
(2) (1946) 73 C.L.R., at p. 200.
(3) (1944) 68 C.L.R., at p. 510.
(4) (1946) 73 C.L.R., at p. 174.

(f) the operation and effect of this Act generally; and (g) the meaning of the word " communist " as defined in s. 3. Although it is provided that the averments shall be prima-facie evidence of the fact, evidence in rebuttal can be given (*R.* v. *Hush*; *Ex parte Devanny* (1)).

If s. 4 is invalid for any reason, the whole Act is invalid, as the Act constitutes one entire scheme, and it is plain from the Act that its operation as a whole was intended to depend upon the operation of s. 4. If s. 5 and s. 9 are invalid as not authorized by the defence power and/or Executive power, s. 4 would necessarily be invalid for the same reason and the whole Act fails. Section 5 (2) and s. 9 (2) are not internally severable as a matter of construction. Section 10 is not internally severable. That section is prefaced by the words " in respect of whom a declaration is in force under this Act ", and to give s. 10 (1) (*a*) and (*b*) and s. 10 (2) an operation independent of s. 4 and s. 9 would be to construct an entirely new Act.

The Act purports, in the guise of legislation, to exercise the judicial power of the Commonwealth contrary to Chapter III. of the Constitution, and to vest judicial power in the Governor-General contrary to that chapter. Under the Constitution a separation of powers between the legislature, the Executive and the Judiciary is clearly made (*Australian Apple and Pear Marketing Board* v. *Tonking* (2); *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (3); *In re Judiciary and Navigation Acts* (4); *New South Wales* v. *The Commonwealth* (5); see also *Ex parte Lowenstein* (6)). There is " a great cleavage " between legislative and executive power on the one hand and judicial power on the other: *Harrison Moore, Constitution of the Commonwealth*, 2nd ed. (1910), p. 101. The judicial power of the Commonwealth cannot be vested in any body other than the High Court and such other courts as are prescribed in Chapter III. of the Constitution (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (7); *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (8)). It follows from the doctrine of the separation of powers that Parliament, which is the legislative organ under the Constitution, cannot itself exercise judicial power (*Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (9)).

(1) (1932) 48 C.L.R. 487.
(2) (1942) 66 C.L.R. 77, at pp. 103, 104.
(3) (1931) 46 C.L.R. 73, at pp. 89 et seq.
(4) (1921) 29 C.L.R. 257, at p. 264.
(5) (1915) 20 C.L.R. 54, at pp. 82-101.
(6) (1938) 59 C.L.R. 556, at p. 565.
(7) (1918) 25 C.L.R. 434.
(8) (1931) 46 C.L.R., at pp. 97-101.
(9) (1931) 46 C.L.R., at pp. 84, 96-101.

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Section 4 of the Act and consequential sections are invalid because they are an exercise of judicial power by Parliament in the guise of legislation. Sections 5 (2) and 9 (2) and consequential sections are invalid because they purport to bestow on the Governor-General part of the judicial power of the Commonwealth.

It is an exercise of judicial power when any person or body purports to make a finding of fact which is conclusive—(a) if that finding gives a court the right to determine or to create an instant liability, or to affect rights immediately without any intermediate process, or (b) itself creates an instant liability or instantly affects rights based on that determination irrespective of whether the finding of fact or law is correct (*Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (3); *Victorian Chamber of Manufactures* v. *The Commonwealth* (4); *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (5)). It is not essential to the exercise of judicial power that there should be laid down a pre-existing rule of conduct, but the rule of conduct being applied may be implicit in the determination itself. The definition of "judicial power" in *R.* v. *Local Government Board for Ireland* (6), and cited with approval in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (7), does not prescribe a pre-existing rule of conduct as a necessary feature of the exercise of judicial power. If the recitals are conclusive as to the matters alleged in them, s. 4 read with the recitals has all the *indicia* of judicial power. The declaration of the Party as an unlawful association and its dissolution by s. 4 (1) is itself a conclusive finding amounting to a decision on certain facts which constitute an essential element in the offences set out in s. 7 of the Act. This is so: (a) even if the recitals have only a prima-facie effect, or (b) even if the recitals have no effect at all, or (c) irrespective of whether Parliament was satisfied (i) conclusively, or (ii) beyond reasonable doubt, or (iii) prima facie of the facts alleged in the recitals, or (iv) to give them no consideration at all (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (8)). Alternatively, the declaration under s. 4, coupled with the divesting of property, is an exercise of judicial power because it instantaneously affects the rights of all members of that association, namely, their right to the property of that association (*Huddart Parker & Co.*

(1) (1909) 8 C.L.R. 330.
(2) (1931) A.C. 275, at pp. 295-296; 44 C.L.R. 530, at pp. 542-543.
(3) (1943) 67 C.L.R. 1.
(4) (1943) 67 C.L.R. 413.
(5) (1944) 69 C.L.R. 185.
(6) (1902) 2 I.R. 349, at p. 373.
(7) (1944) 69 C.L.R., at p. 199.
(8) (1944) 69 C.L.R., at p. 216.

Pty. Ltd. v. *Moorehead* (1); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2); *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (3); *R.* v. *Local Government Board for Ireland* (4)). The divesting of property and its transference to the Commonwealth under s. 4 and s. 15 is either acquisition of property by the Commonwealth without just terms and the provisions are therefore invalid by reason of par. xxxi. of s. 51 of the Constitution, or, alternatively, it is a penalty and therefore consequent upon the exercise of judicial power. If, as is suggested on behalf of the defendants, the Act is not penal but preventive, then—(a) property cannot be divested permanently (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (5)), or (b) acquired by the Commonwealth without observing the provisions of s. 51 (xxxi.) of the Constitution (*Johnston, Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (6); *Roche* v. *Kronheimer* (7)) is distinguishable. Paragraph xxxi. of s. 51 was not argued, and the rights of the property divested were converted into a claim by the alien concerned against the Government for its value. That case is authority for the proposition that the divesting of property is not always the exercise of judicial power; not that the divesting of property is never the exercise of judicial power. The divesting of property under the Act takes place under circumstances that clearly show that it is an exercise of judicial power because it is a penalty. Sections 4 and 5 of the Act contravene the conventions and the implications of the Constitution. The Constitution embodies a system of representative and responsible government and must be read subject to the constitutional conventions existing in United Kingdom at the time the Constitution Act was passed (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (8)). Sections 7, 16, 23, 24, 34, 40, 44, 47, 61-64 of the Constitution show that the Parliamentary system established under the Constitution is a system of representative government. The Executive Government is a government responsible to the majority, which implies the existence of the party system and the existence of political parties having the right to organize, to hold meetings and to issue propaganda in order to secure the support of electors (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (8); *Holdsworth's History of English Law* (1938), vol. 10, p. 468). The electors have the right to hear, to

(1) (1909) 8 C.L.R. 330.
(2) (1931) A.C. 275; 44 C.L.R. 530.
(3) (1944) 69 C.L.R. 185.
(4) (1902) 2 I.R. 349.
(5) (1943) 67 C.L.R. 116.
(6) (1943) 67 C.L.R. 314.
(7) (1921) 29 C.L.R. 329.
(8) (1920) 28 C.L.R., at p. 146.

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read and to consider the political opinions and political propaganda of every political party which contends for political supremacy in the Commonwealth, the only exception therefrom being in the case of individuals who break laws, such as a law of sedition, or of libel, or a law which regulates those rights. The effect of s. 4 and other relevant sections dealing with the property of unlawful associations, together with s. 7, means that those political organizations are prohibited from taking part in the political life of the Commonwealth as political organizations. The Act curtails the exercise of the above-mentioned rights to such an extent that it substantially interferes with the working of the parliamentary institutions of the Commonwealth. The suppression of any political party interferes with the proper working of the parliamentary system and contravenes the direct provisions of the Constitution, the implications arising therefrom and the conventions of the Constitution. The only possible exception is where it is shown to the Court that what purports to be a political party is not really a political party at all, but a treasonable or subversive conspiracy—for example, under the provisions of the *Crimes Act* 1914-1946. Such an exception must be proved to the satisfaction of the appropriate court by evidence. The particulars of claim indorsed upon the writ show that the Australian Communist Party has functioned as a political party in Commonwealth elections. The Act is inconsistent with the maintenance of the constitutional integrity of the several States. The Commonwealth Constitution rests on the indestructibility of State Constitutions. Section 128 of the Commonwealth Constitution shows that it is an essential of the Constitution that the States should maintain their independent existence (*Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1)). Sections 7 and 15 of the Constitution are directed to the same principle of the existence of States as independent entities. *Lloyd* v. *Wallach* (2) was wrongly decided and should be overruled. If the Commonwealth Parliament could interfere with the qualifications of a member of a State Parliament it could interfere with the operation of s. 15. The independence of the States can be preserved only if every political party has equal rights (*Re Alberta Legislation* (3)). The inviolability of State Constitution is quite compatible with the limitation on State authority and power under a Federal Constitution. The definition of the line of demarcation has been considered by the Court in many cases, two of which are

(1) (1892) A.C. 437, at p. 441.
(2) (1915) 20 C.L.R. 299.
(3) (1938) 2 D.L.R. 81, at pp. 87, 106, 119.

D'Emden v. *Pedder* (1) and *Melbourne Corporation* v. *The Commonwealth* (2). The line of demarcation does not warrant laws which (i) interfere with the constitutional framework of the States, (ii) single out States or State authorities and prevents or impedes them from performing their functions, and (iii) so operate that they prevent or impede the functioning of the States (*Melbourne Corporation* v. *The Commonwealth* (2); *Australian Railways Union* v. *Victorian Railways Commissioners* (3)). The Act (a) by direct legislative provision (s. 4) prevents or impedes the functioning of State self-government by prohibiting all activities by a political party, including those which are purely intra-State, and (b) by empowering the Governor-General to declare unlawful organizations which may be purely intra-State bodies with intra-State objectives and activities only thereby prevents or impedes the functioning of State self-government. Similarly as to bodies which, although not purely intra-State, are engaged in intra-State activities. Under s. 7 (2) activities are prohibited, even if unconnected with the former existence of the organization. It prohibits innocent activities and is beyond the defence power (*Jehovah's Witnesses Case* (4)). The Act contravenes s. 92 of the Constitution. That section guarantees freedom of inter-State intercourse, trade and commerce in respect of vocational, political, religious and cultural activities, as well as trading and commercial ventures (*Gratwick* v. *Johnson* (5); *The Commonwealth* v. *Bank of New South Wales* (6)). It is shown as the case stated that the activities of the Party involve inter-State intercourse and trade and commerce as a normal and necessary feature of such activities. Section 4 of the Act prohibits "directly and immediately" all the activities of the Party, including those activities involving inter-State trade, commerce and intercourse (*The Commonwealth* v. *Bank of New South Wales* (7)). That prohibition is reinforced by the prohibition under s. 7. That persons, bodies or groups whose inter-State intercourse is prohibited are properly within a prohibited category must be shown *as a fact* to the satisfaction of the Court. The opinion or belief of Parliament, or of the Government, regarding their activities or their nature is irrelevant (*Tasmania* v. *Victoria* (8); *The Commonwealth* v. *Bank of New South Wales* (9)). The case stated does not contain any facts which establish that any character-

(1) (1904) 1 C.L.R. 91.
(2) (1947) 74 C.L.R. 31.
(3) (1930) 44 C.L.R., at pp. 352-354.
(4) (1943) 67 C.L.R. 116.
(5) (1945) 70 C.L.R. 1.
(6) (1949) 79 C.L.R., at pp. 632, 635, 637.
(7) (1949) 79 C.L.R., at p. 639.
(8) (1935) 52 C.L.R. 157, at pp. 168, 169.
(9) (1949) 79 C.L.R., at p. 641.

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istics of the Party would be sufficient to enable s. 4 to be regarded as a mere regulation of trade, commerce and intercourse. The Act prohibits not only the activities within the category, but all its inter-State activities; therefore the relationship between the declaration of the Party as an unlawful association and its consequent dissolution and the alleged need to protect the citizens against things calculated to injure them is "far too remote and attenuated to warrant the absolute prohibition imposed" (*Tasmania* v. *Victoria* (1); *The Commonwealth* v. *Bank of New South Wales* (2)). The foregoing propositions applied to organizations under s. 5 and to individuals under s. 9 establish that those sections and consequential sections contravene s. 92 of the Constitution. The argument of *Evatt* K.C. on this point is adopted.

The Act is not, nor are any of its provisions, within the defence power conferred by s. 51 (vi.) of the Constitution. In order to be within power it must be a law with respect to defence. The scope of the defence power at the time of the passage of the relevant statute was considered in *Dawson* v. *The Commonwealth* (3); *Hume* v. *Higgins* (4); *Real Estate Institute of New South Wales* v. *Blair* (5); *Sloan* v. *Pollard* (6); *Jehovah's Witnesses Case* (7); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (8); and *Collins* v. *Hunter* (9). The Court must determine the actual operation of the Act (*Bank of New South Wales* v. *The Commonwealth* (10); *Victorian Chamber of Manufactures* v. *The Commonwealth* (11); *Attorney-General for Alberta* v. *Attorney-General for Canada* (12)). Even in time of actual war the defence power enables the Commonwealth to make such laws only as have a real connection with defence (*Victoria* v. *The Commonwealth* (13)), and it is not enough that the law is deemed desirable in the general interests of the community; nor could it be justified merely on the basis that it may promote the welfare and strength of the Commonwealth (*Victoria* v. *The Commonwealth* (14); *Victorian Chamber of Manufactures* v. *The Commonwealth* (15); *Sloan* v. *Pollard* (16)). There must be a specific and not a mere general connection (*Real Estate Institute of New South Wales* v. *Blair* (17)). The "real connection" test means a factual connection, and this is always for the

(1) (1935) 52 C.L.R., at pp. 168, 169.
(2) (1949) 79 C.L.R., at p. 641.
(3) (1946) 73 C.L.R., at p. 175.
(4) (1949) 78 C.L.R., at p. 126.
(5) (1946) 73 C.L.R., at p. 236.
(6) (1947) 75 C.L.R., at p. 71.
(7) (1943) 67 C.L.R., at pp. 116, 161.
(8) (1945) 71 C.L.R., at pp. 178, 179.
(9) (1949) 79 C.L.R. 43, at p. 81.
(10) (1948) 76 C.L.R., at p. 187.
(11) (1943) 67 C.L.R. 335, at pp. 380, 381.
(12) (1939) A.C., at p. 130.
(13) (1942) 66 C.L.R., at pp. 506, 507.
(14) (1942) 66 C.L.R., at p. 509.
(15) (1943) 67 C.L.R., at pp. 417, 418.
(16) (1947) 75 C.L.R., at p. 461.
(17) (1946) 73 C.L.R., at pp. 224, 227.

Court to determine. Where the validity of a measure depends upon some state of facts short of war, such as "public situation" or "emergency" the existence of that state of facts may be proved or disproved by evidence like any other matter of fact (*Stenhouse* v. *Coleman* (1)). The onus is on the Crown to show by evidence that the state of facts relied on exists (*Joseph* v. *Colonial Treasurer (N.S.W.)* (2)). Judicial notice is one of the forms of proof of relevant matters in determining the validity of a statute purporting to be an exercise of the defence power. There is not any basis in logic or in law for relying on facts of which judicial notice can be taken, but excluding other facts which require proof in the ordinary way. The connection between the law impugned and the defence power having been challenged, evidence of relevant facts was admitted in *Jenkins* v. *The Commonwealth* (3); *Sloan* v. *Pollard* (4); *Wagner* v. *Gall* (5); and the *Jehovah's Witnesses Case* (6).

An assertion in a preamble to a statute that that law is necessary for defence is not conclusive (*R.* v. *University of Sydney*; *Ex parte Drummond* (7); *Victoria* v. *The Commonwealth* (8)). An enactment of a social and/or political and/or economic character has never been held to be authorized by s. 51 (vi.) of the Constitution in a time which is not a time of war, unless the enactment has related to the restoration of normal conditions closely following a war. As to whether a law is or is not a law with respect to defence has never been determined by the Court *in vacuo*—by abstract logic divorced from reality—and the Court has never adopted as a test the question of whether in the light of what Parliament considered to be the facts could the law rationally or logically be considered a law with respect to defence. *Lloyd* v. *Wallach* (9) was either wrongly decided or can be explained by the fact that the opinion of the Minister was on a matter within power, namely, the prosecution of a war then in existence, but not on the scope of the defence. Alternatively to that submission, in time of war preventive measures may be taken by Parliament (*Lloyd* v. *Wallach* (9); *Ex parte Walsh* (10)). But such measures must be directly related to the emergency created by the war and must be limited to what is considered by the Court to be reasonably necessary having regard to the nature of the emergency, as proved to the Court's satisfaction (*Jehovah's Witnesses Case* (11)).

(1) (1944) 69 C.L.R., at p. 469.
(2) (1918) 25 C.L.R. 32.
(3) (1947) 74 C.L.R. 400.
(4) (1947) 75 C.L.R. 445.
(5) (1949) 79 C.L.R., at pp. 57-61.
(6) (1943) 67 C.L.R. 116.
(7) (1943) 67 C.L.R., at p. 102.
(8) (1942) 65 C.L.R., at p. 432.
(9) (1915) 20 C.L.R. 299.
(10) (1942) A.L.R. 359.
(11) (1943) 67 C.L.R., at pp. 151, 162.

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The operation of the Act can be determined by construction and by evidence. Evidence is necessary to determine the effect of s. 7—for example, all the activities of the Party are prohibited and relevant evidence must be considered by the Court in order to determine the question of whether such activities are wholly lawful, or wholly unlawful, or partly lawful and partly unlawful. By construction of the Act the following appears :—(a) the property of the Party is forfeited permanently ; (b) the property of any organization declared unlawful under s. 5 is forfeited permanently, including the share in the property of the organization of members of that organization who were never members of the Party or communists and who might even be anti-communists ; (c) that individuals who under s. 9 are removed from their positions lose their property rights in those offices or contracts permanently, for all practical purposes, merely because the Governor-General is of opinion that the individual concerned is " likely " to engage in prejudicial activities at some unspecified future time, which may never come to pass ; (d) that before an organization or an individual can be affected by the Act the Governor-General must first consider whether the organization or the individual comes within the relevant categories (s. 5 (1) and s. 9 (1)), and the exclusions from that limitation show, in conjunction with other aspects of its operation, that the Act is not a law with respect to defence but is a law with respect to members of the Party and to other political opponents of the Government who come within the meaning of the word " communist " as defined in s. 3 ; (e) that the prejudicial activities in which an individual is alleged to be engaged or likely to be engaged may not have any relation to his office or contract, and therefore dismissal from office cannot be regarded as a reasonable preventive measure ; (f) that all the activities of the Party and of any organization dissolved under s. 5 are prohibited by s. 7 ; thus the lawful or " innocent " activities of the Party and of the organizations are prohibited ; and (g) that by s. 27 the operation of the Act is intended to be limited to a temporary period, although the consequences to individuals and organizations are permanent. If the Act is to be regarded as preventive, it is invalid no matter what degree of emergency the Court considers to exist. Although the consequences which flow therefrom do not matter in a punitive statute, they do matter in a preventive statute. The consequences under the Act to the Party, its members and to other organizations and individuals are " incommensurate ", " oppressive ", " fantastic " and " extravagant " (*Jehovah's Witnesses Case* (1)). Several main

(1) (1943) 67 C.L.R. 116.

features are common to the Act and to the regulations declared invalid in that case.

Considering the operative part of the Act without reference to the recitals :—(A) If the connection with defence is to be found in the reference to activities thought to be prejudicial to defence in s. 9 (2) and existence thought to be prejudicial to defence in s. 5 (2) then—(a) the words security and defence connote something more than defence as used in s. 51 (vi.) of the Constitution ; (b) ss. 5 (2) and 9 (2) are not laws with respect to defence but with respect to the Governor-General's opinion with respect to security and defence (*Ex parte Walsh and Johnson* ; *In re Yates* (1)) ; (c) the Governor-General's opinion is not examinable and therefore it cannot be known whether the opinion was with respect to a matter within power (*Ex parte Walsh and Johnson* ; *In re Yates* (1) ; *Liversidge* v. *Anderson* (2)) ; (d) the mere reference therein to the Party does not constitute s. 4 a law with respect to defence, and having regard to ss. 5 (1) and 9 (1) the opinion under ss. 5 (2) and 9 (2) must be based on reasons other than the matters set out in ss. 5 (1) and 9 (1). (B) If the connection with defence is to be found in ss. 4, 5 (1) and 9 (1), then (a) as to s. 4, there is nothing within judicial knowledge concerning the Party which establishes the Act as a law with respect to defence—it is plainly a law with respect to communists and is beyond power ; (b) s. 9 (1) includes persons who have never been members of the Party or had ceased to be members prior to the passing of the Act and may even apply to persons who at the time of the making of the declaration under s. 9 (2) are opponents of the Party ; and (c) s. 5 (1) includes organizations which at the date of the declaration under s. 5 (2), or even at the date of the passing of the Act, may have ceased to be influenced or led by members of the Party. If the connection with the defence power is to be found in s. 4 with the recitals then, if the recitals are conclusive, the allegations contained in the recitals against the Party are not sufficiently direct and specific to establish that the Act is with respect to defence. Alternatively, even if they are, the public situation is not such as to authorize the legislation under the defence power. This is a time of peace (*Dawson* v. *The Commonwealth* (3)). If the recitals are prima facie correct the allegations are rebuttable by evidence and the Court cannot hold the legislation to be valid without hearing evidence. The recitals have no effect on constitutional validity. Alternatively, the recitals are prima facie, and therefore let in evidence including evidence which might not have been admissible if there had not been any recitals.

(1) (1925) 37 C.L.R. 36.
(2) (1942) A.C. 206.
(3) (1946) 73 C.L.R., at p. 174.

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The two functions which, in general, a preamble may lawfully perform are: (a) to explain what may be ambiguous in an enactment (*Fletcher* v. *Birkenhead Corporation* (1); *Bowtell* v. *Goldsbrough, Mort & Co. Ltd.* (2); *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 461, par. 558), and (b) to explain the reasons or motives of Parliament for enacting the statute (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (3); *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (4); *R.* v. *University of Sydney*; *Ex parte Drummond* (5); *Halsbury's Laws of England*, 2nd ed. vol. 31, p. 461, par. 558, p. 568, par. 782; *Craies* on *Statute Law*, 4th ed. (1936), pp. 441-444; *Maxwell* on *The Interpretation of Statutes*, 7th ed. (1929), pp. 37-44; *Wigmore* on *Evidence*, 3rd ed. (1940), vol. v., s. 1662). A statement by Parliament that a statute is necessary for a certain purpose is irrelevant to a determination by the Court of the question whether the enactment is a law with respect to a power; even when the power is defence (*Stenhouse* v. *Coleman* (6). Parliament cannot arrogate a power to itself by attaching a label to a statute. Parliament cannot, by any device, extend its powers (*South Australia* v. *The Commonwealth* (7); *R.* v. *University of Sydney*; *Ex parte Drummond* (8); *Dawson* v. *The Commonwealth* (9); *Arthur Yates & Co. Pty. Ltd.* v. *The Vegetable Seeds Committee* (10); *Chastleton Corporation* v. *Sinclair* (11); *Harvard Law Review*, vol. 38, pp. 6, 18). A mere recital of fact or of law in a preamble is not conclusive (*Halsbury's Laws of England*, 2nd ed., vol. 31, p. 568, par. 782; *Maxwell* on *The Interpretation of Statutes*, 7th ed. (1929), p. 269; *Craies* on *Statute Law*, 4th ed. (1936), p. 43; *Harvard Law Review*, vol. 38, pp. 6, 16-19; *Harvard Law Review*, vol. 49, pp. 631 et seq.; *Harvard Law Review*, vol. 61, p. 692; *Wigmore* on *Evidence*, 3rd ed. (1940), vol. IV., s. 1352, vol. V., s. 1662; *R.* v. *Sutton* (12); *Earl of Leicester* v. *Heydon* (13); *Block* v. *Hirsh* (14); *Chastleton Corporation* v. *Sinclair* (15); *Dunedin Corporation* v. *Massey* (16)).

Neither a recital of alleged facts, as in recitals 3 to 8 inclusive, nor a recital of an alleged connection with power, as in recital 9, is

(1) (1907) 1 K.B. 205, at p. 218.
(2) (1905) 3 C.L.R. 444, at pp. 451, 455.
(3) (1945) 71 C.L.R., at pp. 172, 173.
(4) (1939) 61 C.L.R., at pp. 766, 767, 794.
(5) (1943) 67 C.L.R., at p. 102.
(6) (1944) 69 C.L.R., at pp. 468-472.
(7) (1942) 65 C.L.R., at p. 432.
(8) (1943) 67 C.L.R., at pp. 102, 113.
(9) (1946) 73 C.L.R., at pp. 175, 186.
(10) (1945) 72 C.L.R. 37, at p. 64.
(11) (1923) 264 U.S. 543 [68 Law. Ed. 841].
(12) (1816) 4 M. & S. 532, at pp. 542, 549 [105 E.R. 931, at p. 935].
(13) (1571) 1 Plow. 384 [75 E.R. 582].
(14) (1920) 256 U.S., at p. 154 [65 Law. Ed. 865].
(15) (1923) 264 U.S., at p. 547 [68 Law. Ed., at p. 844].
(16) (1884) 2 N.Z.L.R., at pp. 391, 392.

of any avail to Parliament. Parliament cannot create a fact by stating what it believes to be a fact. To make a parliamentary statement of fact conclusive would be an usurpation of judicial power (*Waterhouse* v. *Deputy Federal Commissioner of Land Tax (S.A.)* (1); *Harvard Law Review*, vol. 49, p. 634; *Harvard Law Review*, vol. 38, p. 19; *Wigmore* on *Evidence*, 3rd ed. (1940), vol. V., s. 1353). The recitals of fact, not being conclusive, cannot provide the link with power, whether s. 4 or s. 9 (2) be regarded as the central feature of the legislation, and whether the test be abstract logic or real, specific and factual (*Chastleton Corporation* v. *Sinclair* (2); *Harvard Law Review*, vol. 49, p. 634). Recitals are not evidence of the contents of documents if the documents exist. Evidence is admissible if there is a dispute as to the truth of facts recited: *Harvard Law Review*, vol. 49, pp. 632, 633. The recital of facts when disputed should be regarded by the Court as merely a "partisan pre-judgment of the majority", and not be given any weight: *Wigmore* on *Evidence*, 3rd ed. (1940), vol. 5, s. 1662. The view that recited facts are prima-facie evidence of their objective truth cannot be a consideration for the Court. A preamble containing recitals, whether of law or facts or of reasons or purpose, cannot in any way add to any presumption of validity which may exist. The scope of judicial knowledge is dealt with in *Halsbury's Laws of England*, 2nd ed., vol. 12, p. 622, par. 693; and *Holland* v. *Jones* (3). The phrase "notorious facts" implies that it is a fact and that it is generally recognized to be a fact. Notorious prejudices and notorious untruths are not "notorious facts". The Court cannot take judicial notice of matters alleged to be "notorious facts" by one party but disputed by the other party.

The matters enumerated on behalf of the defendants as being notorious facts are matters of which judicial notice cannot be taken because, being matters of politics, they are by their essential nature, matters of dispute, or, the plaintiffs having disputed the truth of those matters, the Court must not, or should not, pay any attention to them unless evidence has been heard. The Court can take judicial knowledge that the state of international tension is not such that it might reasonably be said that it is a matter of judicial knowledge that the outbreak of war is imminent, and that there is not any "emergency", as asserted on behalf of the defendants, to justify the drastic and far-reaching power contained

(1) (1914) 17 C.L.R. 665, at p. 671.
(2) (1923) 264 U.S. 543 [68 Law. Ed. 841].
(3) (1917) 23 C.L.R., at pp. 151-155.

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in the Act. The Act does not contain, either expressly or by implication any statement that it is directed by any category of emergency, whether international or national. The preamble being the reasons of Parliament for the Act, the defendants are precluded from furnishing other reasons. "Emergency legislation" ordinarily associated with the marshalling of the nation's resources to meet an imminent danger has not been enacted. Although the ordinary method of proof in such matters, the defendants have not furnished a certificate from the Executive Government of the Commonwealth setting out the Commonwealth's relations with the Government of the U.S.S.R., the nature of law of the Commonwealth's action against the People's Republic of North Korea, or the people of Malaya, or any state of emergency either nationally or internationally. Countervailing matters of which the Court can take judicial notice are, *inter alia*, (a) that the Party has a written Constitution—the contents of that Constitution are not within judicial knowledge but are admissible evidence; (b) the Party has not been declared to be and at no time was an unlawful association under the *Crimes Act* 1914-1948; (c) that no member of the Party has ever been charged with the offences of espionage, treason or mutiny (*Crimes Act* 1914-1948); (d) that the Party is opposed to aggression by one State against another State; (e) that the Government of the Commonwealth has normal diplomatic and trade relations with the Government of the U.S.S.R. and the governments of various European Peoples' Republics; (f) that the Government of U.S.S.R. has included proposals for the outlawing of the use of atomic and bacteriological weapons; reduction in armaments; conferences between the Great Powers to resolve differences; and for making propaganda for war a crime under the domestic law of all nations; (g) that the Government of U.S.S.R. has no troops and no bases outside its own territory except in ex-enemy territory by agreement with its allies in World War II; and (h) that there is in existence between the Government of the U.S.S.R. and the Government of Great Britain (with which Australia has close associations) the Anglo-Soviet Treaty of Alliance and Mutual Friendship.

The Act cannot be said to be incidental to the exercise of the executive power vested in the Executive by s. 61 of the Constitution. The powers vested in the Executive must be read in the light of the Royal Prerogative as it existed in 1900. There is not any prerogative authorizing the confiscation of property and direct interference with proprietary contractual and civil rights by the Executive without recourse to the courts, except

in times of grave civil disturbance and upheaval and even then, *quaere* (*Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1); *Gratwick* v. *Johnson* (2)). The existence or otherwise of such a grave disturbance and upheaval is a question of fact to be determined by a court and not merely on the opinion of the Executive itself as to the state of affairs (*The Zamora* (3); *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (4)). The Executive's power to take preventive measures is limited to the maintenance of the Constitution and the execution of the laws of the Commonwealth (*Burns* v. *Ransley* (5); *R.* v. *Sharkey* (6)). There is not any power to deal with internal security in general, that being the prerogative of the States (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (7); *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (8)). Preventive measures without recourse to the judicial power may be taken by the Executive to maintain the Constitution and the laws of the Commonwealth only when there is an imminent or a clear and present danger (*R.* v. *Hush*; *Ex parte Devanny* (9)). Such preventive measures may extend only to what might reasonably be considered by the Court to be necessary to meet the actual threat to the maintenance of the Constitution or the laws of the Commonwealth. The nature and extent of the actual threat is a matter for determination by the Court. There is not any such imminent or clear or present danger to be found in the operative parts of the Act, or in the Act read with the recitals as conclusive, or in the public situation as known to the Court, and it follows that there is not any Executive power to the exercise of which the Act can be said to be incidental. Subject to the foregoing the arguments submitted on behalf of these plaintiffs in relation to the defence power apply also to the Executive power. On construction, the Act can be held valid only if justified both under the defence power and as incidental to the exercise of the executive power taken together. The declaration made by the Governor-General under s. 9 (2) may specify both, either or the alternative, and under s. 5 (2) may specify either. Section 27 clearly pre-supposes that both powers were being relied on when the Act was introduced. These plaintiffs adopt the argument of *Evatt* K.C. in respect of the above and also with regard to the incidental power and the

(1) (1920) A.C. 508.
(2) (1945) 70 C.L.R. 1.
(3) (1916) 2 A.C. 77.
(4) (1918) 25 C.L.R. 32.
(5) (1949) 79 C.L.R. 101.
(6) (1949) 79 C.L.R. 121.
(7) (1914) A.C. 237; 17 C.L.R. 644.
(8) (1922) 31 C.L.R. 421.
(9) (1932) 48 C.L.R. 487.

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executive power. The latter apply as well to s. 4 and consequential sections as to s. 5 and s. 9 and consequential sections.

H. V. Evatt K.C. (with him *S. Isaacs* K.C. and *G. T. A. Sullivan*), for (a) the Waterside Workers' Federation of Australia and Healy; and (b) the Federated Ironworkers' Association of Australia and McPhillips. The solution of the case depends upon an undeviating application of some of the fundamental principles of Federalism in Australia, as authoritatively laid down by the courts. The Parliament of the Commonwealth is empowered to make laws only with respect to specified subject matters, and it is therefore constitutionally impossible either for Parliament itself or for the executive Government to enlarge in any respect whatever, and whether directly or indirectly, the scope or ambit of Commonwealth legislative authority. One established rule of interpretation is that those who affirm the power of the Commonwealth Parliament to pass a particular law are bound to establish a sufficiently close connection between the challenged enactment and some specified subject matter within Commonwealth legislative jurisdiction (*Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2); *Ex parte Walsh and Johnson* (3)). The elaborate doctrines of presumption as applied in the United States have little or no application in Australia. The only presumption is one of intention to the effect that the Courts will presume that neither the Commonwealth Parliament nor a legislature of the States intended to exceed its constitutional powers. If it were otherwise, and an *inter se* question arose, the presumption of validity would attach just as much to State legislation as to Commonwealth legislation and the presumptions would cancel each other out. Section 5 (2) and s. 9 (2) of the Act provide a crucial application of established rules of interpretation. Each purports to be linked with the subject of defence and the subject of the executive power so far as the exercise of that power is relevant to s. 51 (xxxix.) of the Constitution. But on close analysis both s. 5 (2) and s. 9 (2) are revealed as provisions operating, in their second and vital aspect, by reference to an unappealable and unexaminable decision of the Governor-General that a body or an individual is acting prejudicially to the very subjects which measure the extent of Commonwealth legislative power. This is contrary to principles illustrated by *A.-G. (Cth.)* v. *Colonial Sugar Refining*

(1) (1914) A.C. 237; 17 C.L.R. 644.
(2) (1920) 28 C.L.R. 129, at p. 150.
(3) (1925) 37 C.L.R., at pp. 58, 114, 117, 132.

Co. Ltd. (1); *Ex parte Walsh and Johnson* (2), and the observations in *Reid* v. *Sinderberry* (3) are directly in point. Sections 5 (2) and 9 (2) alike constitute indirect attempts to enlarge the sphere of lawful Commonwealth jurisdiction by utilizing the Commonwealth executive itself as a final judge as to the extent and applicability of the Commonwealth constitutional subject matter. Parallel with this attempt we actually find in the case a complete misconception, for the Commonwealth actually relies upon *Ex parte Walsh and Johnson* (2) as supporting the validity of s. 5 (2) and s. 9 (2). *Ex parte Walsh and Johnson* (2) makes it perfectly plain that a law of the character contained in the second part of s. 5 (2) and s. 9 (2) is not a law with respect to the subject of defence or the subject of matters incidental to the exercise of the executive power. In each case the Executive Government's opinion as to the subject matter affords the only link with the constitutional subject matter. Not only is the majority decision in *Ex parte Walsh and Johnson* (2) decisive on this point, but the dissenting judgment (in relation to power) of *Isaacs* J. concedes the principle that "an act founded on the belief of the Minister as to the extent of a power was not an act in respect of the subject matter of the power" (4). The principle merely applies the general rule illustrated in *Bank of New South Wales* v. *The Commonwealth* (5). That passage shows that the Court determines the actual operation of the law and then considers whether what is done by the enactment falls in substance within the relevant subject matter. Section 4 of the Act also provides an occasion for applying a fundamental rule of constitutional interpretation. It purports to declare unlawful a body called the "Australian Communist Party". Such a section is obviously void if the Act is confined to its own enacting provisions. In the Act proper, there is not even a pretence of connection of s. 4 with any lawful subject of Commonwealth power. But an application of the general principle of interpretation of the Federal constitution of Australia immediately negates any suggestion that s. 4 can find constitutional support in the preamble of the Act which alleges against the Party activities involving serious crimes contrary to the laws of the Commonwealth and justiciable by Australian Courts. If these imputations are regarded merely as motives or reasons for the legislation they are of little or no significance to the case. But if they are used either directly or indirectly to

(1) (1914) A.C. 237; 17 C.L.R. 644.
(2) (1925) 37 C.L.R. 36.
(3) (1944) 68 C.L.R., at p. 551.
(4) (1925) 37 C.L.R., at p. 96.
(5) (1948) 76 C.L.R., at pp. 186, 187.

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manufacture a chain linking s. 4 with a subject matter such as defence, and if on true construction it is ruled that the Party and other plaintiffs cannot be permitted to give evidence in denial of the criminal imputations—this again involves a usurpation by Parliament of an authority to create for the special occasion and quite irrespective of the true facts, constitutional power which would not otherwise exist. This amounts to a breach of the principle that the Parliament cannot trespass beyond the area of its specified subject matters either directly or by the indirect means of making assertions and declarations. Even in the United States commentators seem to be inclined to the view that congressional declarations of fact must be regarded critically in relation to questions of power lest by such means the legislature attempts " to lift itself by its bootstraps " (49 *Harvard Law Review*, p. 634). *Wigmore* on *Evidence*, 3rd ed. (1940), vol. 4, s. 1352, points out that a recital of fact in the statute " is not conclusive testimony " and that they are commonly intended merely as explanations of motives and purposes and " could not without gross injustice be made evidentially conclusive ". To forbid investigation of the facts in such a case is " to forbid the exercise of an indestructable judicial function ". The author also suggests that the legislature has " no power to legislate the truth of facts " upon which rights depend (ss. 1352-1354, 1662). The attitude of the defendant Commonwealth as to the question of the recitals contained in the preamble was that Parliament cannot by means of recitals arrogate to itself power it has not got, but that the Court should accept the statements of Parliament as expressing a view which could be " rationally held " as part of a " sort of logical exercise " to determine whether the law could be rationally related to the view expressed. It was contended that the objective truth was irrelevant. *South Australia* v. *The Commonwealth* (1) affords no ground whatever for the Commonwealth's contention in this case. The general principle may be tested by supposing that instead of making the statements contained in the recitals, Parliament had included in the enactment proper that any body found guilty of conduct set out in the recitals numbered 4 to 8 inclusive would become an unlawful association and subjected to the same sanctions as are in the present enactment directed against the Party. If in such a case there had been added a second section declaring that the Party should be " conclusively deemed " to have been guilty of the misconduct described, clearly the " conclusively deemed " section would be void as not being a law in respect of any subject

(1) (1942) 65 C.L.R. 373.

matter contained in s. 51 of the Constitution. It would also be void upon other grounds; for instance, Parliament would be plainly attempting to arrogate to itself portion of the judicial power of the Commonwealth. Parliament has telescoped the two provisions suggested above and the result is s. 4 of the Act connected up with the recitals contained in the preamble with the exception perhaps of recital 9. The result is no different and s. 4 remains as it is—quite unconnected with any relevant subject matter of Commonwealth jurisdiction. Further support is found in the principles in *Williamson* v. *Ah On* (1). In that case if the judicial door had been closed by a " conclusively deemed " provision the result would have been fatal to the validity of the averment sections. As it was the defendant was entitled to give all the evidence in his power by way of defence and the principle that Parliament cannot indirectly enlarge its own jurisdiction was therefore applied. Neither Parliament nor the Executive nor any other non-judicial authority can of themselves or by themselves add or create or declare any element or factor to enable Parliament or the Executive to transcend the definite limitations imposed by the constitution on the legislative power of the Commonwealth (*Ex parte Walsh and Johnson* (2)). In that case, as in the case of the second part of s. 5 (2) and s. 9 (2), it was not possible for the courts to examine the basis of Executive decision so as to insist upon its conforming to constitutional power. Therefore a very strong case was created for the application of that general principle. But it is the same principle which applies to Parliament's own declarations if contained in the preamble, as here. Thus par. 9 of the preamble adds nothing whatever to the claim of the Commonwealth that the legislation is within power. The constitutional rule that only the Court can determine the validity of Commonwealth statutes cannot be avoided or evaded either in the direct form of recital 9 or in the indirect form of the assertions contained in recitals 4-8 inclusive. The principle is implicit in the judgment of *Latham* C.J. in *South Australia* v. *The Commonwealth* (3). In that case the affidavits setting forth the facts were filed to assist in determining whether the " real substance and purpose is to assist defence " (4). The word " purpose " means purpose ascertainable from the enacting and operating provisions as applied to the facts and certainly not the opinion, reason, motive or object of Parliament itself, as stated in the preamble. In such circumstances the preamble may be of assistance if the operation

(1) (1926) 39 C.L.R. 95, at p. 111.
(2) (1925) 37 C.L.R., at pp. 67, 68.
(3) (1942) 65 C.L.R., at p. 432.
(4) (1942) 65 C.L.R., at pp. 468, 469.

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of the enactment supports the description of it contained in the preamble (*South Australia* v. *The Commonwealth* (1); *Bank of New South Wales* v. *The Commonwealth* (2); *Stenhouse* v. *Coleman* (3)). The actual extrinsic motives and intentions of legislative authorities should be excluded from investigation. On behalf of the defendants it is contended on the basis of *Stenhouse's Case* (4) that subject matters not otherwise within the defence power come within it if they may "fairly be thought to be necessary in the circumstances for the purpose of defending the country". None of the cases cited really support that proposition, which deserts the authoritative test of substantial connection with the subject matter and replaces that test by suggesting that it is sufficient to find "a logical or rational connection" between the immediate subject matter of the legislation and the defence of the country. None of the cases warrant the departure from the ordinary test stated in principle in *Bank of New South Wales* v. *The Commonwealth* (5). Within the four corners of the twenty-seven sections of the Act there is not any provision whatever which purports to be linked up with any subject of Commonwealth power except s. 5 (2) and s. 9 (2). Each of such sub-sections uses the words "prejudicial to the security and defence of the Commonwealth" and also the words prejudicial "to the execution or maintenance of the Constitution or of the laws of the Commonwealth". These references apart, there is nothing within the Act properly so called, which even mentions any subject of Commonwealth legislative power. In determining what is covered by the words "law made by the Parliament of the Commonwealth under the Constitution" and by similar words used in ss. 51 and 109 of the Constitution, it is intended that every Act or law passed by the Commonwealth Parliament commences after the conclusion of the enacting words. If so, in the present case, it commences with s. 1 of the Act proper. The *Acts Interpretation Act* 1901-1948 shows that this approach is correct: see especially ss. 12, 13, 15 and 15A. The preamble and its recitals are physically part of the document of the Parliament and capable of being used for the purpose of explanation of motives or reasons leading to the enactment properly so called, but are never to be regarded as part of the operative law of the Parliament (*Mills* v. *Wilkins* (6)). Each and every section of a valid Act comes into force as a law, but the preamble or recital never operates or comes into force as a law

(1) (1942) 65 C.L.R., at p. 462.
(2) (1948) 76 C.L.R., at p. 48.
(3) (1944) 69 C.L.R., at p. 471.
(4) (1944) 69 C.L.R. 457.
(5) (1948) 76 C.L.R., at pp. 186, 187.
(6) (1703) Holt K.B. 662 [90 E.R. 1266].

and could never be declared by the Court to be either *intra vires* or *ultra vires*. The very nature of a preamble, as well as its part in Parliamentary practice, shows that it is not intended to operate except as ancillary to the enactment proper: *May's Parliamentary Practice*, 10th ed. (1916), pp. 456-457, indicates that the preamble is always postponed until after the clauses constituting the enacting part of the Act have been concluded. Not one of the nine recitals comprising the preamble came into operation as part of the law of the Commonwealth. "... The preamble of a statute is no part of it, but contains generally the motive or inducements thereof" (*Mills* v. *Wilkins* (1)). The Commonwealth's primary support of the validity of the Act proper by reason of the references already mentioned in s. 5 (2) and s. 9 (2) was forced upon the Commonwealth, not only by the extraordinary character of the legislation both in form and substance, but also by the very limited function which can be performed by the preamble of an Act of a Parliament the powers of which are strictly limited by a constitution which gives power to make laws of a certain character but no power whatever to use a preamble to make binding or even persuasive assertions of fact and/or law. The dilemma of the Commonwealth is made more acute by the fact that the central section of the Act seems to be s. 4. Nowhere in the Act proper is this basic section connected with a specified subject of Commonwealth power. Section 3 contains a reference to "the Australian Communist Party", to "the specified date", to an "organization", to a "name", to "the adoption of a Constitution" and to "membership" of the organization. But, in the absence of evidence, the Court knows nothing whatever as to any of the provisions of such constitution or as to the membership or conditions of membership, or as to any of the objectives, principles, purposes, activities, functions or rules of the organization; and the Commonwealth asks the Court to hold in effect that evidence as to any or all of these matters is inadmissible despite authoritative statements to the contrary in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2) and *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (3), which indicate that evidence as to the circumstances to which operative sections of an enactment are to be applied may always be admitted to prove the practical operation of any challenged legislation and also to show that the legislature is in fact trespassing beyond its constitutional limit. It would therefore appear to be prima facie estab-

(1) (1703) Holt K.B. 662 [90 E.R. 1266].
(2) (1939) A.C. 117.
(3) (1939) 61 C.L.R. 735.

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lished from the Act proper that it is not possible to hold valid s. 4, which permanently imprints the brand of illegality upon a lawful political party, perpetrates a wholesale deprivation of property belonging to members, imposes a blanket prohibition on the activities of the group and so applies the ban even to activities having no connection whatever with politics. That s. 4 is the leading section of the Act is plain from the wording both of the short title and of the long title of the Act. It is significant that neither title makes any reference to any head of Commonwealth legislative power. If s. 4 is invalid, it is submitted that s. 5 is consequentially invalid. Section 5 is plainly ancillary to s. 4. Section 5 aims at effecting, by means of the executive declaration, a banning and forfeiture similar to s. 4, together with a prohibition of all the activities of the body which in s. 5 is regarded as either having or having had some direct or indirect association either with the Party or with some of its members or with what is more generally called communism. It is significant, however, that s. 5 never operates at all unless and until the Governor-General chooses to become satisfied in the case of a specified body that its existence is prejudicial to defence, &c. Such a condition may never be fulfilled at all and may be fulfilled ten or twenty years after the coming into force of the Act. It is impossible to impute to Parliament an intention that if s. 4 is deemed invalid so that the Party remains a lawful body and fully entitled to continue all its activities, yet the bodies mentioned in s. 5 could still be the subject of dissolution and forfeiture of property with all their activities prohibited as crimes. It is even plainer that if s. 4 is invalid s. 9 must also be deemed invalid for the reasons similar to those with respect to s. 5, and in addition s. 9 (1) (*a*) is by definition limited to a class of person which is only ascertained upon " the date upon which the Australian Communist Party is dissolved by this Act "—an event which can never happen on the hypothesis that s. 4 is invalid. The Commonwealth endeavoured to support the validity of s. 4 by first asserting the validity of s. 5 (2) and s. 9 (2), and then the similarity in general subject matter between s. 4 on the one hand and ss. 5 and 9 on the other, the attempt to found the validity of s. 4 upon ss. 5 and 9 completely failed. The fair conclusion is that s. 4 is the central feature of the Act and that ss. 5 and 9 are intended to be secondary and not the reverse. Even if s. 5 (2) and s. 9 (2) were valid, the validity of s. 4 would not be established. The Commonwealth's claim in respect to s. 5 (2) and s. 9 (2) is that the second part of the declaration of the Governor-General is based upon a link with constitutional subject matter,

and on this footing it follows that s. 5 and s. 9 and the associated sections are laws in respect to the subject matters of defence and " matters incidental " to both of which the declaration relates. The case against this submission of the Commonwealth may be summarized thus: (a) Section 5 (2) and s. 9 (2) may conveniently be considered together. The words " would be prejudicial " in s. 5 (2) and " is engaged or likely to engage " in s. 9 (2) must be regarded as referring to the state of affairs existing at any time after the Act is passed. Thus, if s. 4 is valid, the group of persons included in s. 9 (1) (*a*) is determined as at the passing of the Act, but no sanctions or disqualifications as prescribed in ss. 10, 12 and 14 are imposed unless and until the Governor-General decides to take the positive action permitted by the second part of s. 9 (2) and so becomes " satisfied " as to " activities " " prejudicial ", &c. Accordingly the sanctions are not intended to operate at all unless the individual's activities come under specific notice and a decision is given against him by the Governor-General. (b) On the true construction of s. 5 (2) and s. 9 (2) all questions of fact and/or law as to which the Governor-General becomes " satisfied " are remitted for final decision to the Governor-General himself. In the case of a body he decides as to its supposedly prejudicial character in relation to the " security and defence of the Commonwealth " or " the maintenance of the Constitution," &c. He also decides in the case of a person what activities the person is engaged in or likely to engage in, whether those activities are prejudicial to security and defence or to the Constitution, &c. (c) It is evident that this " satisfaction " of the Governor-General is not examinable by any court for the purpose of determining whether in fact and/or law the body or the person has been concerned in any activities, whether they are related to defence or the maintenance of the Constitution or whether they are injurious to the defence of the country or the maintenance of the Constitution or of the laws of the Commonwealth. It is impossible for the Governor-General to make an adverse finding under s. 5 (2) or s. 9 (2) on this point unless he applies some standard of conduct and the actual or alleged or predicted conduct bears a definite relationship to the subject matters specified. There is a very close analogy in the construction adopted by the Court in relation to a somewhat similar provision considered in *Ex parte Walsh and Johnson* (1). In *Liversidge* v. *Anderson* (2), Lord *Atkin*, although dissenting on the main question, also expressed his opinion that the word " satisfied " is indicative of a subjective and not an objective

(1) (1925) 37 C.L.R., at p. 67.

(2) (1942) A.C., at pp. 232, 233.

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determination by the person who is to be satisfied. (d) Not only does the relevant part of the Governor-General's "satisfaction" involve a decision by him of law and/or fact as to the lawful defence or executive authority of the Commonwealth (indeed the executive power of the Commonwealth is described in s. 61 of the Constitution in phrases identical with those used in s. 5 (2) and s. 9 (2)), but, in addition, it will be for the Governor-General to determine what is comprised in "security and defence" as at the time the question comes before him. The defence power has a fixed concept but a changing content from time to time. Accordingly, the Governor-General's decision involves questions of difficult law and/or fact and these are made more difficult because of the nature of the matters he is considering. A decision of the Governor-General involved in the second part of the declaration under s. 5 (2) or s. 9 (2) does not constitute a sufficient connecting link with the subject matter of s. 51 (vi.) or s. 51 (xxxix.) of the Constitution. It has been suggested that in s. 5 (2) and s. 9 (2) the phrase "security and defence of the Commonwealth" has a meaning distinct from the meaning "defence" in s. 51 (vi.) of the Constitution. On the contrary the plaintiffs submit that the words "security and defence of the Commonwealth" are no narrower than the "naval and military defence", which are used in the Constitution. In each case "defence" includes every aspect of every activity involved in defending Australia and its territories against external aggression; and when the word "security" is added to defence the scope of the expression used in s. 5 (2) and s. 9 (2) could be regarded as extending to internal security which is only to a limited extent the lawful subject of Commonwealth jurisdiction. In any event, it is sufficient for the plaintiffs to show that the composite phrase "security and defence" is equivalent in scope to "defence" in s. 51 (vi.). The true interpretation of s. 5 (2) and s. 9 (2) is that the Governor-General himself determines what is comprised in the scope of "security and defence" and it is perfectly open to the Governor-General to give an application of the statutory phrase which transcends the lawful ambit of Commonwealth legislative jurisdiction as it exists at the moment of the Governor-General's decision. Indeed it is obvious that by means of the creation of an authority in the Governor-General to act in a way which is contemplated in the second part of s. 5 (2) and s. 9 (2)—what was attempted to be done by wartime regulations and orders which were deemed invalid by the Court could be successfully done without those concerned ever becoming aware of the grounds upon which the Executive Government was acting. For instance, it could be

provided that if in time of war the Governor-General's opinion is that the activities of a company would be " prejudicial to security and defence " the business could be liquidated or its owner disqualified from carrying on the business. As in the case of s. 5 (2) and s. 9 (2) there would be no hearing, no charge, no notice, and the basis of the decision would never be known. A similar principle could be applied to other heads of constitutional power and by such executive processes, regulations or orders of a legislative character deemed invalid by the courts even in time of war—and deemed invalid only because they were of a legislative character and openly expressed—could in substantial effect be made to operate as matters comprised within the Governor-General's own subjective satisfaction, e.g., regs. 3-6B of the *National Security (Subversive Associations) Regulations* in the *Jehovah's Witnesses Case* (1). It would be impossible for the Court to check and restrain the exercise of such powers if ss. 5 (2) and 9 (2) are valid in relation to the Governor-General's " satisfaction " as applied to defence or the executive power. The analysis of s. 5 (2) and s. 9 (2) completely negatives any possibility of connection either with the subject matter of s. 51 (vi.) or s. 51 (xxxix.) as applied to the executive power of the Commonwealth. This conclusion may be based upon alternative grounds. It is of the very essence of the majority judgments in *Ex parte Walsh and Johnson* (2) that in relation to trade and commerce there was no sufficient connection between the enactment and the head of power. The relevant part of the enactment was in truth a law relating to the Minister's opinion as to trade and commerce—not to trade and commerce itself. Moreover, s. 5 (2) and s. 9 (2) purport to invest the Governor-General with the judicial power of determining matters arising under the constitution and involving its interpretation. The same conclusion may also be more broadly expressed by pointing out that in substance neither s. 5 (2) nor s. 9 (2) can be regarded as a law under s. 51 (vi.) or s. 51 (xxxix.). The relevant cases decided by the Court in the Second World War all demand the establishment by the Commonwealth of a real substantial and specific relationship between the subject of defence and the actual operation of the challenged enactment before the validity of the latter can be affirmed. In the present case the relationship is as remote as it possibly could be and the words relating to defence and the executive power are merely " pegs " upon which it has been decided to hang legislation which in its substance has no operative connection with the defence of Australia. The defendants suggest

(1) (1943) 67 C.L.R. 116. (2) (1925) 37 C.L.R. 36.

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that if any construction of s. 5 (2) and s. 9 (2) would work in validity, s. 15A of the *Acts Interpretation Act* requires the adoption of a construction so as to bring the sub-sections within power. That view is clearly wrong. The very purpose of s. 5 (2) and s. 9 (2) is to prevent in relation to the second part of the Governor-General's decision of " satisfaction " such a judicial review as is permitted in the case of the first part of the Governor-General's declaration. The intention is plainly to make the Executive Government itself the sole and final judge on the question whether the body or the individual is " subversive " in the sense of being a menace to the defence of the country or its internal security. Section 15A does not permit the Court to assume the role of legislator and manufacture out of the material of an invalid enactment a new enactment with a fresh policy and operation (*Australian Railways Union* v. *Victorian Railway Commissioners* (1)). In connection with s. 5 (2) and s. 9 (2), *Lloyd* v. *Wallach* (2), *Ex parte Walsh* (3), and *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (4), are distinguishable, being all decided during the crisis of a world war in which Australia's physical survival was threatened by the King's enemies. Having regard to the direct and specific scope of the discretion and the all-embracing nature of the war *Lloyd* v. *Wallach* (5) could be regarded merely as authorizing during the limited period of the crisis a " power of detention in military control of naturalized persons when there is reason to believe they are disaffected or disloyal ". The majority of the Court appears to regard the decision of the Minister as being in principle examinable in order to check objectively the existence of a " reason " for his belief. The construction of the regulation adopted by Lord *Atkin* in *Liversidge* v. *Anderson* (6) was in principle sound (*Nakkuda Ali* v. *Jayaratne* (7)). Therefore, the link with constitutional subject matter found to exist in *Lloyd* v. *Wallach* (2) is much closer than in the case of the arbitrary or unlimited " satisfaction " permitted by s. 5 (2) and s. 9 (2). The Minister did not in any event have to determine anything more than the fact of disloyalty of an individual in time of war and it was unnecessary for him to make any decision as to the scope or ambit of the defence power. *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (4) has very little connection with the present matter : in substance the regulation recognized the constitutional validity in Australia of the

(1) (1930) 44 C.L.R. 319, at p. 386, per *Rich*, *Starke* and *Dixon* J.J.
(2) (1915) 20 C.L.R. 299.
(3) (1942) A.L.R. 359.
(4) (1916) 22 C.L.R. 268.
(5) (1915) 20 C.L.R., at p. 307.
(6) (1942) A.C. 206.
(7) (1951) A.C. 66.

prerogative or Commonwealth powers of the Crown in relation to trading with the enemy. *Ex parte Walsh* (1) did not involve a decision of the Court upon the constitutional validity of reg. 26 of the *National Security (General) Regulations*. The New South Wales Supreme Court merely decided that the order of detention was within the power conferred by the *National Security Act* and regulations. The High Court merely refused special leave to appeal. *Lloyd* v. *Wallach* (2) was referred to, but the case of *Ex parte Walsh and Johnson* (3) and its general principles were not, and could not be regarded as in any way challenged. The language of reg. 26, having regard to the *National Security Act* meant that the Minister had to address his mind to what was necessary to prevent the particular individual from acting prejudicially to the effective prosecution of the war. In that sense the decision required was specific and not general and the means adopted were plainly linked up with the decision to which the Minister came. Undoubtedly *Ex parte Walsh* (1) was decided upon the authority of *Lloyd* v. *Wallach* (2) although there was an apparent extension of that decision. *Ex parte Walsh and Johnson* (3) was not intended to be affected by *Ex parte Walsh* (1). The former case was decided after *Lloyd* v. *Wallach* (2). The two cases of preventive detention during the actual crisis of war are of a special category and relate in substance to discretion of a very special character, not necessarily involving decisions of the character involved either in *Ex parte Walsh and Johnson* (3) or in s. 5 (2) or s. 9 (2) of the present enactment. The general principles of *Ex parte Walsh and Johnson* (3) apply to every head of constitutional power, including defence, and certainly cover the present case. Both s. 5 (2) and s. 9 (2) are deliberately classified by the Commonwealth in the present case as dealing with " conduct prejudicial to defence ". No doubt such an enactment uses the word " defence " and defence is the very subject matter of constitutional power. It is not possible to regard such an enactment as being in substance a law with respect to defence. No person could know the content of such a law. No rule of conduct or even of thought is prescribed by the statutory command. The expression is so general, so vague, so indefinite, that no specific or tangible or substantial or factual relationship to defence is ascertainable. The punishment of " conduct prejudicial to defence " at a time when war is not raging may well be deemed outside the legislative power in respect to defence. In the present enactment the facts are so different from those which were before the courts

(1) (1942) A.L.R. 359.
(2) (1915) 20 C.L.R. 299.
(3) (1925) 37 C.L.R. 36.

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in the cases that have been cited and the connection with the subject matter of power is so attenuated and remote that it is impossible to regard s. 5 (2) or s. 9 (2) as a law with respect to constitutional subject matter. On the contrary, each is an enactment with respect to the Executive Government's opinion as to what is defence and as to what is the executive power of the Government under the Constitution. The question of validity of s. 5 (2) and s. 9 (2) may also be approached by determining the extent and ambit of the legislative authority positively conferred by s. 51 (xxxix.). The question then is whether the enactment is a law with respect to matters incidental to the execution of powers vested in the Executive Government of the Commonwealth. For that purpose it is necessary to measure the extent of such Executive powers, then to analyse what is involved in the exercise of the powers and finally to determine what are the incidents which occur or may occur in the course of such exercise. It is only with respect to " matters incidental to the execution of any power " that Parliament can legislate under s. 51 (xxxix.) of the Constitution. In *Le Mesurier* v. *Connor* (1) emphasis is laid upon " The distinction between a matter incidental to the execution of a power, something which attends or arises in its exercise, and a matter incidental to a subject to which the power is addressed . . . ". *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (2), *R.* v. *Kidman* (3), *Heiner* v. *Scott* (4), *Ex parte Walsh and Johnson* (5), *Burns* v. *Ransley* (6) and *R.* v. *Sharkey* (7) show that the power in s. 51 (xxxix.), important though it is, can never authorize legislation making the Executive in effect the judge of its own powers; and this, in substance, is what is done by s. 5 (2) and s. 9 (2) of the present legislation. Enactments may be passed under s. 51 (xxxix.) punishing, e.g., conspiracies to defraud the Commonwealth, seditious conspiracies, seditious words and the like. In all such matters the legislative power deals with the subject which is truly incidental to the lawful execution of the lawful executive powers of the Commonwealth. In all such cases it is necessary to have regard to what are in law and in fact the lawful powers of the Executive Government. The powers of the Crown in the United Kingdom are in themselves a fairly safe guide in measuring the maximum common law authority of the Crown in the Commonwealth. The essence of the Federal Constitution is the subjection of the Executive as much as the

(1) (1929) 42 C.L.R., at p. 497.
(2) (1914) A.C. 237; 17 C.L.R. 644.
(3) (1915) 20 C.L.R. 425.
(4) (1914) 19 C.L.R. 381.
(5) (1925) 37 C.L.R., at pp. 70, 71, 118-122, 138, 139.
(6) (1949) 79 C.L.R. 101.
(7) (1949) 79 C.L.R. 121.

Parliament to the rule of law. The extent of executive power appears from the following references :—*Harrison Moore, Constitution of the Commonwealth*, 2nd ed. (1910), p. 297 ; *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (1) ; *Thomas and Bellot's Leading Cases on Constitutional Law*, 6th ed. (1927), xxix., xxx., pp. 3, 4 ; *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 414, 446, 450 ; *Chitty's Prerogatives of the Crown* (1820), pp. 5, 104, 119 ; *Maitland* on *Constitutional History* (1950), p. 422 ; *Dicey* on the *Constitution*, 8th ed. (1939), pp. 538-545 ; *Anson* on the *Law and Custom of the Constitution*, 4th ed. (1935), vol. 2, pp. 40, 42-47 ; *The Zamora* (2)—which contains a misleading sentence as to those responsible for security judging what security implies—and *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (3). Consideration of all authorities shows that there is not any executive power in relation to which ss. 5 and 9 have been enacted. Section 61 carries into the Constitution a grant of that part of the prerogative appropriate to the Commonwealth. Section 5 (2) and s. 9 (2) are laws which can never be regarded as dealing with matters incidental to the carrying out of lawful executive powers because they desert and part from all conception of an Executive acting according to law and openly endeavour to make the Executive supreme over the law and over the Constitution by purporting to give it power to determine its own powers. Yet the Commonwealth claims that s. 51 (xxxix.) gives Parliament the authority to remove impediments, or rather what the Executive Government regards as impediments, to the execution of its own authority. The Commonwealth makes a claim of power far wider than that which was rejected in the case of *Ex parte Walsh and Johnson* (4). Also destructive of the validity of the present legislation is the principle decided in *Jehovah's Witnesses Case* (5) in 1943 during a very critical period of the Second World War. A state of war justifies legislation by the Commonwealth Parliament in restriction of personal freedom and proprietary rights which would not be legitimate except in a state of war (*Jehovah's Witnesses Case* (6)). Such restrictions are " of an abnormal and temporary nature " and so relevant to the carrying forward of hostilities during the period of hostilities. A similar emphasis upon the temporary character of wartime restriction appears in *Liversidge* v. *Anderson* (7) although that case dealt only with the question of construction.

(1) (1922) 31 C.L.R. 421, at pp. 430-432, 437.
(2) (1916) 2 A.C. 77.
(3) (1920) A.C. 508.
(4) (1925) 37 C.L.R. 36.
(5) (1943) 67 C.L.R. 116.
(6) (1943) 67 C.L.R., at pp. 161-163.
(7) (1943) A.C. 206.

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In *Jehovah's Witnesses Case* (1) the majority judgments emphasized the permanent character of the drastic action authorized by regs. 3-6B of the *National Security* (*Subversive Organizations*) *Regulations*, all of which were deemed to be invalid. No doubt the regulations in that case affected the property of creditors as well as shareholders. But here, too, there is a forfeiture of the whole of the property of members under s. 4 and s. 5, and all activities of the bodies are made criminal irrespective of their legality, the statement to the effect that in the case of s. 4 there are " no innocent activities " being a mere assertion, unsupported by any evidence. In connection with s. 5, expropriated members have not even a personal right of appeal (see s. 5 (4)). It is submitted that in principle the same conclusion as in *Jehovah's Witnesses Case* (2) should be drawn in the present case, and that the validity not only of s. 4 and s. 5 (2) but of s. 9 (2) is destroyed. This is so because the contention of the Commonwealth that consequences may be ignored in determining the validity of an enactment providing for consequences is contrary to the recognized principle that each and every part of a challenged enactment has to be ascertained and measured in determining whether the enactment as a whole is within constitutional power. On this part of the case the position may be summarized thus :—(a) In the case of a body declared unlawful either by s. 4 or under s. 5 (2) the declaration is not of temporary but of indefinite duration and the detrimental consequences are final in respect of forfeiture of property and complete prohibition of all activities. In both cases there is a public notification or declaration which is a practical equivalent of condemnation of subversive or treasonable tendencies and the procedures go far beyond and are quite irrelevant to any evils alleged or threatened. (b) In the case of individuals declared under s. 9 (2), a similar declaration in the *Gazette* imputes subversive or disloyal tendencies and this means defamation of a permanent and degrading character. The disqualification from holding office is not for a limited or precautionary period, but is indefinite. Even if the declaration is revoked there is no provision for reinstatement of the individual in his previous office. The trade union in respect of which disqualification takes place is ascertained by the mere opinion of the Governor-General that a substantial number of its members are engaged in certain industries. But the number of trade unionists so engaged may be relatively minute and the functions of the office held by the person declared may have no relationship whatever to the work of trade unions or

(1) (1943) 67 C.L.R. 116. (2) (1943) 67 C.L.R., at p. 163.

union branches associated with so-called vital industries. An interference with the fundamental rights of trade unions to choose their own office-bearers is involved. Even if the Act is repealed under s. 27, there is no provision for re-instatement. Above all, there is no factual connection required between the alleged activities forming the basis of any declaration and the functions performed in the trade union by the person declared. This is in complete contrast with the regulation considered in the case of *Ex parte Walsh* (1). Finally the declaration is made without notice, without hearing, without evidence and without appeal. Quite irrespective of other grounds for deeming ss. 4, 5 and 9 invalid, the principle of *Jehovah's Witnesses Case* (2) is clearly applicable in this case. Neither s. 5 (2) nor s. 9 (2) is internally severable to permit of striking out words in the event of the Court holding that the satisfaction of the Governor-General can find constitutional support as an enactment justifiable under s. 51 (vi.) or s. 51 (xxxix.) of the Constitution, but not under both. There is a disjunctive form of expression employed both in s. 5 (2) and s. 9 (2). But s. 15A of the *Acts Interpretation Act* cannot possibly authorize any "blue pencil" operation in the peculiar context of both sub-sections. So far as s. 5 (2) is concerned, the instrument of declaration will be confined to a declaration that the body is "an unlawful association". It would be very odd if under s. 9 (2), which requires a "declaration accordingly", one or more of the phrases used by the legislature could be treated as excised. A declaration "accordingly" means in accordance with the formula and the whole of the formula set out in the sub-section. Parliament clearly intended that so far as the declaration is regarded as affecting "a person to whom this section applies" the grounds for the application of this section need not be stated and indeed under s. 9 (1), as in the case of s. 5 (1), the facts might cover more grounds than one. Clearly the sub-section has been drafted upon the precedent *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (3). All the matters set out in the second part of the declaration convey and are intended to convey a "taint" or imputation of the same general character, that is to say, of subversive conduct or disloyal tendencies and regarded as affecting the subject both of external aggression and internal subversion of the Commonwealth alike. There is no reason to suppose that the Governor-General must determine whether the person declared is deemed to be "engaged" as opposed to being "likely to engage"

(1) (1942) A.L.R. 359.
(2) (1943) 67 C.L.R. 116.
(3) (1916) 22 C.L.R. 284.

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in activities prejudicial, &c. All that the Governor-General has to be satisfied about is that one or other of the numerous descriptions covered by the sub-section fits the person, and, if so, it is intended that the formula of the sub-section should be employed—in which case, as in the *Welsbach Case* (1), it is intended to conclude the matter, because the second part of the declaration is not reviewable. If the declaration under s. 5 (2) or s. 9 (2) is intended to be founded upon the Governor-General's satisfaction, expressed in the statutory formula, the Commonwealth should show that the power to declare is supportable not only by the legislative power in respect of defence, but also by s. 51 (xxxix.), so far as it deals with the exercise of the Commonwealth's executive power. With regard to s. 15A of the *Acts Interpretation Act* the principle was discussed in *Bank of New South Wales* v. *The Commonwealth* (2). On this part of the case, as on others, the formula of s. 5 (2) and s. 9 (2) constitutes " an inseparable context ". The provision is an " interwoven " provision (*Fraser Henleins Pty. Ltd.* v. *Cody* (3)), and there is " some positive indication of interdependence " apparent " from the text, context, content or subject matter of the provisions " (4). Because of its specific operation and clear intention, s. 27 of the Act implies that when the Act first came into force it had to be supportable both by s. 51 (vi.) and s. 51 (xxxix.) of the Constitution. Section 27 postulates that the Act as a whole may and can continue in force although the constitutional support of one or other of the two heads of power is withdrawn. It follows that, unless the Act as a whole when passed was supportable under both powers, it was as a matter of construction void *ab initio* and never came into operation at all. Any words in s. 27 in excess of power cannot be struck out. The cases do not support such striking out. Section 27 postulates a choice exercisable by the Governor-General and if words were struck out of the section other words would have to be added. The point now arises whether, upon the assumption which is here made that the second part of the Governor-General's declaration under s. 5 (2) or s. 9 (2) is not supported by reference to any Commonwealth subject matter, s. 5 and s. 9 as a whole can be supported otherwise. The suggestion is made without any real arguments that s. 5 (1) and s. 9 (1) are in themselves sufficient to attract validity to the whole of s. 5 and s. 9 respectively. It is not possible to reconstruct s. 5 or s. 9 to give them validity if s. 5 (2) and s. 9 (2) are insufficient for that purpose. In such a case the intention of Parliament

(1) (1916) 22 C.L.R. 284.
(2) (1948) 76 C.L.R., at pp. 371, 372.
(3) (1945) 70 C.L.R. 100, at p. 131.
(4) (1945) 70 C.L.R., at p. 127.

would be completely defeated. The intention is that no adverse action should be taken either against a body described in s. 5 (1) or against a person described in s. 9 (1) unless and until the Governor-General makes a legally effective finding under s. 5 (2) or s. 9 (2). In other words, Parliament's intention is that the declaration which alone works disqualifications should be a composite declaration covering not only the applicability of s. 5 (1) or s. 9 (1), but also the decision of the Governor-General that the body or person is operating prejudicially to defence or the maintenance of the Constitution, &c. This construction is borne out by the form of s. 5 (2) and s. 9 (2) and by the general framework of the provisions. Section 10 (1), which refers to a person in respect of whom a declaration is said to be "*in force under this Act*", means only, a declaration which has the force of Commonwealth law as one composite and integral declaration including the second part of it as imputing prejudicial activities relating to defence or the Constitution. It is the declaration as a whole which acquires "force" under the statute. If, however, for reasons already adduced, invalidity attaches to the second part of the declaration in s. 5 (2) or s. 9 (2), the declaration never comes into force at all as a declaration evidencing the Governor-General's satisfaction that the person (in the case of s. 9) is both a person to whom the section applies and also a person engaged or likely to engage in prejudicial activities. The declaration is given force by the Act upon the foundation of a dual satisfaction in the Governor-General. It is that dual satisfaction which gives the declaration its statutory force. This is made clear in s. 9 (4), (7), s. 10 (1) and s. 11 (1). The avoidance for constitutional reasons of the second limb of the dual satisfaction destroys the declaration *in toto*. Similar reasoning applies also to s. 5 (2). Again, the Governor-General must be satisfied as to two separate matters. Upon the declaration being made the body is automatically converted into an unlawful association by s. 5 (2) itself, whereupon the consequences set out in ss. 7 and 8 immediately attach. It follows in relation to s. 5 that if the second part of s. 5 (2) is void and inoperative as unsupported by constitutional subject matter, there is lacking an essential element of the double finding which is intended by Parliament to be the condition precedent to the imposition of sanctions and consequences. It was never intended by Parliament that the declaration should have legal force or effect merely because it identified a body defined in s. 5 (1). Section 15A of the *Acts Interpretation Act* cannot be relied upon by the Commonwealth in s. 5 (2) or s. 9 (2) in order to divert the plan of legislation

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contained in s. 5 and s. 9 from its fundamental purpose and object which are based upon the legally effective operation of both parts of the Governor-General's expression of satisfaction. The intention of Parliament would be completely defeated if the declaration in the second part of s. 5 (2) or the second part of s. 9 (2) were treated as merely providing an occasion, having in itself no legal effect whatsoever, for applying the tremendously serious consequences which are attached by the statute to the making of a declaration including the two parts. The intention of Parliament, evident from the statutory framework, context and subject matter, is that no adverse consequences should be attached to bodies or persons merely because they answer the description in s. 5 (1) or s. 9 (1), and that such consequences are to follow if and only if complicity or suspected complicity in subversive or detrimental activities relating to defence or the Constitution is found as a fact by the Governor-General. Section 5 (1) and s. 9 (1) are not intended to be operative sections at all. Under the statutory plan of s. 5 or s. 9 the operative instrument is the declaration described in s. 5 (2) and s. 9 (2). Such declaration is the condition precedent for the operation of any sanctions and it may operate long after the passing of the statute. Then and then only does the declaration come " into force ". It never could have been intended by Parliament to divert the composite plan of action into an entirely different plan under which the statutory committee would be set up to assist the Executive Council in such a way that all considerations of defence and the maintenance of the Constitution would become of no significance and indeed little more than a constitutional sham or nullity. On the assumption that the second part of the Governor-General's declaration would be void and inoperative in itself, both s. 5 and s. 9 would " operate differently upon the persons matters and things falling under it " and also " produce a different result " (*Bank of New South Wales* v. *The Commonwealth* (1)). The only constitutional basis which can be relied upon by the Commonwealth for the validity of s. 5 and s. 9—properly construed—lies in the constitutional validity of the second part of the Governor-General's declaration made under s. 5 (2) and s. 9 (2) respectively. Even if it were possible to regard sub-s. (1) as the operative portions of s. 5 and s. 9, neither subsection has itself any sufficient link with constitutional subject matter. In the case of s. 4 the Commonwealth relies to some extent at least upon certain of the recitals contained in the preamble to the Act. But in the case of s. 5 (1) and s. 9 (1) such recourse to

(1) (1948) 76 C.L.R., at p. 371.

the preamble is not possible. The allegations in the preamble refer only to the Party. But s. 5 (1) and s. 9 (1) do not deal with the Party as such. When dealing with s. 5 (1) or s. 9 (1) as itself constituting a possible subject matter of constitutional power, it is not possible to reason from the fact of mere membership or mere past membership of the Party that the charges made against the Party as a party in the preamble can be imputed to each individual member or ex-member. Much more would have to be known about the facts and about the particular member before any such reasoning or inferences could be adopted in order to link up s. 5 (1) and s. 9 (1) regarded separately as an enactment with respect to s. 51 (vi.) or s. 51 (xxxix.). So far as the Party itself is concerned the Commonwealth depends entirely upon the acceptance by the Court of the recitals making the imputation against the group and practically convicting it—upon the assumption that no evidence is admissible to rebut the charges—of seditious conspiracy and other conspiracies. But it is not possible to go further and justify the imposition of the most drastic and permanent disqualification upon other bodies and individuals without any information whatever as to rules of membership, as to constitution, and as to the circumstances of the individual in relation to the Party. In *Schneiderman* v. *United States* (1), quoted in *Harvard Law Review*, vol. 61, p. 594, it is pointed out that in the United States " men adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all its platforms or asserted principles ". Beliefs are not a matter of mere association. The position is analogous to the principle applied in cases of conspiracy. It would have to be shown, or at least alleged, that the particular member was a party to such a conspiracy; and in reference to s. 9 the same disqualification as could be visited upon an official of the Party would have to be visited—so far as constitutional power is concerned, for that is the only point being considered—upon an ex-member of that Party. The reason for the Commonwealth's original submission and support of the validity of s. 5 and s. 9 by reference to s. 5 (2) and s. 9 (2) was correct and even if contrary to the submissions of the plaintiffs, the recitals in the preamble could be utilized to link up s. 4 with constitutional subject matter, at any rate to some extent and for some purposes, such a course is not constitutionally permissible in the case of the less direct and more remote association with the Party, which is referred to in s. 5 (1) or s. 9 (1). Therefore any attempt to establish the validity of s. 5 or s. 9 fails. It has never been the practice even

(1) (1942) 320 U.S. 118 [87 Law. Ed. 1796].

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in the United Kingdom, where the Parliament has plenary powers, to regard allegations of fact contained in the preamble as conclusive against the person actually named in the recitals (*R.* v. *Sutton* (1); *Earl of Leicester* v. *Heydon* (2)). It would be impossible even to argue or reason upon the basis of a recital against a political party that imputations of a similar character were to be automatically applicable to members or ex-members of it. The approach indicated in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (3) is indicative of the limited purpose and function of a preamble or recitals or objects under a Federal system where the powers of the Commonwealth Parliament are limited by reference to subject matter. See also *Abitibi Power and Paper Co. Ltd.* v. *Montreal Trust Co.* (4), *Gratwick* v. *Johnson* (5) and *South Australia* v. *The Commonwealth* (6). The Commonwealth has attempted to use the recitals for a purpose which is quite inconsistent with any sound solution of the question of constitutional validity under the Federal system. The defence cases, including those cited on behalf of the Commonwealth, especially as they became more numerous and far-reaching after the outbreak of war with Japan, are entirely inconsistent with the theory that an object or purpose in the mind of the legislature or the executive, even though that object or purpose is honestly addressed to the prosecution of the war, is sufficient to make the law or executive Act or Regulation in truth one with respect to defence. *Stenhouse* v. *Coleman* (7) negatives such a contention. There must be "a real connection with the subject of defence" (8). The test of validity under the Constitution is not the object or intent or opinion of Parliament or the Executive however logical or illogical. The Court looks first at the actual operation of the law in order to scrutinize its operation and applies the law in operation to existing facts. The motives of Parliament are irrelevant to the question of whether the law is within legislative power (*Bank of New South Wales* v. *The Commonwealth* (9); *Ex parte Walsh and Johnson* (10)). The Commonwealth Parliament is to be regarded as having in relation to defence power "to make such laws only as have a real connection with defence" (*Victoria* v. *The Commonwealth* (11)). The decisions in *Victorian Chamber of Manufactures* v. *The Commonwealth* (12) and

(1) (1816) 4 M. & S. 532, at pp. 539, 549 [105 E.R. 931, at pp. 933-937].
(2) (1571) 1 Plowd. 384, at pp. 396, 398 [75 E.R. 582, at pp. 599, 600, 602-604.
(3) (1944) 69 C.L.R., at pp. 486, 497.
(4) (1943) A.C. 536.
(5) (1945) 70 C.L.R. 1, at p. 15.
(6) (1942) 65 C.L.R. 373.
(7) (1944) 69 C.L.R., at pp. 469, 471.
(8) (1944) 69 C.L.R., at p. 464.
(9) (1948) 76 C.L.R., at p. 393.
(10) (1925) 37 C.L.R., at p. 117.
(11) (1942) 66 C.L.R., at pp. 507, 509.
(12) (1943) 67 C.L.R. 413.

the *Jehovah's Witnesses Case* (1) are based on a view which is quite inconsistent with the submissions of the Commonwealth, in the present case. All the decisions of the Court since 1942 show clearly an increasing emphasis, in connection with the defence power, upon the necessity of the challenged law and regulation being " specifically ", " substantially " and " really " connected with the prosecution of the war—not in the mind of the Parliament or the Executive, but factually connected with the practical task of waging the war to a successful conclusion. The content of the defence power, as exercised, must be directly related in time of war not only to the existence of war but to the extent of the conflict and the demands which must be made upon a nation if it is to emerge successfully from the war. Equally insistent is the Court upon the factual approach to the problem in the post-hostilities cases. An attempt is being made to resurrect the doctrine that so long as Parliament or the Executive does not act irrationally and its reasons for action are sufficiently stated the Court will accept those reasons and close its eyes to evidence of the facts and to the actual operative effect of the challenged regulation as applied to the true facts. Once the *dictum* of *Isaacs* J. in *Farey* v. *Burvett* (2) is rejected or at least qualified and modified, the case of the Commonwealth on this point should break down. That *dictum* was criticized in *Victoria* v. *The Commonwealth* (3) and *Victorian Chamber of Manufactures* v. *The Commonwealth* (4). The recitals in this case are the method employed for the object mentioned. Recitals in a statute are not conclusive evidence of facts recited—they are prima-facie evidence (*Dawson* v. *The Commonwealth* (5)). But that situation is rejected by the Commonwealth and the attempt is made to use them by way of suggestion of objects or reasons which cannot be contradicted as objects or reasons and cannot even be qualified or explained in their true setting of fact by admitting evidence even of the activities of the Party although the statute operates to make criminal all such activities. The substantial invalidity of the Act can be declared by the Court quite irrespective of the admission of evidence under Question I as asked, but in no case should any declaration be made in favour of validity of any part of the Act unless the plaintiffs are given an opportunity of calling evidence so far as it is relevant to any of the constitutional issues in the case. Matters of which the Court can take judicial notice never cover matters of opinion or dispute

(1) (1943) 67 C.L.R. 116.
(2) (1916) 21 C.L.R., at pp. 455, 456.
(3) (1942) 66 C.L.R., at pp. 506, 507.
(4) (1943) 67 C.L.R., at p. 421.
(5) (1946) 73 C.L.R., at p. 175.

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any more than so-called " notorious facts " cover anything other than facts. Whenever the Court takes judicial notice of a fact, the matter must be of such a character so well-known and so indisputable that the introduction of evidence on the same point would be unthinkable and absurd. As appears from the alleged principal factors or facts stated on its behalf, the Commonwealth is in effect asking the Court to make use of a selection of political and international information much of which does not even purport to be facts as much as statements of trends based on possibly false inferences and assumptions as to the intentions of a number of nations. None of those alleged principal factors or facts are either relevant to any issue in the present action or such as ought to be judicially noticed by the Court. They are not even described as being matters of which the Court is bound to take judicial notice. The quotation in " fact " (d) is merely descriptive and vituperative in character and which should not be allowed to influence the processes of the King's Courts having regard to the fact that His Majesty is in a state of peace with Russia, apart altogether from the constitutional doctrine cited in *Chitty's Prerogatives of the Crown* (1820), p. 43, " *ubi bellum non est, pax est* ". There are many matters of which the Court or the Judges thereof may have " general knowledge ", which are clearly outside the scope of judicial notice. The principle applies even more clearly to preclude a British Court from taking judicial notice of the alleged facts, trends and policies constituting the tremendously complex and changing situations in the sphere of international relationships, because that field is peculiarly one where information may be incomplete and unsound or even false inferences easily drawn. It is submitted that even in the United States the series of vague, loose and misleading combinations of facts, alleged facts, inferences from facts and comments submitted by the defendants would not be regarded as constituting " facts " so " indisputable " in character that a Court of Justice must accept them without more : see Prof. *Morgan's* article in 57 *Harvard Law Review*, p. 267, on this topic, and also as to the grave danger of a misuse of judicial notice. The limits of the material in international affairs which are available by way of judicial notice are referred to in *Ffrost* v. *Stevenson* (1). The case of *American Communications Association* v. *Douds* (2) has little or no bearing on the present question, but it may be noted (a) that the legislation did not purport to dissolve or disband the Communist Party of America or to render unlawful

(1) (1937) 58 C.L.R. 528, at p. 549.

(2) (1949) 94 Law. Ed. 925 [339 U.S. 382].

any of its activities; (b) that no adverse conclusions as to the activities of the American Communist Party could possibly be automatically applied to the Australian Communist Party; (c) that the material referred to in that case could never be judicially noted for the purpose of the present litigation; and (d) in *Harvard Law Review*, vol. 38, p. 6, *Chastleton Corporation* v. *Sinclair* (1) is regarded as being of double significance, "first showing that the Court regards it proper to consider evidence as to the underlying facts as well as to take judicial notice of such matters of fact as properly come within that power; and second as showing that information derived from such evidence and from such judicial notice may be adequate to overthrow a legislative finding of fact incorporated in the challenged legislation". *Block* v. *Hirsh* (2) was also considered. It is submitted that the case for the plaintiffs in relation to s. 92 of the Constitution is clearly established by the principles of *Commonwealth of Australia* v. *Bank of New South Wales* (3); *Bank of New South Wales* v. *Commonwealth* (4). The position may be summarized as follows:—(a) The evidence establishes that an integral portion of the activities of the Party is inter-State in character (*Commonwealth of Australia* v. *Bank of New South Wales* (5); *Bank of New South Wales* v. *Commonwealth* (6)). (b) The rule laid down by the Privy Council in respect of the freedom guaranteed by s. 92 applies to the Party. The restriction upon its inter-State intercourse results from the direct force of s. 4 of the Act. The body is declared unlawful and it is dissolved; the purpose of such action is to place a complete and absolute ban upon all its activities, whether inter-State or intra-State in character. By s. 7 it becomes a criminal offence for the activities of the body to be continued, so that the prohibition is utterly complete. This is a perfect example of what was called in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (7) and *Australian National Airways Pty. Ltd.* v. *Commonwealth* (8) "a mere prohibition" and in *Commonwealth of Australia* v. *Bank of New South Wales* (9) "a simple prohibition". It is not a case of regulation at all; the restriction is direct and immediate, not indirect nor consequential, not remote, not incidental. (c) The same principle applies not only to s. 4 of the Act but to s. 5, which is not intended to limit the prohibition to the intra-State activities

(1) (1923) 264 U.S. 543 [68 Law. Ed. 841].
(2) (1920) 256 U.S. 135 [65 Law. Ed. 865].
(3) (1950) A.C. 235, at p. 303; 79 C.L.R. 497.
(4) (1948) 76 C.L.R. 1.
(5) (1950) A.C., at p. 303; 79 C.L.R., at p. 632.
(6) (1948) 76 C.L.R., at pp. 380-382.
(7) (1939) 62 C.L.R. 116.
(8) (1945) 71 C.L.R. 29.
(9) (1950) A.C., at p. 311; 79 C.L.R., at p. 640.

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of declared bodies, and to s. 9, which enables the Executive Government to terminate the professional or trade activities of union officers engaged in conducting a vocation or pursuit which necessarily involves inter-State activities. (d) Section 4 prohibits all activities of the Party, but it is an irrelevant factor that intra-State activities are prohibited in the same inseparable command (*Commonwealth of Australia* v. *Bank of New South Wales* (1). In the particular setting s. 4 cannot be construed as confined to intra-State activities alone. (e) There is not any ground for applying the doctrine illustrated by *Tasmania* v. *Victoria* (2); *Commonwealth of Australia* v. *Bank of New South Wales* (3). It has not been suggested by the Commonwealth that this doctrine can be applied to s. 4 of the Act. (f) It follows that s. 4 is invalid and, if so, for reasons already given s. 5 and s. 9 also fall. (g) Because of s. 92 of the Constitution, s. 5—regarded separately—is invalid in relation to any body with inter-State activities, and s. 9 is invalid in relation to the business of every trade union officer who is engaged in inter-State business. (h) The principle of the *Banking Case* (4) creates in some respects at least a right of choice of vocation. If the business, profession or vocation includes inter-State activity, such activity cannot be prohibited: see *New York University Law Review*, July 1950, p. 451, at pp. 507, 511. (k) There is nothing in the recent decision of the High Court in *McCarter* v. *Brodie* (5), or in the argument before the Privy Council on the application for special leave which detracts in any way from the propositions here submitted in relation to s. 92. The submission of the plaintiffs is that this case falls simply and clearly within the binding rule laid down in the *Banking Case* (6). Section 5 (2) and s. 9 (2) constitute an attempt by Parliament to confer upon the Governor-General judicial power to determine finally and conclusively whether a body of persons in one case, or a person in the other, is of the character or tendency described in the sub-section. The analogy to the exercise of judicial power is apparent. Each sub-section means in effect that the Governor-General, and he alone, decides every question of law and fact, including the scope and ambit of questions arising in relation to the interpretation of the Constitution. The matter must be looked at from the point of view of substance (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (7) and *Huddart, Parker & Co. Pty.*

(1) (1950) A.C., at p. 311; 79 C.L.R., at p. 640.
(2) (1935) 52 C.L.R. 157.
(3) (1950) A.C., at p. 312; 79 C.L.R., at p. 641.
(4) (1950) A.C. 235; 79 C.L.R. 497.
(5) (1950) 80 C.L.R. 432.
(6) (1950) A.C. 235; 79 C.L.R. 497.
(7) (1944) 69 C.L.R. 185.

Ltd. v. *Moorehead* (1)). The principle is that the nature, quality and operation of a determination indicates whether there has been an exercise of judicial power by the particular person or tribunal. In the present case the Governor-General certainly decides the subject matter of controversy as if it were a matter arising under s. 76 (1) of the Constitution. The reference of the Chief Justice in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2) cannot be applied to circumstances like the present, which are of a very different character. Here sub-s. (2) of s. 5 and s. 9 respectively represent an intrusion by the Executive Government upon the true function of the judicial organs of the Commonwealth. The nature and quality of the act performed is essentially judicial in character. The Governor-General's " satisfaction " or decision or finding is just as final and conclusive as that of an ultimate Court of Appeal. The liability is imposed by the determination of the Governor-General, not by the fact determined. The decision results in the deprivation and forfeiture of property or in the deprivation of a valuable office. The fact that there is no hearing, no charge, no notice, is true, but completely irrelevant. These additional elements merely add a denial of natural justice to what is in effect a procedure enabling the Government of the day to determine finally as against a citizen or a group certain rights and liabilities. In one aspect a determination vests property in the Commonwealth itself. Section 4 of the Act should also be regarded as an invalid exercise of judicial power by the Parliament if, upon true construction, the allegations contained in the recital are to be regarded as Parliamentary findings preliminary to the passing into law of s. 4. The legislative determination to transfer property from one person to another is ordinarily an exercise of judicial power (*Harrison Moore, Constitution of the Commonwealth*, 2nd ed. (1910), pp. 322, 323 ; *Cummings* v. *Missouri* (3)). The last-mentioned case also illustrates the analogy between an Act of Attainder or a Bill of Pains and Penalties and s. 4 read with the recitals, which for present purposes the plaintiffs are treating as not capable of being rebutted by evidence to disprove their accuracy. *Cummings* v. *Missouri* (3) also shows that deprivation of or disqualification from an office or profession may amount to punishment. Sanctions are imposed by means of s. 4, s. 5 and s. 9, together with associated sections. No assistance whatever is obtained by labelling the sanctions as being " preventive " in

(1) (1909) 8 C.L.R. 330.
(2) (1909) 8 C.L.R., at p. 357.
(3) (1867) 4 Wall. 277 [18 Law. Ed. 356].

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character. The motive of the legislature may be " preventive ", but the operation of the law is to deprive those concerned of property and existing rights either permanently or indefinitely. Under the Constitution Acts of Attainder and Bills of Pains and Penalties are impliedly prohibited in the case of the Commonwealth because they would represent an exercise of judicial power by the Parliament. The recitals in the Act declare many crimes and misdemeanours, and if these recitals are to be taken as in any way established because they cannot be contradicted s. 4 should also be regarded as an invalid exercise of judicial power.

S. Isaacs K.C. (with him *M. N. Julius*) for the Seamen's Union of Australia, the Sheet Metal Workers' Union, and Federated Ship Painters and Dockers' Union. The Act threatens the whole of the trade union movement. If valid, legislation in this form permits or enables the executive government, at the discretion of the Governor-General by appropriate proclamations, in effect to obliterate or expunge or blot out the various trade unions in various ways. As regards the defence power and the Governor-General's opinion, the correct principle is that if it is a law with respect to a subject matter within power, it does not matter if the operation of the law is made to depend on the Governor-General's opinion. Merely to make the law dependent on his opinion as to what is the subject matter of the power without providing in any other fashion a subject matter or a nexus is not to make a law with relation to the particular head of power. The confusion lies in identifying the Governor-General's opinion as to the subject matter itself. The Governor-General's opinion with regard to s. 5 (2) and s. 9 (2) may depend upon a matter not related to defence but related to executive power ; therefore s. 5 (2) and s. 9 (2) cannot be *ex facie* defence. The word " accordingly " in s. 9 (2) may mean " according to the whole tenor of the Section ". The declaration contemplated by s. 5 (2) is entirely different from the type of declaration under s. 9 (2), which is a declaration of the Governor-General's satisfaction. The declared person may come under one or more of three categories. The submission on behalf of the defendants that a law which has as its sole criterion the opinion of the Governor-General as to a matter relating to a subject matter is contrary to *Ex parte Walsh and Johnson* (1). A law cannot be made to depend upon the opinion of the Minister or the Governor-General as to any matter at all so long as the consequences are related to a head of power and are not incommensurate. Such a law is not *ex facie*

(1) (1925) 37 C.L.R., at pp. 61, 68, 96, 132.

a law on that particular head of power. Section 10 (1) (*c*) cannot be read down so as to limit it in its operation to organizations registered under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. Section 15A of the *Acts Interpretation Act* 1901-1948 cannot be applied if the effect of applying it would make the subject provision an entirely new law, a different law in principle from that which Parliament intended. Sections 9 and 10 must be regarded together. If s. 9 itself be invalid s. 10 does not arise, that is to say, if there never be a valid declaration s. 10 is never reached. The consequences under s. 10 are not reached until the validity of the subject matter under s. 9 (2) has been determined. The primary inquiry is—what is the validity of the declaration (s. 9) on which the consequence (s. 10) is based? From the point of view of these plaintiffs s. 9 (2) is the crucial provision. If that is invalid s. 10 does not operate. Merely ascertaining that the consequences are not incommensurate and that they have some logical connection with subject matter does not bring the matter *ex facie* within power where it otherwise is not *ex facie* within power. The submission that even if it was not *ex facie* defence, if the consequences can be causally, rationally, or logically connected with a subject matter of power and not too remote, the law is valid, is a wrong submission. There must be a real and substantial connection between the consequences and the power. Either the legislature has or has not the power to pass the particular legislation. If it has not the power, making the operation of the legislation depend upon an opinion of the Governor-General does not assist the question. If the subject matter be within power then the consequences are for Parliament, unless they are so extravagant that the Court would say it is not a law on the subject matter at all. The mere disclosure in a preamble by Parliament of its reasons for particular legislation does not make that legislation valid if otherwise invalid. The recital of such reasons in a preamble would indicate that they were not matters, in Parliament's view, of which the Court would take judicial notice. So far as the alleged "notorious facts" mentioned by Mr. *Barwick* relate to matters of international or political situations, they are matters of such a controversial nature and depend upon such a variety of opinions, that it is unsafe to accept any of them as being matters of which judicial notice can be taken, within the meaning of that term. Upon analysis of those alleged notorious facts, the defendants really ask the Court to take judicial notice of (a) the character of the Australian Communist Party and not of the state of the country, and (b) the fact

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that that Party, in accordance with the basic principles of Marx and Lenin, is the subversive agent of a foreign power, carrying on its work in Australia. That is a matter which is highly contentious and is vigorously disputed. Those matters could not be ascertained or resolved without some judicial investigation. Judicial notice cannot be taken of any of those matters. Recitals in preambles broadly cover three categories: (i) recitals which merely declare the reasons or motives or intentions of Parliament as distinct from asserting facts; (ii) recitals which consist of allegations of fact or allegations of law, or allegations of mixed fact and law; and (iii) recitals which combine recitals in categories (i) and (ii). Recitals in category (i) are conclusive and unexaminable and as such they never play any part in the construction of a statute except possibly to resolve an ambiguity: *Craies* on *Statute Law*, 4th ed. (1936), pp. 184, 185. Such recitals are never relevant when a question of constitutional validity, or power, is involved in a Federal system. If there is not any constitutional power to make the particular enactment, a recital does not aid it (*Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1); *R.* v. *Barger* (2); *South Australia* v. *The Commonwealth* (3); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (4)). As to recitals in category (ii) allegations of fact do not create any estoppel, but are prima-facie evidence of the facts, and are examinable if relevant to matters in issue. Allegations of law are not binding on courts if they are not correct, and likewise allegations of mixed fact and law are examinable (*Dunedin Corporation* v. *Massey* (5)). As a general rule on constitutional validity, statements of fact in recitals are irrelevant, but an exception exists in the Constitution with regard to the defence power. That power enables Parliament to do things at given times, and it depends upon the facts—that is, real facts—to which the legislation is directed. Those facts may be prima-facie evidence, but are rebuttable. Real facts in ordinary non-war times are the facts which should be looked at and determined by the Court in order to ascertain whether the Act is or is not within power. Allegations of fact are prima-facie evidence in cases where they are relevant to the issue, but where there is not any constitutional question involved (*Halsbury's Laws of England*, 2nd ed., vol. 31, pp. 568, 569, par. 782; *Craies* on *Statute Law*, 4th ed. (1936), p. 41; *Maxwell* on *The Interpretation of Statutes*, 9th ed. (1946); *Phipson* on *Evidence*, 8th ed. (1942),

(1) (1939) 61 C.L.R., at pp. 766, 767, 774, 777, 778.
(2) (1908) 6 C.L.R. 41, at pp. 67, 75, 93, 112.
(3) (1942) 65 C.L.R., at p. 412.
(4) (1945) 71 C.L.R., at pp. 176-178.
(5) (1884) 2 N.Z.L.R. 385.

p. 328; *Wigmore* on *Evidence*, 4th ed. (1947), vol. IV, pars. 1352, 1353; *Earl of Leicester* v. *Heydon* (1); *R.* v. *Sutton* (2); *Earl of Carnarvon* v. *Villebois* (3); *Attorney-General* v. *Earl of Powis* (4); *Dawson* v. *The Commonwealth* (5)). Where a matter of constitutional validity is in issue as a rule the recitals are irrelevant except in relation to the defence power, which is defined by reference to purpose, its application depending on the facts as they exist from time to time (*Andrews* v. *Howell* (6); *Stenhouse* v. *Coleman* (7)). Evidence was received in *Jenkins* v. *The Commonwealth* (8) and *Sloan* v. *Pollard* (9). That evidence was adduced by the Commonwealth. It was evidence of the real facts and not what Parliament believed to be the facts. So here, evidence by the plaintiffs is admissible to show non-existence of facts upon which the supposed exercise of the defence power is said to exist. Short of actual war or crises in war, the policy of Parliament will be examined by the courts (*Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press* (10)). There is not any fixed category of the facts of which the Court takes judicial notice. There are different facts which arise from time to time and which change with the times of which judicial notice is taken by the Court. The Act infringes s. 92 of the Constitution. Section 4 is directly prohibitory; it is not regulatory. The taking of the property is a feature of the prohibition. Section 5 is prohibitory in the same way as s. 4 in regard to the Party; alternatively, it is directed against unregistered trade unions. As in the case of s. 4, the prohibition is achieved by the operation of ss. 5, 6 and 7. Any prohibition of activities of an organization which has some inter-State activities is necessarily invalid. The inter-State activities cannot be made unlawful because making them unlawful is in itself a breach of s. 92 of the Constitution. The activities of these bodies amount to inter-State intercourse of an industrial nature—perhaps to trade and commerce. The matters shown in the stated case amount to intercourse of a more substantial nature than the intercourse referred to in *Gratwick* v. *Johnson* (11). If s. 4 impinges s. 92 of the Constitution, as is submitted, then ss. 5 and 9 fall too. The legislative scheme must be gathered from the Act as a whole. The ninth recital makes it clear that Parliament intended ss. 4, 5 and 9 to operate together. Those sections

(1) (1571) 1 Pl. Com. 284, at p. 398 [75 E.R. 582, at p. 603].
(2) (1816) 4 M. & S., at p. 542 [105 E.R., at p. 935].
(3) (1844) 13 M. & W. 313, at p. 332 [153 E.R. 130, at p. 138].
(4) (1853) Kay 186, at p. 207 [69 E.R. 79, at p. 88].
(5) (1946) 73 C.L.R., at p. 175.
(6) (1941) 65 C.L.R., at p. 278.
(7) (1944) 69 C.L.R., at p. 471.
(8) (1947) 74 C.L.R. 400.
(9) (1947) 75 C.L.R., at pp. 462-464, 466, 471, 472, 474, 476.
(10) (1923) A.C., at pp. 703, 706.
(11) (1945) 70 C.L.R. 1.

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also show that it was not the intention of Parliament that one should function without the others. The only reason on the face of the legislation for s. 10 (a) and (b) is because of the consequences that arise from the declaration made in s. 4. Section 92 of the Constitution protects all trade, business, vocations, pursuits and callings, whether of a business, scientific, political or industrial nature, and any groups, individuals or corporations, so long as their activities are on an inter-State basis and involve inter-State communications as an ordinary feature of such activities. Individuals as well as associations get the benefit of s. 92. The meaning of the phrase " trade, commerce and intercourse " in s. 92 appears in *The Commonwealth* v. *Bank of New South Wales* (1) and *Bank of New South Wales* v. *The Commonwealth* (2). The facts show that the unions are engaged in inter-State trade. " Intercourse " was considered in *R.* v. *Smithers* ; *Ex parte Benson* (3) ; *Gratwick* v. *Johnson* (4) ; *Peanut Board* v. *Rockhampton Harbour Board* (5) ; *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (6), *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (7) ; and *Bank of New South Wales* v. *The Commonwealth* (8). The difference between prohibition and regulation is shown in *The Commonwealth* v. *Bank of New South Wales* (9) ; *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (10) ; *McCarter* v. *Brodie* (11) ; *Gratwick* v. *Johnson* (12) ; and *Tasmania* v. *Victoria* (13). Section 4 is a complete prohibition of a group. Section 5 (2) and s. 9 (2) also are direct prohibitions achieved medially by the interposition of the Governor-General's declaration, under s. 5 (2) of bodies and under s. 9 (2) of individuals. Those sections do not amount to regulation because they do not regulate anything. Section 92 of the Constitution is not avoided because what is done is purported to be done under the defence power or any other legislative power. The legislation is therefore not saved by any doctrine of *salus populi*. A system of regulation must be set up within a Commonwealth power : here s. 10 (*c*) covers State organizations. The Act does not fall within the exceptional class of case of creatures and things dangerous to the community (*The Commonwealth* v. *Bank of New South Wales* (14)). There must be

(1) (1950) A.C., at p. 302 ; 79 C.L.R., at p. 632.
(2) (1948) 76 C.L.R., at p. 380.
(3) (1912) 16 C.L.R. 99, at pp. 106, 107, 113, 117, 118.
(4) (1945) 70 C.L.R., at pp. 17, 22.
(5) (1933) 48 C.L.R. 266, at pp. 277, 288.
(6) (1945) 71 C.L.R. 29, at p. 110.
(7) (1935) 52 C.L.R. 189, at p. 211.
(8) (1948) 76 C.L.R., at p. 283.
(9) (1950) A.C., at pp. 309-310 ; 79 C.L.R., at p. 639.
(10) (1939) 62 C.L.R. 116, at p. 127.
(11) (1950) 80 C.L.R. 432.
(12) (1945) 70 C.L.R., at pp. 14, 15, 17, 21, 22.
(13) (1935) 52 C.L.R., at pp. 168, 170.
(14) (1950) A.C. 235 ; 79 C.L.R. 497.

evidence to establish that they are dangerous or subversive in fact as distinct from an expression of opinion. The operation of s. 92 upon those sections cannot be avoided by any doctrine of severance, so as to sever intra-State from inter-State bodies or individuals, or individuals having intra-State activities as distinct from inter-State activities. Inter-State activities cannot be severed from intra-State activities. The relationship of s. 92 to the defence power was mentioned in *Andrews* v. *Howell* (1); *James* v. *The Commonwealth* (2); *Farey* v. *Burvett* (3); and *The Commonwealth* v. *Bank of New South Wales* (4). Other submissions made by *Evatt* K.C. on behalf of certain trade unions are adopted on behalf of these plaintiffs.

M. Ashkanasy K.C. (with him *E. A. H. Laurie*) for (a) the Australian Railways Union and Brown; and (b) Bulmer and others (suing for the Building Workers' Industrial Union) and Purse. The Building Workers' Industrial Union is the only organization before the Court which is directly concerned with s. 5 of the Act. Sub-section (1) of that section is applicable to all forms of organizations; e.g., local government bodies, charitable, social, religious, sporting, cultural and industrial organizations, including trade unions of all kinds. It is impossible to link sub-s. (1) either with defence or any power of the Commonwealth, and it may impinge on the structure of State Governments. The Act may remain in force for a long time, but throughout its operation its effect is determined by affiliation with the Australian Communist Party or by other matters provided for in s. 5 (1) at the time prescribed in sub-s. (1), which may be years earlier than the declaration under s. 5 (2) and may have been very short in duration or slight in nature. At the time of declaration there may not be any connection with or taint of communism. That being so, s. 5 (1) does not reveal any connection with power. If registered organizations had been included in s. 5 it might have attracted some validity from the arbitration power. The submissions made on the relationship of s. 5 to power apply also to s. 9. The person who may be affected might be a person who, it could be demonstrated, has ceased and has abjured his affiliation with the Party. The various provisions in the Act are all part of one scheme. The Act is directed to the destruction of the Party and its affiliates and anything that has been in the remotest degree tainted by contact

(1) (1941) 65 C.L.R., at p. 267.
(2) (1936) 55 C.L.R. 53.
(3) (1916) 31 C.L.R., at pp. 453-456.
(4) (1950) A.C., at p. 312; 79 C.L.R., at p. 641.

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with the Party. If " defence " be regarded as that which will protect and strengthen the country against any ultimate attack that may be made upon it by enemies of the country, then it does comprehend every component of the national life which contributes to its strength. That would actually include every industry, as well as every occupation, primary and secondary. That is not what is intended by the Constitution. However, it is in that sense that the word " defence " is used in the seventh and eighth recitals. *Farey* v. *Burvett* (1) does not mean that s. 51 (vi.) of the Constitution includes but is not limited to war-like operations. The real emphasis is on " includes all kinds " and not on " includes " ; the inclusion of everything that merely made the nation strong was not contemplated. It is not enough to say that this or that measure or this or that prohibition will make the nation stronger to resist attack, e.g., that could be achieved by education. It is a fallacy to regard everything that strengthens the national economy and industry as linked with defence (*Reid* v. *Sinderberry* (2) ; *Victorian Chamber of Manufactures* v. *The Commonwealth* (3)). Unless " defence " is read in the narrower sense of s. 51 (vi.), the seventh recital contains the germs of handing to the Commonwealth almost unlimited powers in time of peace because there is uneasiness, apprehension and tension. An exercise of the defence power is always related to s. 51 (vi.) by facts. That may be tested by the words " guns or butter ". It has been accepted by the Court that the constitutional validity of legislation might be affected by the nature of the evidence adduced (*Sloan* v. *Pollard* (4) ; *Attorney-General* (*Vict.*) v. *The Commonwealth* (5) ; *The Commonwealth* v. *Australian Commonwealth Shipping Board* (6)). It is significant that the defendants did not attempt to substantiate the recitals by evidence. There are two distinct uses of preambles, namely, (i) to ascertain the meaning of the enacting words, and (ii) to determine whether there is legislative power under the Constitution, or to establish a link with power. The recital under consideration in *Chilton* v. *Progress Printing and Publishing Co.* (7) was used to determine matter under a unitary constitution. Recitals are used for constructional purposes only where the statutory provisions are ambiguous (*President, &c., of the Shire of Arapiles* v. *The Board of Land and Works* (8)). Preambles can be used by Parliament to designate the legislative power that is being invoked

(1) (1916) 21 C.L.R., at p. 440.
(2) (1944) 68 C.L.R., at p. 572.
(3) (1943) 67 C.L.R., at p. 418.
(4) (1947) 75 C.L.R. 445.
(5) (1935) 52 C.L.R. 533, at p. 558.
(6) (1926) 39 C.L.R. 1.
(7) (1895) 2 Ch. 29, at p. 33.
(8) (1904) 1 C.L.R. 679, at p. 686.

so as to limit the legislature to that power (*Ex parte Walsh and Johnson* (1)).

[WILLIAMS J. The Privy Council took exactly the opposite view in *Moore* v. *Attorney-General for the Irish Free State* (2).]

Parliament having designated the links with power, others cannot be substituted. Where Parliament is legislating on a subject within power, it may recite facts which are received as prima-facie evidence. But where power is involved it is axiomatic that Parliament cannot enlarge its powers by any device, including the device of making evidence. Parliament is endeavouring to draw within the ambit of the power something which is not there. It cannot create a fact by stating what it believes to be a fact. The recitals are not prima-facie evidence on matters relating to power, but they are the facts which Parliament has stated are the links between the legislation and its power. If they are not found to be the facts, then the link which Parliament invoked does not exist. And that ends it, even though there may be some other fact. But on certain matters, e.g., state of war, the opinion of the Executive has always been accepted as final. The preamble is conclusive in stating the reasons and motives of Parliament in enacting the legislation: *Craies* on *Statute Law*, 4th ed. (1936), pp. 41, 43 (see *R.* v. *Barger* (3)). The inquiry of the Court is limited to whether they are reasons sufficient to establish constitutional validity. Ultimate motives are irrelevant (*Attorney-General for Alberta* v. *Attorney-General for Canada* (4)). All matters relating to policy, motive and objectives—all the political factors—must be eliminated from the recitals.

[LATHAM C.J. referred to *Stenhouse* v. *Coleman*. (5).]

An exception may exist where the recital contains a declaration which is within the complete power of Parliament or the Executive which joins in the legislation, e.g., the *Defence (Transitional Provisions) Act*, where a continuance of a state of war is recited. It would be for the Court to regard whether the facts existed, whether they be judicially noticed or proved facts, which would justify the invocation of the power and legislation which follows. It is not contended that if it come within the definition of real connection with substantial connection, that the subject matter itself for the Court to determine should be quantitative only. One possible view of the ninth recital is that it leaves the door wide open, does let in evidence, until all the evidence has been heard. That recital

(1) (1925) 37 C.L.R., at p. 110.
(2) (1935) A.C. 484, at p. 498.
(3) (1908) 6 C.L.R. 41.
(4) (1939) A.C. 117.
(5) (1944) 69 C.L.R. 457.

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does not contain any evidentiary fact at all unless the invocation of necessity be regarded as a fact. The foregoing is alternative to the view that recital nine may be read as argumentative, but not as in itself an independent statement of any facts. The Court's inquiry is, in effect, first, whether the facts recited, if true, would provide a sufficient connection between the legislation and any relevant power, legislative power. If "yes" to that, then the Court is called upon to inquire into the truth of those facts. Those observations certainly apply to recitals four to eight inclusive. Where the legislature has recited certain facts which are intended to supply the link with power, the Court should inquire into the reality of those facts and should not consider any other facts. To consider other facts would give rise to uncertainty on the question of validity. It is not disputed that legislation may be supported under a head of power other than that referred to in the Act. Vital industries can only be treated in the general way they are treated in the seventh recital, as vital industries to the defence power if defence be taken as covering all things which make the nation strong. Recital seven is in too general a form : it is a general connection and not a specific connection. If every industry vital to defence were treated as being within the defence power of the Commonwealth the Commonwealth could control everything : that is not the plan of the Constitution. It is the eighth recital alone which provides the link between the power and interference with the unions and their office-bearers. That recital is a direct factual statement—an adjudication, a verdict. If that link be broken then the whole of the foundation of s. 9 and the ancillary sections must be broken. Unless the recitals are shown to be true, and if true to provide a sufficient link, the attempted exercise of the power fails. Enough may be true to constitute a link, but there cannot be added other facts not recited at all.

It is not denied that there is a state of uneasy apprehension and tension. That has existed before and will exist again. There is no justification in that situation for the invocation of the defence power to the point of dissolving all sorts of organizations and the Australian Communist Party and to interfere in the control and management of unions. The High Court is an essential and integral part of the Federal system, its primary function being to act as the arbitrator between the States and the Commonwealth in the event of a conflict. Judicial power was introduced into the Constitution of the United States so that force could be used against States without a state of war arising : *Curtis' Constitutional*

History of the United States (1889-1896), vol. 1, p. 353. The Act, particularly s. 5, authorizes the suppression of a purely intra-State political activity associated with purely State functions and issues. The existence of political parties and voluntary organizations dealing with political issues is an integral part of the Government of the States. The Constitution and the provision of courts in the Constitution require that, if there be an interference with anything that is part of the constitutional government of a State, it should be done through the interposition of a court which will make an appropriate finding, and the enforcement should be an enforcement of the order of the court. The necessity for the intervention of the judicial power appears from *Australian Railways Union* v. *Victorian Railways Commissioners* (1); *New South Wales* v. *The Commonwealth* (2); and *Melbourne Corporation* v. *The Commonwealth* (3). Representative democratic government cannot function without political parties or voluntary organizations dealing with controversial issues (*The Alberta Case* (4)). Commonwealth legislation which directly affects the constitutional government of a State can only be enforced through the medium of judicial enforcement (*New South Wales* v. *The Commonwealth* (5)).

[DIXON J. referred to the *Australian Railways Union* v. *Victorian Railways Commissioners* (6).]

It was recognized in *Melbourne Corporation* v. *The Commonwealth* (7) that legislation which might otherwise be within power might be excluded because of its effect in interfering with the functions of government. Political parties, or voluntary organizations dealing with political matters, should be regarded as an essential part of the government of States when they deal with intra-State matters. The whole of the machinery of election involving freedom of speech and association for political purposes and the formation of political parties is part of the State organization. Commonwealth Parliament may, in respect of a subject matter within power, legislate providing for a course of conduct relating to Commonwealth matters, and no objection can be taken if, as a result of the enforcement of those provisions, a State political organization is dissolved. But direct legislation or executive action suppressing purely State political activities would be contrary to the implied prohibition arising from the basis of the Constitution, and to s. 106 in particular. The result could only be achieved through the interposition of a judicial body, e.g., the

(1) (1930) 44 C.L.R., at p. 352.
(2) (1931) 46 C.L.R. 155.
(3) (1947) 74 C.L.R. 31.
(4) (1938) 2 D.L.R. 81, at p. 119.
(5) (1931) 46 C.L.R., at p. 155.
(6) (1930) 44 C.L.R. 319.
(7) (1947) 74 C.L.R. 31.

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application of s. 5 to a municipal corporation would encounter the contention embodied in *Melbourne Corporation* v. *The Commonwealth* (1).

[LATHAM C.J. referred to *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (2).]

The Act as a whole is a complete exercise in all its aspects of judicial power. It suppresses the specified bodies and activities and imposes penalties or disabilities upon persons engaged or likely to be engaged in such activities. The function of a court enforcing such an Act would be to (i) ascertain the facts; (ii) interpret and apply the law; (iii) give the appropriate judgment upon the facts and the law; and (iv) issue the warrant or order for the execution of its judgment. Each of those judicial steps is embodied in the Act: (a) in the recitals; (b) in the recitals and by inference from s. 4; (c) in s. 4; and (d) in other sections, particularly s. 15. The whole scope of the judicial power is covered. Nothing in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (3) was intended to be or could be submitted as a reason for separating powers of the legislature and the Executive on the one hand and the judiciary on the other: see *Harrison Moore, Constitution of the Commonwealth*, 2nd ed. (1910), p. 315. The judicial power was considered in *Huddart Parker Co. Pty. Ltd.* v. *Moorehead* (4); *New South Wales* v. *The Commonwealth* (5); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (6); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (7); *Peacock* v. *Newtown, Marrickville and General Co-operative Building Society No. 4 Ltd.* (8); *Rola Co. (Aust.) Pty. Ltd.* v. *The Commonwealth* (9); *Ex parte Coorey* (10); and *Victorian Chamber of Manufactures* v. *The Commonwealth (Industrial Lighting Regulations)* (11). The Act, upon any view, constitutes a distinct violation of the judicial power. There are various forms of the acquisition of property. The only one applicable here is acquisition through imposition and enforcement of penalties, and the only way the Commonwealth can acquire the property of the bodies referred to in s. 5 is through the exercise of the judicial power, the forfeiture being in the nature of a penalty judicially imposed. In some cases the subject matter is com-

(1) (1947) 74 C.L.R. 31.
(2) (1919) 26 C.L.R. 508.
(3) (1931) 46 C.L.R. 73.
(4) (1908) 8 C.L.R. 330.
(5) (1915) 20 C.L.R. 54, particularly at p. 90.
(6) (1925) 35 C.L.R. 422, particularly at p. 432.
(7) (1943) 67 C.L.R., particularly at p. 9.
(8) (1943) 67 C.L.R. 25, at p. 29.
(9) (1944) 69 C.L.R. 185.
(10) (1944) 45 S.R. (N.S.W.) 287.
(11) (1943) 67 C.L.R., at pp. 416, 417.

pletely within power and a discretion exists as to conditions under which rights are conferred by the Commonwealth, and other cases are where during a war emergency it is necessary to take precautionary action—not judicial (*Jehovah's Witnesses Case* (1)). *Liversidge* v. *Anderson* (2) was a case under a unitary system. Preventive measures can be taken in peace by enacting that any organization which engages in activities prejudicial to the defence of the country, if so found, may be dissolved, proof being made through the judicial machinery. The arguments of all the plaintiffs already addressed to the Court in respect of the executive's power, the defence power and s. 92 are adopted. Section 92 applies to direct legislative or executive acts prohibiting or destroying inter-State organizations and activities; but that section would not be infringed if such organizations and activities were brought to an end as a result of a decision of a court. The real basis of *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3) is that the tribunal was not a court, but had many of the attributes of a court. That case is an answer to the discussion in respect to judicial power only commencing when the court is called upon to exercise it. Each and every provision of the Act is unseverable from the other. The whole Act is directed to one particular purpose, namely, the purpose set out in the ninth recital, which is the destruction of the Australian Communist Party, its affiliates and associates, and the disqualification of the members of that Party as at the particular date. If s. 4 be invalid then the whole Act must be invalid.

C. A. Weston K.C. (with him *C. M. Collins*), for the Australian Amalgamated Engineering Union (Australian Section) and Rowe. Arguments addressed to the Court on behalf of other plaintiffs are adopted on behalf of this plaintiff. A judge cannot take judicial notice of a fact that he does not know. The exception, that if a fact be notorious but unknown to a judge he may inform his mind, does not apply in this case. The alleged facts contained in the recitals are, it is submitted, not known as facts by the members of this Court, therefore those recitals are not part of judicial knowledge. Judicial notice is only taken of matters so notorious as to be indisputable. Recitals are not judicially accepted as conclusive evidence against the world: *Craies* on *Statute Law*, 4th ed. (1936), p. 41. No part of any recital can have any bearing upon power. There is nothing in the

(1) (1943) 67 C.L.R., at p. 162.
(2) (1942) A.C., at pp. 261, 265.
(3) (1918) 25 C.L.R. 434.

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cases and text-books cited to the Court contrary to the view that recitals are only (a) conclusive as to the reasons of Parliament, and (b) an aid to construction where there is ambiguity. If the recitals are only prima-facie evidence they are controvertible: *Maxwell* on *The Interpretation of Statutes*, 9th ed. (1946), p. 46. There is nothing in the facts of which the defendant asked the Court to take judicial notice which links the Australian Communist Party and other parties interested with the defence power. Alternatively, as to some of those alleged facts the Court will not attach any importance to them, even if acceptable as competent for judicial notice, because they do not relate to the subject matter; they are irrelevant. The fact that there is a state of tension is irrelevant unless the Party is proved subversive. There is not any allegation that the Party has in any way supported the opponents of the United Nations' forces in Korea. The "world movement" allegation is utterly irrelevant and the "march together" allegation is too vague. It does not matter if the Party does "sympathize with Russia" There have always been parties or persons who on various grounds disapproved of any particular war. It is not asserted that the Party is the agent of Soviet Russia. There is nothing in those facts to show that the Party engages in activities which are injurious to either the Australian Commonwealth or the British Commonwealth of Nations. The Court must be satisfied that there is a real connection with the power. If there is a connection Parliament can determine its own action provided the consequences are not fantastic. Regard must be had to the consequences (*Jehovah's Witnesses Case* (1)). That case shows that the Court is at liberty to rule out legislation if it is thought to be fantastic, even though the legislation deals with the subject matter of power.

[FULLAGAR J. referred to *R.* v. *Burah* (2).]

In *R.* v. *Foster*; *Ex parte Rural Bank of New South Wales* (3); *Collins* v. *Hunter* (4) and *Wagner* v. *Gall* (5), Parliament's opinion was overruled as to the sufficiency, reality and directness of the nexus with power. The Court is the guardian of the Constitution. The Act usurps the function of the Court to the extent, if any, that the Court thinks the preambles inconclusive. If the consequences of an Act, which would be within power, are incommensurate, fantastic and extreme, the whole of the Act will fail. This was admitted by the defendants.

(1) (1943) 67 C.L.R. 116.
(2) (1878) 3 App. Cas. 889.
(3) (1949) 79 C.L.R. 43
(4) (1949) 79 C.L.R. 43, at p. 67.
(5) (1949) 79 C.L.R. 43, at p. 56.

[LATHAM C.J. referred to *West* v. *Federal Commissioner of Taxation* (1).]

There can be something so remote that it is irrelevant to the power. Decisions made by this Court during World War II show that consequences do matter: that is shown, for example, by *Jehovah's Witnesses Case* (2), which is also against the submission made on behalf of the defendants that the opinion of the Governor-General brings a matter within power. It cannot be said that an Act is a law of the Commonwealth Parliament with respect to defence unless the Court knows or can investigate the facts. The real facts are found by some appropriate process and then the question is whether there is a real connection between them and the enactment. The opinion of the competent Minister was overruled in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (3); *R.* v. *University of Sydney*; *Ex parte Drummond* (4); *Wagner* v. *Gall* (5); *Collins* v. *Hunter* (6); and *Gratwick* v. *Johnson* (7). As to s. 92 of the Constitution, the Act is not a mere regulation, but is a direct prohibition and therefore bad. It prevents the Party from doing anything inter-State and it also prevents persons from engaging in inter-State activities (*Bank of New South Wales* v. *The Commonwealth* (8)). If there is inter-State intercourse here, as is submitted, then (i) a union is prohibited from employing in its necessary and lawful activities certain officers whom it wishes to employ, and (ii) those officers are debarred from engaging in a calling that is inter-State business. It is within judicial knowledge that the Party has nominated candidates for election to the various Houses of the Legislature and in the normal way has advocated and indorsed their candidature. Those are innocent activities. The Act does not relate to defence; it relates to things related to a defence matter. It is disputed that the matter of necessity is always—perhaps, ever—a matter for the Minister and never for the Court.

S. G. Webb K.C. (with him *G. T. A. Sullivan*), for the Australian Coal and Shale Employees' Federation and Williams. If the recitals are conclusive of the facts alleged there is a clear usurpation of judicial power and the Act is void. If, however, they be some evidence, but are not conclusive, then evidence should be submitted to rebut them. There is not sufficient material before

(1) (1937) 56 C.L.R. 657.
(2) (1943) 67 C.L.R. 116.
(3) (1943) 67 C.L.R. 413.
(4) (1943) 67 C.L.R. 95.
(5) (1949) 79 C.L.R., at p. 56.
(6) (1949) 79 C.L.R., at p. 67.
(7) (1945) 70 C.L.R. 1.
(8) (1948) 76 C.L.R. 1.

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the Court on which to pronounce that there is a real connection with the power and that any part of the Act is valid (*Joseph* v. *Colonial Treasurer* (*N.S.W.*) (1)). The recitals are no more than the legislature's view or reasons for taking action. Judicial notice cannot be taken of any of the facts submitted by the defendants, because none of them is notorious and all are controversial. Evidence sought to be given would establish that the Australian Communist Party and communism have no influence whatever on the policy or actions of this, the Miners' Federation, or its members. It is desired to show that the power taken is too wide; the prevention of a communist from holding an office with the Federation is too wide, harsh and capricious to have a connection with defence. Any authoritative interpretation of the Constitution is an exercise of part of the judicial power (per Constitution, ss. 71, 76; and *Australian Apple and Pear Marketing Board* v. *Tonking* (2)). Although the judicial power is the right to decide controversies between subjects or between the Crown and subjects, whether the rights involved refer to life, liberty or property, yet it is not always necessary, in order that the power may be judicial, that it shall be concerned with the ascertainment and determination of legal rights and liabilities as between litigants (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3); *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (4); *The Tramways Case* [*No.* 1] (5)). The exercise of judicial power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3)). A right must have an origin independent of its enforcement. The creation of a new legal right of general application is a matter for legislation. The declaration of duties consequent upon the creation or existence of a legal right is an exercise of the judicial power (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (6)). Unless the final act affects rights or imposes liabilities the power is ministerial and not judicial (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3)). Section 30 of the *Judiciary Act* has conferred on this Court original jurisdiction in matters arising under the Constitution or involving its interpretation. "Matter" does not mean a legal proceeding, but the subject matter for determination in a legal proceeding, and this requires that there be some immediate right, duty or liability to be established by the determination of the Court (*In re Judiciary*

(1) (1918) 25 C.L.R., at p. 47.
(2) (1942) 66 C.L.R., at pp. 83, 105, 106.
(3) (1909) 8 C.L.R. 330.
(4) (1944) 69 C.L.R., at pp. 203, 204.
(5) (1913) 18 C.L.R. 54, at pp. 64, 65.
(6) (1918) 25 C.L.R. 434.

and Navigation Acts (1)). If any tribunal must necessarily direct itself as a matter of law to arrive at the intention of the legislature, it is an exercise of part of the judicial power of the Commonwealth (*British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2)). It is an exercise of part of the judicial power when determinations are made on pure questions of fact not to create a standard of liability, but to ascertain and authoritatively pronounce upon the standard already created (*British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3)). The judicial power can only be conferred on a court which is a court in fact, and when there is an intention to confer judicial power it does not matter how the intention appears so long as it does appear (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4) ; *Federal Commissioner of Taxation* v. *Munro* (5)). The power and function of finally determining matters of fact and even of discretion are not solely indicative of judicial action, but are also attributes of administrative action (*Federal Commissioner of Taxation* v. *Munro* (5)). Property can be vested or divested by an administrative act done under the authority of the legislative act as well as by judicial act (*Roche* v. *Kronheimer* (6)). There are many tribunals with many of the trappings of a court which are not courts, and there are many functions which are inconsistent with executive power or inconsistent with judicial power, but there are also many functions which are consistent with both the executive power and the judicial power (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (7)). The principles to be applied in determining whether there has been an exercise of the judicial power were discussed also in, amongst other cases, *R.* v. *Federal Court of Bankruptcy ; Ex parte Lowenstein* (8) ; *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (9) ; *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (10) ; *Fraser Henleins Pty. Ltd.* v. *Cody* (11) ; and *O'Keefe* v. *Calwell* (12). Applying those principles to the Act it is clear that there has been an exercise of the judicial power ; for example, both parts of s. 5 (2) are matters of law ; the first part requiring the construction of s. 5 (1) and the second part requiring a con-

(1) (1921) 29 C.L.R. 257.
(2) (1925) 35 C.L.R. 422, at p. 439.
(3) (1925) 35 C.L.R., at p. 439.
(4) (1918) 25 C.L.R. 434.
(5) (1926) 38 C.L.R. 153.
(6) (1921) 29 C.L.R. 329.
(7) (1931) A.C. 275 ; 44 C.L.R. 530.
(8) (1938) 59 C.L.R., at pp. 565, 566, 575-577, 578, 580-582, 585-589.
(9) (1943) 67 C.L.R., at p. 9.
(10) (1943) 67 C.L.R., at pp. 142, 155, 156, 167, 168.
(11) (1945) 70 C.L.R., at pp. 118-121, 131, 132, 139, 140.
(12) (1949) 77 C.L.R. 261, at pp. 278, 287.

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sideration of the laws of the Commonwealth, and there is not any appeal against that part. Any application of a statutory provision, involving as it does an understanding of the statutes, involves a determination of a question of law. It is impossible to determine the validity or invalidity of any Act relying on an exercise of the executive power without reference to par. (xxxix.) of s. 51 of the Constitution and the prerogative power, that is to say, a statute may be shown to be auxiliary to or in execution of the prerogative power and it may be supported in that way. The executive power, which cannot be added to by par. (xxxix.), can be determined only by a study of the common law in England with regard to the prerogative power in 1900. The executive powers of the Commonwealth exercisable by the Governor-General are: (i) the execution and maintenance of the Constitution; (ii) the execution and maintenance of the valid laws of the Commonwealth (s. 61); (iii) the summoning of executive councillors (s. 62); (iv) the appointment of Ministers of State (s. 64); (v) the Command-in-Chief of the Forces (s. 68); and (vi) the execution of the prerogative powers remaining in the Queen at that time (s. 2) (*Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (1)). The meaning of the "execution and maintenance of the laws" was dealt with in *New South Wales* v. *The Commonwealth* (2). A definition of "executive functions" is given in *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 385. The Governor-General can exercise his powers, including the powers of execution and maintenance of the Constitution and laws of the Commonwealth, only through his Ministers of State. Dealing with executive power, regard may be had only to s. 61 of the Constitution and s. 51 (i.)—(xxxviii.) to ascertain what par. (xxxix.) can do. Paragraph (xxxix.) cannot add to any power (*In re Judiciary and Navigation Acts* (3); *Roche* v. *Kronheimer* (4)). The testing time in regard to the prerogative power within the Commonwealth is at the year 1900 (*Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (5); *Australian Steamships Ltd.* v. *Malcolm* (6); *James* v. *Commonwealth of Australia* (7)). The prerogative was at that time controlled by constitutional convention (*Baxter* v. *Commissioners of Taxation (N.S.W.)* (8); *Amalgamated Society of Engineers* v. *Adelaide Steam-*

(1) (1940) 63 C.L.R. 278, at pp. 303, 304.
(2) (1915) 20 C.L.R., at p. 89.
(3) (1921) 29 C.L.R. 257.
(4) (1921) 29 C.L.R., at pp. 337-339.
(5) (1908) 6 C.L.R. 469, at p. 501.
(6) (1914) 19 C.L.R. 298, at p. 328.
(7) (1936) A.C. 578, at p. 614; 55 C.L.R., at p. 44.
(8) (1907) 4 C.L.R. 1087, at p. 1106.

ship Co. Ltd. (1); see also *Magna Carta* (1215) and *Chester* v. *Bateson* (2)). No law of the Commonwealth can extend the executive power of the Commonwealth as it existed in 1900; that can be done only by referendum. The history and effect of statutes which limit the extent of the prerogative is shown in *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 450-452. Section 51 (xxxix.) of the Constitution operates within the limits of and subject to the frozen limits of executive power in 1900. The Act provides for forfeiture, and prevents access to the courts. If the power were given by the Constitution there would not be any complaint: see *R.* v. *Halliday* (3). Sections 4, 5, 9 and 10 of the Act go far beyond the executive power, are invalid and inseverable. The position is similar to the position in *Sprigg* v. *Sigcau* (4). If the defendants' view of *Lloyd* v. *Wallach* (5) is correct, then that case should be overruled. As to the overruling of cases, see *Tramways Case* [*No.* 1] (6). In *Lloyd* v. *Wallach* (5) the respondent was not represented; the validity of that Act and regulation was assumed for the purposes of judgment; the Court's attention was directed only to jurisdiction and whether the Minister's reasons were examinable. (That case has been referred to only in *Jehovah's Witnesses Case* (7) and *Ex parte Walsh* (8)). With regard to defence, it is true that power to punish carries a power to prevent, but the preventive measure must be connected with defence, subject to the Constitution and not too wide (*McCulloch* v. *Maryland* (9); *Australian Apple and Pear Marketing Board* v. *Tonking* (10)).

M. F. Hardie K.C. (with him *G. T. A. Sullivan*), for the Federated Clerks' Union of Australia (New South Wales Branch) and Maurice John R. Hughes, intervening by leave. This union is registered as a trade union under New South Wales legislation, but is not registered as an industrial organization of employees under the Federal legislation. Section 9 of the Act and the related sections have no real or substantial connection with the defence power or the executive power. The subject matter of those sections is the capacity of persons to make and perform contracts of employment. Those sections also affect persons such as committee-men who have not any contract of service with the union. Section 51

(1) (1920) 28 C.L.R., at pp. 146, 147.
(2) (1920) 1 K.B. 829, at p. 832.
(3) (1917) A.C. 260, at p. 270.
(4) (1897) A.C. 238, at pp. 246, 247.
(5) (1915) 20 C.L.R. 299.
(6) (1914) 18 C.L.R., at p. 58.
(7) (1943) 67 C.L.R. 116.
(8) (1942) A.L.R. 359.
(9) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(10) (1942) 66 C.L.R., at p. 99.

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(xxxix.) of the Constitution does not authorize legislation of that nature. In declaring a person under s. 9 the Governor-General could act upon conduct of the person declared quite unrelated to his union office, e.g., continuous and persistent breach of the income-tax laws. Section 9 cannot be described as not a law at all. It is an important law. It is a law which authorizes the Governor-General to publish something formally and derogatory of persons in the community. Persons may be declared under s. 9 who will be quite untouched by the consequences provided by s. 10. Section 9 authorizes the Government to publish something concerning people that otherwise would be possibly libellous. It is not justified by the alleged need to have some control over the type of person to be employed by an industrial organization. Such control could be effected in many other ways. Section 9 (2) does not contain a provision limiting declarations to persons employed by the Government or by a union, or proposed or likely to be employed by the Government or a union. In that respect s. 9 (2) differs very substantially from s. 5 (2). In the form in which it is drafted s. 9 is not valid and it does not receive any validity from s. 10, so far as it relates to conduct prejudicial to the execution or maintenance of the laws of the Commonwealth. Section 9 (2) is too wide, because it is not limited to laws in some way related to the matters referred to in the eighth recital. There are many Commonwealth Acts the fundamental or vital importance of which is not sufficient to warrant the adoption of the drastic measures indicated in s. 9 and s. 10. The laws to be protected by this type of legislation are the laws of the Commonwealth that are directed to bringing about production and work in vital industries. Section 51 (xxxix.) of the Constitution does not authorize Parliament to pass legislation such as is set out in s. 9 (2) and the defence power does not cure the defect. Defence and the incidental power are so intermingled in s. 9 (2) that s. 15A of the *Acts Interpretation Act* would not save any portion of the sub-section. A declaration under s. 9 (2) must be made in terms of the sub-section which shows that the sub-section is invalid. The declaration must follow the sub-section, including alternatives; it cannot be directed to one topic only. It may include both in the alternative. The sub-section is not internally severable. If any portion of s. 9 (2) is not authorized by s. 51 (xxxix.) of the Constitution, then the whole fails, because there would be some cases in which the Governor-General would make a declaration in terms of the section, and the only satisfaction he would entertain would be that the person in question was doing things prejudicial to

the execution or maintenance of the laws of the Commonwealth. A declaration might be made in terms of the section when the Governor-General is in fact satisfied as to only one element of the section. The objects of the Act could have been achieved in better ways. A person may be said to be engaged in activities prejudicial to the laws of the Commonwealth if he seeks to have those laws altered. If "laws" means laws generally, the matter is covered by the *Crimes Act*. Prejudicial conduct certainly includes breaches of laws unrelated to the subject matter. The phrase "execution or maintenance" is vague. The use of the word "or" may vary the constitutional meaning of the phrase. If s. 15A of the *Acts Interpretation Act* were applied to s. 9 (2), then, since the proclamation must follow the section, any proclamation must be void. Similarly, with regard to s. 27—the Governor-General is not bound to terminate the Act until it is no longer necessary for the purposes stated therein; but the Act may only be valid so far as it relates to defence. Sections 4 and 5 are the dominant sections of the Act and their invalidity carries with it the invalidity of ss. 9 and 10. Sections 4 and 5 are invalid because they are not supported by s. 51 (vi.) or (xxxix.) of the Constitution, they conflict with s. 92 of the Constitution, they constitute an attempt by Parliament to usurp and exercise the judicial power of the Commonwealth, and to vest control of that judicial power in the Governor-General, and they do not provide for just terms. If there is forfeiture there is not any judicial punishment on which the forfeiture is consequent. If there is an acquisition not by forfeiture there are not any just terms as required by s. 51 (xxxi.) of the Constitution. Recitals are only of help if the matters recited can be judicially noticed. The Court is not entitled to take judicial notice of the cause of industrial disturbances. Those matters are not so notorious as to be capable of being judicially noticed. Recitals cannot be looked to at all in determining the constitutional validity of legislation of the Commonwealth Parliament.

[WILLIAMS J. In *Abitibi Power and Paper Co. Ltd.* v. *Montreal Trust Co.* (1), which was a case as to the constitutional powers under the Canadian Constitution, the Privy Council looked at the recitals but did not hold that they were decisive.]

Recitals are not even prima-facie evidence. Parliament intended these recitals to be conclusive. Section 5 of the Constitution supports the view that recitals are not part of the laws. Sections 4 and 5 cannot be justified at all because they go beyond the

(1) (1943) A.C. 536.

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defence power; alternatively, they cannot be justified as valid on the facts at present before the Court and ss. 9 and 10 fall with them. The arguments relating to the judicial power and s. 92 of the Constitution put to the Court on behalf of other plaintiffs are adopted on behalf of these intervenants.

G. E. Barwick K.C., in reply. (a) Section 51 (vi.) of the Constitution is a "purposive" power in the sense that in certain circumstances matters which are not primarily and essentially matters of defence will come within the grant of power as incidents, *pro tempore*, of the subject matter granted, because legislation with respect to them may fairly be thought to be necessary in the circumstances for the purpose of defending the country. Put another way, in certain circumstances matters which are not obviously matters of defence will come within the scope of the defence power because it sufficiently appears that legislation with respect to such matters may fairly be thought by the legislative authority to be necessary for the defence of the country (*Stenhouse* v. *Coleman* (1); *Andrews* v. *Howell* (2); *South Australia* v. *The Commonwealth* (3); *Women's Employment Regulations Case* (4); *Industrial Lighting Regulations Case* (5); *Commonwealth* v. *Grunseit* (6); *Australian Woollen Mills* v. *The Commonwealth* (7); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society Pty. Ltd.* (8); *Reid* v. *Sinderberry* (9); *De Mestre* v. *Chisholm* (10); *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (11); *R.* v. *University of Sydney*; *Ex parte Drummond* (12)). (b) The grant of power thus authorizes laws which deal with matters (i) obviously within the subject matter, and (ii) which do not appear on their face to be within the subject matter, but which, in the circumstances, fall within the scope of the power, and *pro tempore* become part of its subject matter. As to both (b) (i) and (ii) the power is plenary, so that the Court is not concerned with the measures adopted by the legislative authority to carry its purpose into effect (*Women's Employment Regulations Case* (13); *Co-operative Committee on Japanese*

(1) (1944) 69 C.L.R., at pp. 469, 470.
(2) (1941) 65 C.L.R., at pp. 263, 271, 287.
(3) (1942) 65 C.L.R., at pp. 431, 432, 468.
(4) (1943) 67 C.L.R., at pp. 357, 358, 375, 383, 384, 400.
(5) (1943) 67 C.L.R., at pp. 417, 419, 422, 423, 427.
(6) (1943) 67 C.L.R. 58, at p. 67.
(7) (1944) 69 C.L.R., at pp. 487, 497-499.
(8) (1943) 67 C.L.R., at pp. 48, 49.
(9) (1944) 68 C.L.R., at p. 511.
(10) (1944) 69 C.L.R. 51, at p. 68.
(11) (1947) A.C. 87, at pp. 101, 102.
(12) (1943) 67 C.L.R., at p. 113.
(13) (1943) 67 C.L.R., at pp. 357, 358, 384.

Canadians v. *Attorney-General for Canada* (1); *Attorney-General (Vict.)* v. *The Commonwealth* (2); *M'Culloch* v. *Maryland* (3); *Jehovah's Witnesses Case* (4); *Stenhouse* v. *Coleman* (5)). Laws may be made with respect to matters within (b) (i) at any time, irrespective of whether or not the country is at war, or passing through a situation short of war, or enjoying the tranquility of complete peace. Laws may be made with respect to matters within (b) (ii) according to the nature of any emergency. The nature of the situations which constitute the emergency will vary infinitely, and is not confined to war, or the actual threat of war (*Hume* v. *Higgins* (6); *Koon Wing Lau* v. *Calwell* (7); *Farey* v. *Burvett* (8); *South Australia* v. *The Commonwealth* (9); *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (10)). Apprehension by Parliament or the Executive of international conflict may be such a situation. Upon the disappearance of the situation, the scope and ambit of the legislative power contracts and correspondingly and to the same extent a law may cease to be valid. It is not necessary that a given law should contain an express provision limiting it to the duration of the emergency. This follows from either of two views of the relevant principle, namely, (a) upon the disappearance of the situation the law has no further operation (*Crouch* v. *The Commonwealth* (11); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (12); *Dawson* v. *The Commonwealth* (13); *Sloan* v. *Pollard* (14); *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (15); *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (16); *Reference re Validity of War-time Regulations* (17); *Fleming* v. *Mohawk Wrecking and Lumber Co.* (18); *In re Yamashitia* (19); *Hamilton* v. *Kentucky Distilleries and Warehouse Co.* (20); *U.S.* v. *Carolene Products Co.* (21); *Chastleton Corporation* v. *Sinclair* (22)). (b) there is implied in the law a term providing for its cessation upon the disappearance of the situation in the

(1) (1947) A.C., at p. 102.
(2) (1935) 52 C.L.R., at p. 566.
(3) (1819) 4 Wheat. 316, at p. 421 [4 Law. Ed. 579, at p. 605].
(4) (1943) 67 C.L.R., at p. 133.
(5) (1944) 69 C.L.R., at p. 470.
(6) (1949) 78 C.L.R., at pp. 133, 134.
(7) (1949) 80 C.L.R. 533, at p. 585.
(8) (1916) 21 C.L.R., at pp. 455, 456.
(9) (1942) 65 C.L.R., at p. 432.
(10) (1923) A.C., at pp. 705, 706.
(11) (1948) 77 C.L.R., at p. 351.
(12) (1945) 71 C.L.R., at pp. 170, 171, 180.
(13) (1946) 73 C.L.R., at p. 175.
(14) (1947) 75 C.L.R., at p. 471.
(15) (1923) A.C., at pp. 706, 707.
(16) (1947) A.C., at p. 101.
(17) (1950) 2 D.L.R. 1.
(18) (1947) 331 U.S. 111 [91 Law. Ed. 1375].
(19) (1946) 327 U.S. 1 [90 Law. Ed. 499].
(20) (1919) 251 U.S. 146, at p. 162 [64 Law. Ed. 194, at p. 202].
(21) (1938) 304 U.S. 144, at p. 153 [82 Law. Ed. 1234, at pp. 1242, 1243].
(22) (1923) 264 U.S. 543 [68 Law. Ed. 841].

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face of which it was made (*Hume* v. *Higgins* (1)). The question of validity is a matter exclusively for the Court and is resolved by determining the substantial nature of the law. The substantial nature of laws upon matters not falling within (b) (i) is ascertained by determining whether, in the "public situation", legislation with respect to the immediate subject matter of the law might reasonably be thought to be necessary to the furtherance of the defence of the country. The "public situation", though sometimes referred to as the "fact", which expands the scope of the power is—(a) never the ultimate objective "reality" or "truth" of the current state of affairs and (b) sometimes no more than the Parliamentary appreciation or view of the "public situation". The Court is apprised of the "public situation" by its judicial knowledge or in default of any or any sufficient judicial knowledge by the view of the Parliament expressly indicated by recital or impliedly by the making of the law, provided always that that view is not contradicted or shown to be untenable by any judicial knowledge (*Stenhouse* v. *Coleman* (2); *South Australia* v. *The Commonwealth* (3); *R.* v. *University of Sydney*; *Ex parte Drummond* (4); *Dawson* v. *The Commonwealth* (5); *Block* v. *Hirsh* (6); *Craies' Statute Law*, 4th ed. (1936), p. 41). The "public situation" affords ground for finding a logical or rational connection between the immediate subject matter of the legislation and the defence of the country, so as to attract that matter within the ambit of the power granted. The connection must be real, as distinct from fanciful, or imaginary; substantial in the sense of practical as distinct from theoretical; specific rather than general or remote, but, so far as the question of validity is concerned, is never factual, in the sense of being shown to be objectively true, but logical, in the sense of affording ground for a reasonable view. There has been no departure from *Farey* v. *Burvett* (7), except to insist that the word "conceivable" does not include the unreal, fanciful, or merely theoretical (*Andrews* v. *Howell* (8); *South Australia* v. *The Commonwealth* (9); *Women's Employment Regulations Case* (10); *Industrial Lighting Regulations Case* (11);

(1) (1949) 78 C.L.R., at pp. 133 et seq.
(2) (1944) 69 C.L.R., at p. 470.
(3) (1942) 65 C.L.R., at p. 432.
(4) (1943) 67 C.L.R., at pp. 101, 102, 113.
(5) (1946) 73 C.L.R., at p. 175.
(6) (1920) 256 U.S., at pp. 154, 155 [65 Law. Ed., at p. 870].
(7) (1916) 21 C.L.R. 433.
(8) (1941) 65 C.L.R., at pp. 263, 271, 287.
(9) (1942) 65 C.L.R., at pp. 431, 432, 468.
(10) (1943) 67 C.L.R., at pp. 357, 359, 375, 383, 384, 400.
(11) (1943) 67 C.L.R., at pp. 419, 421-423, 427.

The Commonwealth v. *Grunseit* (1); *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society* [*No.* 4] *Ltd.* (3); *Reid* v. *Sinderberry* (4); *Hirabayashi* v. *J.S.* (5); *De Mestre* v. *Chisholm* (6); *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (7); *R.* v. *University of Sydney*; *Ex parte Drummond* (8); *Hume* v. *Higgins* (9)). The matters with respect to which the Act makes provision are primarily and essentially matters of defence. The immediate subject matter of the Act is conduct, activities, both organized and individual, prejudicial to the defence of the country. The premise of the Act is that there may be in the community (i) organizations the very existence of which may be rationally accepted as prejudicial to the defence of the country; (ii) individuals who may rationally be accepted as engaged or likely to engage in activities so prejudicial. The control, prevention, or punishment of such conduct, or activity, whether it be actual, or suspected, or apprehended, is at the heart of the subject matter of defence at any time and in any state of the "public situation". Espionage, sabotage, fifth-column activities (deliberate destruction and impairment of vital industries) are all species of conduct of which "conduct prejudicial to defence" is the *genus*. The expression "prejudicial to defence" is traditional; it is not vague; it does denote conduct specifically and vitally related to the defence of the country. For similar expressions see:—*National Security* (*General*) *Regulations*, reg. 26 (1); *Ex parte Walsh* (10); *National Security* (*Subversive Associations*) *Regulations*, regs. 2, 3; *National Security* (*General*) *Regulations*, regs. 17B, 24, 25 (1); and for the converse phrase see:—*National Security* (*General*) *Regulations*, regs. 4, 5, 8, 16, 24 (1), 32 (1). The expression "the defence of the Commonwealth" in ss. 5 (2) and 9 (2) refers to a complex of activities directed towards the maintenance of our territorial integrity and the physical safety of our people. Such activities always exist, though to a lesser extent in time of peace than in time of war. The nature and extent of such activities is at all times peculiarly within the knowledge of the Executive. The expression "security and defence of the Commonwealth" is not a reference to matters with respect to which the Parliament

(1) (1944) 67 C.L.R., at p. 67.
(2) (1944) 69 C.L.R., at pp. 487, 497-499.
(3) (1943) 67 C.L.R., at pp. 48, 49.
(4) (1944) 68 C.L.R., at p. 513.
(5) (1943) 320 U.S. 81 [87 Law. Ed. 1774].
(6) (1944) 69 C.L.R., at p. 68.
(7) (1947) A.C., at pp. 101, 102.
(8) (1943) 67 C.L.R., at p. 113.
(9) (1949) 78 C.L.R., at p. 141.
(10) (1942) A.L.R. 309.

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may make laws under s. 51 (vi.). The word " defence " in s. 51 (vi.) describes a subject matter of power. In ss. 5 (2) and 9 (2) it describes activities: see and compare:—*National Security Act* 1939-1946, s. 5 (1), which was held to be valid and not vague; *Wishart* v. *Fraser* (1); *Defence Act* 1903-1949, ss. 33, 63 (1) (f); *Communist Party Dissolution Act* 1950, s. 27; and *Liquid Fuel (Defence Stocks) Act* 1949, s. 4 (1) (*a*). As the subject is within power, Parliament is exercising its legislative power in itself identifying organizations or persons with whom it desires to deal in relation to such conduct or activities (*Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (2); *Yakus* v. *United States* (3); *Gray* v. *Chicago, Iowa and Nebraska Railroad Co.* (4); *Wilkinson* v. *Leland* (5); *Paramino Lumber Co.* v. *Marshall* (6); *Cooley's Constitutional Limitations*, 8th ed. (1927), vol. 1, pp. 188-193; *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (7)). As the subject matter is within power, the extent to which Parliament deals with such organizations or persons in relation to such conduct or activities, is exclusively a matter for the Parliament. What Parliament can do itself by legislation it can authorize the Governor-General to do as its delegate. The Governor-General is accordingly exercising delegated legislative power (*Roche* v. *Kronheimer* (8); *Ex parte Walsh and Johnson*; *Re Yates* (9); *Welsbach Light Co. of Australasia* v. *The Commonwealth* (10); *Jehovah's Witnesses Case* (11)). The satisfaction of the Governor-General is not as to the extent of a subject matter of power (which would be a question of constitutional law) but as to conduct and activities specifically connected with the defence of the country—a question of fact. Sections 5 (2) and 9 (2) are fundamentally different from the laws considered in *Ex parte Walsh and Johnson* (12). *Ex parte Walsh and Johnson* (12) affirms the legislative power to delegate to the Executive the selection or identification of the bodies or persons upon or with respect to whom a law upon some granted subject matter is to operate. Thus, if the law be upon the topic of the granted power, the selection of the persons to be affected may be left to the unexaminable discretion of the Executive, even though an

(1) (1941) 64 C.L.R. 470, at pp. 484, 485, 488.
(2) (1916) 22 C.L.R., at p. 283.
(3) (1944) 321 U.S. 414 [88 Law. Ed. 834].
(4) (1870) 10 Wall 454, at p. 463 [19 Law. Ed. 969, at p. 971].
(5) (1829) 2 Pet. 627, at pp. 660, 661 [7 Law. Ed. 542, at p. 554].
(6) (1940) 309 U.S. 370 [84 Law. Ed. 814].
(7) (1947) 75 C.L.R. 495, at pp. 520, 579.
(8) (1921) 29 C.L.R., at p. 337.
(9) (1925) 37 C.L.R., at pp. 96-99, 108, 134.
(10) (1916) 22 C.L.R., at pp. 275, 281.
(11) (1943) 67 C.L.R., at pp. 135, 136, 155-157.
(12) (1925) 37 C.L.R. 36.

element in that selection is the Executive's opinion as to the constitutional powers of the Parliament. *Ex parte Walsh and Johnson* (1) denies that the exercise by the Executive of discretion in the selection of such bodies or person is an exercise of judicial power (*Roche* v. *Kronheimer* (2)). *Ex parte Walsh and Johnson* (1) affirms that if the only connection of the legislation with the granted power is the unexaminable opinion of the Executive as to the ambit of the power the Act is invalid: cf. *Reid* v. *Sinderberry* (3). The Parliament can validly place in the hands of the Governor-General the determination of the facts upon which depends the identification or selection of the bodies or persons to be affected by the law (*Lloyd* v. *Wallach* (4); *Ex parte Walsh* (5); *Welsbach Light Co. of Australasia* v. *The Commonwealth* (6)). *Lloyd* v. *Wallach* (4) has been applied or referred to in:—*R.* v. *Snow* (7); *Farey* v. *Burvett* (8); *R.* v. *Macfarlane* (9); *Ex parte Walsh and Johnson*; *Re Yates* (10); *Wall* v. *The King*; *Ex parte King Won and Wah On* [*No.* 1] (11); *Boucaut Bay Co. Ltd.* v. *The Commonwealth* (12); *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (13); *Ex parte Walsh* (5); *Little* v. *The Commonwealth* (14); *R.* v. *Sharkey* (15); *Pidoto* v. *Victoria* (16); *Reid* v. *Sinderberry* (17); *Jehovah's Witnesses Case* (18). *Ex parte Walsh* (5) has been applied in subsequent cases and on the basis that the law in *Ex parte Walsh* (5) was held to be within power: see *Jehovah's Witnesses Case* (19); *Pidoto* v. *Victoria* (20). The true ground of the decisions in *Lloyd* v. *Wallach* (4) and *Ex parte Walsh* (5) is that detention of disloyal and disaffected naturalized persons is a subject with the defence power at least in war time. Submitting the selection or identification of the person to be dealt with to the Governor-General is no more and no less within power in war time than it would be in time of peace. Power to make such a delegation flows from the plenary nature of the power, not from the circumstances under which the power is exercised (*Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (21)). The criterion of the operation of the law, (i) *qua*

(1) (1925) 37 C.L.R. 36.
(2) (1921) 29 C.L.R., at pp. 337, 340.
(3) (1944) 68 C.L.R., at p. 511.
(4) (1915) 20 C.L.R. 299.
(5) (1942) A.L.R. 359.
(6) (1916) 22 C.L.R. 268.
(7) (1915) 20 C.L.R. 315, at p. 338.
(8) (1916) 21 C.L.R., at p. 444.
(9) (1923) 32 C.L.R., at p. 581.
(10) (1925) 37 C.L.R., at pp. 40, 78.
(11) (1927) 39 C.L.R. 245, at pp. 251, 262.
(12) (1927) 40 C.L.R. 98, at p. 101.
(13) (1942) 65 C.L.R., at p. 436.
(14) (1947) 75 C.L.R. 94.
(15) (1949) 79 C.L.R., at p. 163.
(16) (1943) 68 C.L.R. 87, at p. 101.
(17) (1944) 68 C.L.R., at p. 516.
(18) (1943) 67 C.L.R., at pp. 135, 152.
(19) (1943) 67 C.L.R., at pp. 135, 152, 162.
(20) (1943) 68 C.L.R., at p. 101.
(21) (1931) 46 C.L.R., at pp. 88, 102, 113-124.

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association, is that the existence of the association is shown to the satisfaction of the Governor-General to be prejudicial to the defence of the country, (ii) *qua* persons, is that they are shown to the satisfaction of the Governor-General to be engaged, or as likely to be engaged, in activities prejudicial to the defence of the country. The operation of the Act, except as to the Communist Party itself, depends upon the making of a declaration by the Governor-General. The power to make the declaration is conditioned upon the existence of the relevant " satisfaction ". The satisfaction is as to the existence of facts. The existence of such a condition, i.e., of such a " satisfaction ", is always examinable to ascertain the validity as distinct from the correctness of the declaration (*Nakkuda Ali* v. *Jayaratne* (1); *Reid* v. *Sinderberry* (2); *Stenhouse* v. *Coleman* (3); *Bank of New South Wales* v. *The Commonwealth* (4); *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (5); *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (6); *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (7); *R.* v. *Trebilco*; *Ex parte F. S. Falkiner & Sons Ltd.* (8); *Commissioner of Taxes (Q.)* v. *Ford Motor Co. of Australia Pty. Ltd.* (9); *R.* v. *War Pensions Entitlement Appeals Tribunal*; *Ex parte Bott* (10); *Wertheim* v. *The Commonwealth* (11); *Shrimpton* v. *The Commonwealth* (12); *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (13)). Cases in which the Court has examined and declared invalid particular orders are: *Shrimpton* v. *The Commonwealth* (14); *Wertheim* v. *The Commonwealth* (15); *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (16); *Gratwick* v. *Johnson* (17); and *Crouch* v. *The Commonwealth* (18). An apparent satisfaction as to facts which is either, (i) baseless so as to be irrational, or (ii) arrived at by means of self-misdirection of relevant law, particularly the meaning of the section which authorizes the declaration, is not a valid satisfaction. The Act thus operates upon and with respect to organizations and persons who may be rationally and without misconception of relevant law accepted—(i) *qua* organizations, as having an existence prejudicial to the defence of the country; (ii) *qua* persons, as engaged

(1) (1951) A.C. 66.
(2) (1944) 68 C.L.R., at p. 512.
(3) (1944) 69 C.L.R., at pp. 463, 464.
(4) (1948) 76 C.L.R., at p. 199.
(5) (1944) 69 C.L.R. 407, at pp. 429, 431, 436, 450, 455, 456.
(6) (1945) 72 C.L.R., at pp. 64-69, 71-73, 74-76, 79-84.
(7) (1935) 53 C.L.R. 534.
(8) (1936) 56 C.L.R. 20, at p. 27.
(9) (1942) 66 C.L.R. 261, at p. 274.
(10) (1933) 50 C.L.R. 228, at p. 243.
(11) (1945) 69 C.L.R. 601, at p. 610.
(12) (1945) 69 C.L.R. 613, at pp. 619, 620, 628-630.
(13) (1932) 47 C.L.R. 621, at pp. 631, 636, 637.
(14) (1945) 69 C.L.R. 613.
(15) (1945) 69 C.L.R. 601.
(16) (1945) 72 C.L.R. 37.
(17) (1945) 70 C.L.R. 1.
(18) (1948) 77 C.L.R. 339.

or likely to engage in activities so prejudicial. The "consequences" which follow upon the declaration are relevant to the basis of the declaration: (i) as to organizations, (a) the extinction of the organized existence where that existence is prejudicial to the defence of the country is appropriate; (b) the forfeiture of the property which has been accumulated for the maintenance and furtherance of that organization—such forfeiture being an obvious and potent means of preventing re-assembly of the organization and re-aggregation of its funds—is also appropriate. (ii) As to persons, the disqualification from office in industrial organizations closely connected with the operation of industries vital to the defence of the country is appropriate. The decision in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1) if understood as under is not to the contrary. The basis of the majority view may have been that the "consequences" of the declaration were irrelevant to its basis, or at least that some of the consequences were so irrelevant, and that they were inseverable from valid and relevant consequences. If, on the other hand, the view of the majority was that the consequences, though relevant, were incommensurate, the decision should be overruled. The courts have no function to overlook the extent of the legislative provision if its nature be within power. Thus the basis of the declaration being within the primary subject matter of defence, and, if it be material, the consequences being relevant to that basis, the law is, upon its face, whenever made, a law with respect to defence. Whether or not a valid declaration can be made at any given time with respect to any given body or person will depend upon the circumstances in which or the time at which it is made. The Court is not further concerned with the nature or extent, or sufficiency or insufficiency of the provisions made by Parliament (*Women's Employment Case* (2); *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (3); *Attorney-General (Vic.)* v. *The Commonwealth* (4); *M'Culloch* v. *Maryland* (5); *Jehovah's Witnesses Case* (6); *Stenhouse* v. *Coleman* (7)). In particular, there is not any constitutional reason why property should not be forfeited by a law otherwise within power (*Customs Act* 1901-1949, ss. 228, 229; *Crimes Act* 1914-1941, s. 30G; *Unlawful Associations Act* 1916-1917, s. 7E—see *Pankhurst*

(1) (1943) 67 C.L.R. 116.
(2) (1943) 67 C.L.R., at pp. 357, 358, 383, 384.
(3) (1947) A.C., at p. 102.
(4) (1935) 52 C.L.R., at p. 566.
(5) (1819) 4 Wheat., at p. 421 [4 Law. Ed., at p. 605].
(6) (1943) 67 C.L.R., at p. 133.
(7) (1944) 69 C.L.R., at p. 470.

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v. *Kiernan* (1)). Section 4 is so far related to ss. 5 and 9 that it is apparent, particularly through the classifications set out in s. 5 (1) and s. 9 (1), that, apart from recitals, it can be seen to be upon the same subject matter as ss. 5 and 9. It is clear from the recitals that the Parliament held the view that the existence of the Australian Communist Party was prejudicial to the defence of the country. It is also clear that it is for that reason that it has itself terminated its existence, rather than accept the delay which action under provisions such as s. 5 (1) (*c*) and s. 5 (2) would involve. The Court is bound to accept the Parliamentary statement that it, the Parliament, does hold that view and that that view is a reason of its enactment (*Craies* on *Statute Law*, 4th ed. (1936), p. 41). The rationality of the view of Parliament cannot be called in question, or, alternatively, if, in a constitutional matter, the reasonableness, in the sense of rationality, of the Parliament's view can be canvassed, it can only be reviewed by the Court upon the material within judicial knowledge (*Stenhouse* v. *Coleman* (2) ; *South Australia* v. *The Commonwealth* (3) ; *R.* v. *University of Sydney* ; *Ex parte Drummond* (4) ; *Dawson* v. *The Commonwealth* (5) ; *Block* v. *Hirsh* (6) ; *Craies* on *Statute Law*, 4th ed. (1936), p. 41). There is no material within judicial knowledge which would compel the conclusion that the view of the Parliament was untenable. Section 4 enacted as a means of dealing with a body the existence of which may rationally be accepted as prejudicial to the defence of the country, is clearly a law with respect to defence, when enacted. This is the true nature of the section. Reasons which support s. 4 bring ss. 5 (1) and 9 (1) themselves within power. The matters stated in chief as facts are all within judicial knowledge. They show an emergency, a state of apprehended danger, of apprehended international conflict which may threaten our territorial integrity and the physical safety of the country. They show such a relationship between the Australian Communist Party and our potential enemies as may be thought to endanger our defence and call for urgent and decisive legislative action. Insofar as opinion enters into the estimate of the current situation and of the existence and extent of a danger or of a threat of danger, the Court will accept the Parliament's view, if known, e.g., by recitals and the fact of the enactment, and will not be concerned with the absolute or theoretical correctness or soundness

(1) (1917) 24 C.L.R. 120.
(2) (1944) 69 C.L.R., at p. 470.
(3) (1942) 65 C.L.R., at p. 432.
(4) (1943) 67 C.L.R., at pp. 101, 102, 113.
(5) (1946) 73 C.L.R., at pp. 175, 176.
(6) (1920) 256 U.S., at pp. 154, 155 [65 Law. Ed., at p. 870].

of that view (*Farey* v. *Burvett* (1); *South Australia* v. *The Commonwealth* (2); *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (3)). Laws to protect the country's preparedness for war are within power (*Hume* v. *Higgins* (4); *Koon Wing Lau* v. *Calwell* (5)). Applying the tests set out above, the logical connection can clearly be seen between the defence of the country and (i) the extinction of bodies whose very existence may rationally be thought to be prejudicial to our preparedness and to the defence of the country; and (ii) the limitation of the scope of the activities in relation to defence, of persons who may rationally be thought to be engaged in, or likely to engage in, activities prejudicial thereto. In such a time as this, the provisions of this Act are not inappropriate or irrelevant to the protection of the country's preparedness for war. The decision in *Adelaide Society of Jehovah's Witnesses Inc.* v. *The Commonwealth* (6) is not to the contrary. On this view the Act is within the defence power, both (i) because it deals appropriately with those who may rationally be thought to sympathize with and be likely to support our potential enemies, and (ii) because, on the narrowest view of such cases as *Lloyd* v. *Wallach* (7), *Ex parte Walsh* (8), and *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (9), it makes provisions not inappropriate to such an emergency conditioned upon the opinion of the Executive. Considerations as to the reliance on the legislative provisions as set out above may be repeated *a fortiori* in the emergency constituted by the current situation. If there is insufficient material within judicial knowledge to show that the enacted provisions might reasonably be regarded as necessary for defence at this time, the Court will accept the Parliamentary statement of the necessity (i) there being nothing in the enacted provisions which denies the possibility of the connection, and (ii) there being nothing within judicial knowledge which denies the possibility (*Stenhouse* v. *Coleman* (10); *South Australia* v. *The Commonwealth* (11); *R.* v. *University of Sydney*; *Ex parte Drummond* (12); *Dawson* v. *The Commonwealth* (13); *R.* v. *Taylor* (14); *Block* v. *Hirsh* (15); *Craies* on *Statute Law*, 4th ed. (1936), p. 41). The Act is a valid exercise of the incidental power, s. 51 (xxxix.), in relation to the execution of

(1) (1916) 21 C.L.R., at pp. 455, 456.
(2) (1942) 65 C.L.R., at p. 432.
(3) (1923) A.C., at pp. 705, 706.
(4) (1949) 78 C.L.R., at pp. 133, 134.
(5) (1949) 80 C.L.R., at pp. 585, 586.
(6) (1943) 67 C.L.R. 116.
(7) (1915) 20 C.L.R. 299.
(8) (1942) A.L.R. 359.
(9) (1916) 22 C.L.R. 268.
(10) (1944) 69 C.L.R., at p. 470.
(11) (1942) 65 C.L.R., at p. 432.
(12) (1943) 67 C.L.R., at pp. 101, 102, 113.
(13) (1946) 73 C.L.R., at p. 175.
(14) (1949) 79 C.L.R. 333, at p. 338.
(15) (1920) 256 U.S., at pp. 154, 155 [65 Law. Ed., at p. 870].

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the power vested by s. 61 in the Governor-General; the Act provides aid to the execution of the Executive function of executing and maintaining the Constitution and the laws of the Commonwealth. Alternatively, the Act is a valid exercise of the implied legislative power of the Commonwealth to protect the body politic and its laws from actual or apprehended assault or overthrow. Section 51 (xxxix.) is a distinct grant of power (*R.* v. *Kidman* (1)). As to its subject matter the power is plenary (*R.* v. *Kidman* (1)). The grant is as to those matters which are incidental to the execution of some constitutionally vested power. The constitutionally vested power to the execution of which a law may be incidental is not confined to legislative powers, but includes executive and judicial powers. A law under this power may operate to extend powers (*R.* v. *Kidman* (1); *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (2); *R.* v. *Taylor* (3); *Smith* v. *Oldham* (4); *New South Wales* v. *The Commonwealth* [*No.* 1] (5)). The execution and maintenance of the Constitution and of existing laws and of the legal system are powers vested by the Constitution in the Executive (s. 61). These powers are vested; are existing, and although undefined are specific; they are always being executed (*R.* v. *Kidman* (1); *Burns* v. *Ransley* (6); *R.* v. *Sharkey* (7)). To remove what may be considered to be an impediment to the execution and maintenance of the Constitution and the laws of the Commonwealth is to take a necessary step in aid of the execution of this executive power. It is truly incidental and does not transform the power into a power of a different nature (*Burns* v. *Ransley* (6); *R.* v. *Sharkey* (8)). The expression "the execution and maintenance of the Constitution and of the laws of the Commonwealth" in the Act and recitals describes the execution of the powers vested by s. 61. Parliament in s. 4 has legislated to remove that which Parliament is satisfied is an obstacle to the due execution by the Executive of its constitutional powers. The matter with respect to which the whole Act is enacted is conduct prejudicial to the execution by the Executive of its powers under s. 61. The specification in ss. 5 and 9 is of such conduct. Parliament's power with respect to this matter is plenary; the power is not limited to making specified conduct which is inimical to the execution of the relevant powers of the

(1) (1915) 20 C.L.R. 425.
(2) (1917) 23 C.L.R. 226.
(3) (1949) 79 C.L.R. 333.
(4) (1912) 15 C.L.R. 355.
(5) (1932) 46 C.L.R. 155, at pp. 174, 181, 229-233, and cf. p. 201.
(6) (1949) 79 C.L.R., at pp. 109, 110.
(7) (1949) 79 C.L.R., at pp. 135, 137, 157, 163.
(8) (1949) 79 C.L.R., at pp. 135-137, 157, 163.

Executive an offence. Parliament can take preventive measures (*R.* v. *Sharkey* (1)). The premise of the Act is that there may be in the community: (i) organizations the very existence of which may be rationally accepted as prejudicial to the execution and maintenance of the Constitution and the laws of the Commonwealth; and (ii) individuals who might rationally be accepted as engaged or as likely to engage in activities so prejudicial. The control, prevention or punishment of such conduct or activity, whether it be actual or suspected or apprehended, is at the heart of the subject matter of the execution and maintenance of the Constitution and the laws of the Commonwealth at any time and in any state of the " public situation ". As the subject is within power, Parliament is, in s. 4, exercising its legislative power in identifying the organizations or persons with whom it desires to deal in relation to such conduct or activities (*Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (2); *Yakus* v. *United States* (3); *Gray* v. *Chicago, Iowa and Nebraska Railroad Co.* (4); *Wilkinson* v. *Leland* (5); *Paramino Lumber Co.* v. *Marshall* (6); *Cooley Constitutional Limitations*, 8th ed. (1927), vol. 1, pp. 188-193—Declaratory statutes are not an exercise of the judicial power; *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (7)). The extent to which Parliament deals with such organizations or persons in relation to such conduct or activities and the means to be adopted are exclusively a matter for the Parliament (*Women's Employment Regulations Case* (8); *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (9); *Attorney-General (Vict.)* v. *The Commonwealth* (10); *M'Culloch* v. *Maryland* (11); *Jehovah's Witnesses Case* (12); *Stenhouse* v. *Coleman* (13)). What Parliament can do itself by legislation it can authorize the Governor-General to do as its delegate. The Governor-General is accordingly exercising delegated legislative power (*Roche* v. *Kronheimer* (14); *Ex parte Walsh and Johnson*; *Re Yates* (15); *Jehovah's Witnesses Case* (16)). The Parliament can validly place in the hands of the Governor-General the determination of the facts upon which

(1) (1949) 79 C.L.R., at p. 163.
(2) (1916) 22 C.L.R., at p. 283.
(3) (1944) 321 U.S. 414 [88 Law. Ed. 834].
(4) (1870) 10 Wall, at p. 463 [19 Law. Ed., at p. 971].
(5) (1829) 2 Pet., at pp. 660, 661 [7 Law. Ed., at p. 544].
(6) (1940) 309 U.S. 370 [84 Law. Ed. 814].
(7) (1947) 75 C.L.R., at pp. 529, 579.
(8) (1943) 67 C.L.R., at pp. 357, 358, 383, 384.
(9) (1947) A.C., at p. 102.
(10) (1935) 52 C.L.R., at p. 566.
(11) (1819) 4 Wheat., at p. 421 [4 Law. Ed., at p. 605].
(12) (1943) 67 C.L.R., at p. 133.
(13) (1944) 69 C.L.R., at p. 470.
(14) (1921) 29 C.L.R., at p. 337.
(15) (1925) 37 C.L.R., at pp. 275, 281.
(16) (1943) 67 C.L.R., at pp. 135, 136, 155-157.

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depends the identification or selection of the bodies or persons to be affected by law (*Lloyd* v. *Wallach* (1); *Ex parte Walsh* (2); *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (3)). The criterion of the operation of the law, (i) *qua* associations, is that the existence of the association is shown to the satisfaction of the Governor-General to be prejudicial to the execution and maintenance of the Constitution and the laws of the Commonwealth; (ii) *qua* persons, is that they are shown to the satisfaction of the Governor-General as likely to be engaged in activities so prejudicial. The satisfaction of the Governor-General under ss. 5 and 9 is as to activities—matters of fact. It is not in any respect as to the ambit of legislative power. Accordingly the present law is different from the law considered in *Ex parte Walsh and Johnson* (4): see comment on this case (5). The satisfaction is examinable to determine the validity of the declaration. Parliament cannot be limited under s. 51 (xxxix.) to legislation with respect to those matters which a court finds necessary to be dealt with to aid the execution of the constitutionally vested powers. Accordingly Parliament or the Executive may select the bodies or persons whose existence or conduct is believed by Parliament or the Executive to be an impediment to the execution of the power. Section 4 is so closely related to ss. 5 and 9 that it is apparent, having regard to the classification set out in ss. 5 (1) and 9 (1) that, quite apart from the recitals, it is upon the same subject matter as ss. 5 and 9. The foregoing is all upon the basis that the Act is on its face a law with respect to the execution of the Executive function of executing and maintaining the Constitution and the laws of the Commonwealth. Alternatively with the foregoing submissions, however, the principles set out above apply with equal force to the incidental power in relation to s. 61. Accordingly the whole Act can be supported in the alternative having regard to the recited reasons for its enactment, such reasons, being conclusive and binding in the sense that Parliament did with reason entertain and act upon them. In the further alternative the principles set out above in relation to defence apply with equal significance to the incidental power. As the legislative power is as to matters incidental to the execution of some other power, changing situations may, in connection with executive power, vary the matters which may from time to time be held to be incidental. Consequently considerations similar to those relevant to the determination of the scope of the defence power

(1) (1915) 20 C.L.R. 299.
(2) (1942) A.L.R. 359.
(3) (1916) 22 C.L.R. 268.
(4) (1925) 37 C.L.R. 36.
(5) See pp. 98, 99 (*supra*).

are applicable where determining whether a given matter is incidental so as to fall within the power granted by s. 51 (xxxix.). Accordingly the whole Act is valid as dealing with matters which in the current circumstances as judicially known are within the ambit of the power to make laws incidental to the execution by the Executive of its function of executing and maintaining the Constitution and the laws of the Commonwealth. In the further alternative the principles set out above also apply to the incidental power in relation to s. 61. Accordingly, the Act is valid as dealing with matters which Parliament has asserted are dealt with as incidental to the execution of the Executive's function of executing and maintaining the Constitution and the laws of the Commonwealth, which statement of Parliament is not contradicted or shown to be untenable by any judicial knowledge. The creation of the Commonwealth with a Constitution and power of law-making necessarily implies a power in the Parliament to pass laws to protect the body politic and its system of laws against actual and apprehended threats to its existence (*R.* v. *Sharkey* (1); *M'Culloch* v. *Maryland* (2); *British Medical Association* v. *The Commonwealth* (3)). Such a power will, within its subject matter, be plenary and will extend to authorize preventive measures to deal with apprehended interferences. Accordingly, the various considerations set out above apply with equal force to support the law as an exercise of this implied power. Section 15A raises a rebuttable presumption of a legislative intention of partial operation of the law. The process is not one of reading down an expression as was considered in *Pidoto* v. *Victoria* (4) and the *Industrial Lighting Regulations Case* (5); it is a process of striking out. The following cases are authority for the striking out of the words in excess of power (*Australian National Airways Pty. Ltd.* v. *The Commonwealth* (6); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (7); and *Fraser Henleins Pty. Ltd.* v. *Cody* (8)). Sections 5 (2) and 9 (2) are grammatically severable. There is nothing in the Act on which to found any inference that the Parliament intended the Act to operate as to every matter in ss. 5 to 9, or not at all. The form of the sections is against such a view. The true construction of ss. 5 (2) and 9 (2) is that the Governor-General must be satisfied positively as to one or more of the matters specified. The use of the word "satisfied" makes it clear that

(1) (1949) 79 C.L.R., at pp. 148, 163.
(2) (1819) 4 Wheat. 316 [4 Law. Ed. 579].
(3) (1949) 79 C.L.R. 201, at p. 274.
(4) (1943) 68 C.L.R. 87.
(5) (1943) 67 C.L.R. 413.
(6) (1945) 71 C.L.R. 31.
(7) (1943) 67 C.L.R. 1.
(8) (1945) 70 C.L.R., at p. 127.

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the Governor-General must hold a definite view to the existence of one or both of the matters. The word " accordingly " in s. 9 (2) supports this construction. If anything, s. 27 points to severance rather than against it. Section 27 has little significance. If the Act should cease to be necessary for any of the matters specified in the section, no valid declaration could thereafter be made. The doctrines set out under *Defence Power*—will preclude the further operation of the Act. If any expression is in excess of power and is struck out of ss. 5 (2) or 9 (2) the same expression would be struck out of s. 27 in accordance with the above authorities; unless this were done s. 27 would then have a different meaning and a different operation from that which it would have if ss. 5 and 9 were valid in their enacted form—see *Australian Railways Union* v. *Victorian Railways Commissioners* (1). By reason of s. 15A of the *Acts Interpretation Act*, s. 4 is severable from the remainder of the Act. By reason of s. 15A of the *Acts Interpretation Act*, s. 7 (2) (*b*) is severable from the remainder of the Act. Section 10 (1) (*a*) and (*b*) can be supported independently as an exercise of the power of the Parliament to make laws with respect to matters incidental to the execution of the Executive powers and to this extent s. 9 and s. 10 (1) (*a*) and (*b*) are independently valid. The provisions of the Act which deprive unlawful associations of their property are valid. The provisions of the Act relating to the disposal of the property of an unlawful association constitute a forfeiture—see preamble 9 and ss. 4, 8 and 16. The forfeiture is a preventive measure to insure that the unlawful associations cannot re-form and that their funds shall not be used for unlawful purposes. The provisions constitute a *deprivation* not an acquisition. The position would be no different if the Act provided that the property were to be destroyed. As the measure is preventive, the forfeiture is not punitive. Forfeiture stands in no different position from any other preventive measure. Just as the organizations may be disbanded by the legislative action of Parliament or by the delegated legislative action so their property can be forfeited by the legislative action of Parliament or by delegated legislative action. The forfeiture, being a legislative process, does not require the interposition of a court, and does not involve the exercise of judicial power (*Roche* v. *Kronheimer* (2); *Various Items of Personal Property* v. *United States* (3); *Customs Act* 1901-1949, ss. 228, 229; *Crimes Act* 1914-1946, s. 300 (forfeiture of property held by an

(1) (1930) 44 C.L.R., at pp. 373-379, 385-387.
(2) (1921) 29 C.L.R., at p. 337.
(3) (1931) 282 U.S. 577, at p. 581 [75 Law. Ed. 558, at p. 561].

unlawful association); *Unlawful Associations Act* 1916-1917, s. 7E; see *Pankhurst* v. *Kiernan* (1)). None of the provisions of the Act infringe s. 92 of the Constitution. The Australian Communist Party and other unlawful associations and trade union officers are not engaged in inter-State intercourse. They merely resort to inter-State communications and other forms of inter-State intercourse. The distinction may be illustrated by reference to sport such as tennis. Tennis players may resort to inter-State intercourse in travelling inter-State to play matches. But tennis is not itself a form of inter-State intercourse (*Adair* v. *United States* (2)). As the activities of the Australian Communist Party and other unlawful associations and of trade union officers are not themselves inter-State intercourse, the effect of the *Communist Party Dissolution Act* on these activities is not direct but remote and accordingly the Act does not infringe s. 92 (*The Commonwealth* v. *Bank of New South Wales* (3)). In contrast with the provisions of the *Communist Party Dissolution Act*, the laws in the following cases operated to restrict inter-State trade directly and immediately (*James* v. *The Commonwealth* (4); *James* v. *Cowan* (5); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (6); *Bank of New South Wales* v. *The Commonwealth* (7); and *Gratwick* v. *Johnson* (8)). Further, the Act does not infringe s. 92 because it is a measure necessary for the safety and welfare of the community. This follows from either or both of two views of the relevant principle, namely, (i) such a law is a law of regulation (*Commonwealth* v. *Bank of New South Wales* (9); *McCarter* v. *Brodie* (10); *Hartley* v. *Walsh* (11)); and (ii) laws for the protection of the defence, welfare, health, &c., of the community are not affected by the prohibition contained in s. 92 (*James* v. *Cowan* (12); *James* v. *The Commonwealth* (13); *Bank of New South Wales* v. *The Commonwealth* (14); *W. & A. McArthur Ltd.* v. *Queensland* (15); *Ex parte Nelson* [No. 1] (16); *R.* v. *Connare*; *Ex parte Wawn* (17); *R.* v. *Martin*; *Ex parte Wawn* (18); *Home Benefits Pty. Ltd.* v. *Crafter* (19)). If a law is in its true character regulatory, it does

(1) (1917) 24 C.L.R. 120.
(2) (1908) 208 U.S. 161, at pp. 176-180 [52 Law. Ed. 436, at pp. 443-445].
(3) (1950) A.C., at pp. 309-313; 79 C.L.R., at pp. 639-642.
(4) (1936) 55 C.L.R. 1.
(5) (1932) 47 C.L.R. 386.
(6) (1945) 71 C.L.R. 29.
(7) (1948) 76 C.L.R. 1; (1950) A.C. 235; 79 C.L.R. 497.
(8) (1945) 70 C.L.R. 1.
(9) (1950) A.C., at p. 311; 79 C.L.R., at p. 641.
(10) (1950) 80 C.L.R. 432.
(11) (1937) 57 C.L.R. 372.
(12) (1932) A.C., at p. 559; 47 C.L.R., at p. 396.
(13) (1936) A.C., at pp. 627, 628; 55 C.L.R., at p. 56.
(14) (1948) 76 C.L.R., at p. 390.
(15) (1920) 28 C.L.R. 530, at p. 550.
(16) (1928) 42 C.L.R. 209.
(17) (1939) 61 C.L.R. 596.
(18) (1939) 62 C.L.R. 457.
(19) (1939) 61 C.L.R. 701.

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not infringe s. 92 even although it prevents individuals or organizations from engaging in inter-State trade, commerce or intercourse (*Commonwealth* v. *Bank of New South Wales* (1); *McCarter* v. *Brodie* (2)). The test applied in *O. Gilpin Ltd.* v. *Commissioner of Road Transport and Tramways (N.S.W.)* (3), would not invalidate this law, because even if inter-State intercourse is restricted it is not restricted because it is intercourse or because it involves movement into or out of a State: see also *R.* v. *Connare*; *Ex parte Wawn* (4), and *R.* v. *Martin*; *Ex parte Wawn* (5). None of the provisions of the Act involves an unauthorized exercise of the judicial power of the Commonwealth. The judicial power of the Commonwealth is never involved unless and until a tribunal or person having authority to apply a pre-existing rule of conduct to pre-existing facts is called upon to take action, and gives a decision as between parties which decision is enforceable against those parties by the authority giving the decision or by its executive officers (*Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (6); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (7); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (8); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (9); *Rola Co. (Aust.) Pty. Ltd.* v. *The Commonwealth* (10); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society [No. 4] Ltd.* (11); *Consolidated Press Ltd.* v. *Australian Journalists' Association* (12); *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (13)). Section 4 does not involve the exercise of judicial power. Parliament itself does not enforce anything. It merely lays down a number of new rules of conduct, it declares the Communist Party illegal and forfeits its property. Enforcement requires independent steps taken in courts of law. If the receiver construed his powers wrongly he would have no answer to a civil action; on the other hand, execution pursuant to a court order is beyond challenge. The facts of which the Court takes judicial notice, read in conjunction with Parliament's reasons and the indication of the power it was exercising as set out in the preambles, are the facts which involve the exercise of judicial power. It is for the Court to be satisfied as to these necessary facts to bring the statute within power. However, once these facts are determined

(1) (1950) A.C., at pp. 309-311; 79 C.L.R., at pp. 639-641.
(2) (1950) 80 C.L.R. 432.
(3) (1935) 52 C.L.R., at pp. 204, 205.
(4) (1939) 61 C.L.R., at p. 618.
(5) (1939) 62 C.L.R., at pp. 461, 462.
(6) (1909) 8 C.L.R., at p. 357.
(7) (1918) 25 C.L.R. 434.
(8) (1931) A.C., at pp. 295, 296; 44 C.L.R., at pp. 542, 543.
(9) (1943) 67 C.L.R., at pp. 9, 21, 23.
(10) (1944) 69 C.L.R., at pp. 199, 211, 213.
(11) (1943) 67 C.L.R., at p. 46.
(12) (1947) 73 C.L.R. 549, at p. 564.
(13) (1949) A.C. 134, at p. 149.

by the Court the actual determination by Parliament relating to the Australian Communist Party in s. 4 is not the application of a rule of conduct to a particular set of facts, but merely a single legislative enactment within power, every element of which is legislative and not judicial (*Yakus* v. *United States* (1); *Gray* v. *Chicago, Iowa and Nebraska Railroad Co.* (2); *Wilkinson* v. *Leland* (3); *Paramino Lumber Co.* v. *Marshall* (4); *Cooley's Constitutional Limitations*, 8th ed. (1927), vol. 1, pp. 188-193; *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (5); *Welsbach Light Co. of Australasia* v. *The Commonwealth* (6)). Whether ss. 5 and 9 are brought within power by reason of sub-s. (1) of each of those sections, or whether they are *ex facie* defence and security laws by reason of sub-s. (2) of each of those sections, the declaration of the Governor-General does not involve an exercise of judicial power. The Governor-General does not enforce anything. He makes declarations which have certain consequences. If an organization resisted the receiver in taking property, the receiver would have to obtain an order of the Court before he could actually enforce the forfeiture. If he acted without such an order he would take the risk that he was acting outside his power. The Governor-General is exercising delegated legislative power, not judicial power (*Roche* v. *Kronheimer* (7); *Ex parte Walsh and Johnson*; *Re Yates* (8); *Welsbach Light Co. of Australasia* v. *The Commonwealth* (9); *Jehovah's Witnesses Case* (10)). The operation of s. 4 with s. 15 is legislative in character and not judicial. The sections retain this character in respect of their total operation. Forfeiture of property cannot change the character of s. 4 with s. 15. It is merely one of many possible consequences of illegality and in the present statute is a natural and almost necessary consequence (*Roche* v. *Kronheimer* (7); *Jehovah's Witnesses Case* (11)). The view of *Rich* and *Williams* JJ. in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (12) is that the exercise of judicial power is involved whenever an authority has power to make a conclusive determination as an essential step in a process of applying a pre-existing rule of conduct to pre-existing facts, provided such total process ultimately involves, by the machinery

(1) (1944) 321 U.S., at p. 442 [88 Law. Ed., at p. 858].
(2) (1870) 10 Wall, at p. 463 [19 Law. Ed., at p. 971].
(3) (1829) 2 Pet., at pp. 660, 661 [7 Law. Ed., at p. 554].
(4) (1940) 309 U.S., at p. 381 [84 Law. Ed., at p. 819].
(5) (1947) 79 C.L.R., at pp. 520, 579.
(6) (1916) 22 C.L.R., at p. 283.
(7) (1921) 29 C.L.R., at p. 337.
(8) (1925) 37 C.L.R., at pp. 96-99, 108, 134.
(9) (1916) 22 C.L.R., at pp. 275, 281.
(10) (1943) 67 C.L.R., at pp. 135, 136, 155-157.
(11) (1943) 67 C.L.R., at pp. 142, 155-157.
(12) (1944) 69 C.L.R., at pp. 203, 204, 216-218.

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either of the tribunal itself or of some other tribunal, a power of enforcement against the parties to the controversy. An essential aspect of this view is that it draws a distinction between, on the one hand, determining facts as part of a legislative process, and, on the other hand, determining facts as part of a judicial process. On the other hand, where the total process is essentially judicial, that is, there is no extension of the rule but only the application of a pre-existing rule to pre-existing facts and a power of enforcement ultimately exists, a conclusive determination as a step in the process does involve the exercise of judicial power. No member of the Court in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1) took the view that whenever a fact is determined conclusively as a step in the process of either creating or enforcing legal rights or obligations, judicial power is involved. The distinction between such view and that of *Rich* and *Williams* JJ. is that it includes steps in the expression of the rule as part of the legislative process, as well as steps in the ascertainment of rules when legislation is completed and its application to existing facts. The error of this view is that it disregards the distinction drawn above between conclusive determinations as part of a legislative process and conclusive determinations as part of a judicial process. On this latter view a conclusive determination as part of either process involves the exercise of judicial power unless there is a right of appeal. This view is inconsistent with the decisions of the High Court in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2); *Rola Company Case* (1) (the whole Court); and *Consolidated Press Ltd.* v. *Australian Journalists' Association* (3) (the whole Court). *Rich* and *Williams* JJ. dissented in the *Rola Company Case* (4), not because they applied this latter test, but because they construed the regulations to mean that the Committee of Reference was applying a pre-existing rule of conduct to pre-existing facts as an essential and conclusive step in what would be ultimately an enforceable decision. The application of the view of *Rich* and *Williams* JJ. does not invalidate s. 4 because it does not apply a pre-existing rule but creates a new rule. Section 4 involves the exercise of legislative power. It lays down a new rule of conduct. The fact that the law applies to a particular organization does not make it any less a new rule of conduct. The view of *Rich* and *Williams* JJ. would not invalidate either s. 5 or s. 9. The Governor-General is not applying a pre-

(1) (1944) 69 C.L.R. 185.
(2) (1948) 25 C.L.R. 434.
(3) (1947) 73 C.L.R. 549.
(4) (1944) 69 C.L.R., at pp. 207, 216, 217.

existing rule of conduct. He is laying down a rule of conduct in the very process of making a declaration. The fact that his power to make declarations is limited to the classes specified in ss. 5 (1) and 9 (1) does not make it any the less a legislative function. What the Governor-General does is more legislative than the function of the Committee of Reference under the Women's Employment Regulations. The Committee merely determined classes of persons to whom the regulations applied, whereas the Governor-General lays down a rule of conduct in relation to specified classes. Hence, even apart from the power of appeal, the Governor-General is not exercising judicial power. The appeal to a court in ss. 5 (4) and 9 (4) would involve the exercise of original not appellate jurisdiction by that Court (compare Board of Review in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1)). What the Governor-General does is just as much legislative as the function of the Arbitration Court in making awards. The fact that the jurisdiction to make awards is confined to inter-State disputes (cf. ss. 5 (1) and 9 (1)) does not make the function judicial (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2)). That the Governor-General is exercising delegated legislative power and not judicial power is supported by the decisions cited above. Neither the forfeiture provisions nor s. 7 involve the application of a pre-existing rule. The fact that the preambles may recite facts which constitute crimes under the Commonwealth *Crimes Act* is legally irrelevant to any matter concerned with this case. The rule applied is laid down for the first time by the *Communist Party Dissolution Act* itself. Accordingly neither the forfeiture provisions nor s. 7 would be invalidated by the test of *Rich* and *Williams* JJ. in the *Rola Company Case* (3). With regard to ss. 5 and 9 the declaration may be made :—(1) if the Governor-General is satisfied that persons are engaged in what he thinks are activities which he thinks are prejudicial to what he thinks are matters with respect to which he thinks laws may be made under s. 51 (vi.) of the Constitution ; (2) if the Governor-General is satisfied that persons are engaged in what he thinks are activities which he thinks are prejudicial to what he thinks is defence ; (3) if the Governor-General is satisfied that persons are engaged in what he thinks are activities which he thinks are prejudicial to what is defence in fact and in law ; (4) if the Governor-General is satisfied that persons are engaged in activities which are in fact and in law prejudicial to what is defence

(1) (1931) A.C. 275 ; (1930) 44 C.L.R. 530.
(2) (1918) 25 C.L.R. 434.
(3) (1944) 69 C.L.R. 185.

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in fact and in law; (5) if the Governor-General says he is satisfied that persons, &c. On constructions other than (5) the "satisfaction" must be examinable to determine the validity of the declaration, that is, to see that the satisfaction exists in fact and in law. But in each case the definitive subjective elements are different—and thus the extent of the examination more or less limited. The matter could be completely unexaminable. But, none the less, if the matter as to which the Governor-General is to be satisfied is a matter of fact which may be connected with the actual defence of the country the law will still be a law within power. These alternative propositions are submitted:—(i) that the law is valid under s. 51 (vi.) upon all the constructions except No. (1) and No. (5) to the extent that it embodies No. (1); (ii) that construction No. (1) is an unarguable construction; (iii) that the law is valid on constructions (3) and (4) at any time; (iv) that the law is valid on constructions (2), (3), (4) and (5) (except to the extent that No. (5) embodies No. (1)) in circumstances prevailing at the time of the passage of this law; (v) (a) that the preferable construction is construction No. (4), and (b) that if any construction would work invalidity, s. 15A of the *Acts Interpretation Act* requires the adoption of a construction that brings the section within power. The decision of the question of the validity or invalidity of the Act does not depend upon a judicial determination or ascertainment of the facts stated in the preamble.

H. V. Evatt K.C. in reply. The suggestion that the Governor-General's function under s. 5 (2) and s. 9 (2) is one of "identification" tends to conceal the elaborate character of the finding required for the second part of the declaration. The suggestion that the preamble "states some evils," &c., is an insufficient description of the fact that specific charges and of crime and criminal conspiracy contrary to Commonwealth law are recited. Further, the statement that the Act is "preventive" as distinct from "punitive" is irrelevant and also inaccurate. The motives of Parliament are one thing. The actual operation of the Act goes far beyond any purpose of prevention. The question is whether it is a law with respect to the given subject matter. To say it is preventive "in relation to conduct likely to prejudice the defence of the country, the execution of the Constitution" assumes a relationship between what is enacted and the subject matter which is required to be proved. Section 5 (2) and s. 9 (2) are not internally severable. The suggestion that if a particular enactment is not a law with respect to defence and the relationship

between such an enactment in actual operation and the subject matter of power is non-existent or attenuated, Parliament has a discretion to add matters to the defence power by reference solely to its opinion as to what would be desirable is not correct. None of the cases cited by the defendants establishes such a proposition. Even in *Farey* v. *Burvett* (1) the emphasis of the main reasoning is upon the great extension of the content of the defence power in time of war. Clearly the passage of *Isaacs* J. (2) containing the words " may conceivably in such circumstances even incidentally aid " are referable to a war of the character described by the same Judge previously and the suggestion (3) that s. 92 is apparently suspended at a time of war is erroneous. The use of *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (4) is unjustifiable. It refers to a Constitution where the residuary power and the so-called emergency power are given to or treated as given to the central legislature. The distinction between the Canadian and Australian Constitutions is explained in *Gratwick* v. *Johnson* (5). The Court is concerned with the measures adopted by the legislature to carry its purpose into effect. The Court is always concerned with the measures adopted and every portion of the enactments passed. The cases cited by the defendants do not bear out the contrary contention. The argument that the nature of the situation varies infinitely has to be applied to the principle that there is not any emergency power as such in the Australian Constitution. The submission by the defendants that a law may cease to be valid although valid when passed must depend on its terms and its proper construction. It should not be assumed that the doctrine applied under the emergency power in Canada or under the United States practice is applicable in all respects to the Australian Constitution.

The proposition that in a " public situation " the Commonwealth Parliament may legislate if it is of opinion that there is a logical connection between that situation and the " immediate subject matter of the legislation " is incorrect. The question is always whether the enactment in operation bears a definite relationship to the subject matter described in the Constitution. In truth the descriptions are inaccurate and the only test is to analyse the factual operation of the legislation and then to measure such factual operation with the subject matter of power. In point of fact it is not " *conduct . . . prejudicial to the defence of the country* "

(1) (1916) 21 C.L.R., at pp. 440-442, 453-454.
(2) (1916) 21 C.L.R., at p. 455.
(3) (1916) 21 C.L.R., at p. 454.
(4) (1947) A.C. 87.
(5) (1945) 70 C.L.R. 1.

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at all, but alleged conduct which, if it had occurred, would, in the opinion of the Executive, be prejudicial to what the Executive regards as necessary or desirable either for defence or the maintenance of the Constitution. Even if the Act had merely punished " conduct prejudicial to defence ", its validity would be seriously challenged; but it goes so far beyond this as to reach a new dimension in the characterization of laws. An examination of all the references found elsewhere which are said to be similar to the expression " prejudicial to defence " shows very many differences. Most of the examples are taken from war-time regulations in a context where " defence " clearly means the efficient prosecution of the Second World War. Even so, many of the references are to phrases which occur where other subjects, clearly within defence power, are being dealt with by regulation, e.g., *National Security (General) Regulations*, regs. 5 (dealing with protected areas), 8 (dealing with diversion of roads), 16 (dealing with censorship), 24 (dealing with stopping a ship). The submission that in ss. 5 (2) and 9 (2) " the defence of the Commonwealth " refers to a complex of activities is substantially correct. But that is exactly the meaning of " defence " in s. 51 (vi.) of the Constitution. What the defendant does not deal with is the fact that ss. 5 (2) and 9 (2) make the Governor-General the sole and final judge as to what is included in " the defence of the Commonwealth ". When, therefore, the defendant says that " security and defence of the Commonwealth " is not a reference to " matters with respect to which the Parliament may make laws " under s. 51 (vi.) the verbal turning of the phrase conceals the fact that under s. 51 (vi.) Parliament can make laws only with respect to " defence ", just as under s. 5 (2) and s. 9 (2) the Governor-General determines for himself whether the alleged activities may be regarded by him as " prejudicial to defence ". It is a fallacious approach to suggest that " as the subject is within power " Parliament could itself " identify " those whom it desired to deal with in relation to conduct prejudicial to defence and to suggest that in authorizing the Governor-General to " identify ", the Governor-General is exercising " delegated legislative power " is quite an inaccurate description of s. 5 (2) and s. 9 (2). It is certain that the power so exercised by the Governor-General is not legislative and it partakes of the nature of an executive power strictly so-called and also of a judicial power exercised without the safeguards of a Court of Justice. Accordingly, the antithesis between the Governor-General's decision on the question of constitutional law and the so-called question of fact is quite irrelevant.

Ex parte Walsh and Johnson (1) does not affirm, but denies the right of the Executive to select persons with respect to whom the law is to operate. If the law is on the subject of trade and commerce, then the statement merely begs the question. *Ex parte Walsh and Johnson* (1) decides precisely that if the question is whether the law is upon the subject of trade and commerce, and the fact is that the Executive determines whether a person who in its opinion has interfered with trade and commerce should be visited with some sanction, then the law is outside the subject of trade and commerce. The *Jehovah's Witnesses Case* (2) is binding and decides in principle that every part of an enactment including its consequences, must be examined before any part of the enactment can be deemed valid or invalid. The power to forfeit property under the *Customs Act* 1901-1949, ss. 228, 229; the *Crimes Act* 1914-1941, s. 30T, and the *Unlawful Associations Act* 1916-1917, s. 7E is quite distinct from the power exercisable under the present Act. The attempt to contend that s. 4 is valid merely because it is " upon the same subject matter " as ss. 5 and 9 is entirely opposed to the established interpretation of the Constitution for determining whether an enactment is within power. The Act itself makes no pretence of connecting s. 4 with constitutional subject matter. Hence the fact that the defendant falls back upon the doctrine of " rational or logical " connection, which has never been applied to the Australian Constitution. This contention of the defendant reaches its climax when it is suggested that " it deals appropriately with those who may rationally be thought to sympathise with and be likely to support our potential enemy ". The legislation regarded from the point of view of s. 51 (xxxix.) is completely alien and foreign to what is comprised in the Executive power of the Commonwealth exercisable by the King's representative. The contentions put forward by the defendants are completely opposed to basic statutes like Magna Carta, the Petition of Right, the Bill of Rights, the Act of Settlement and the Habeas Corpus Acts, all of which are limitations upon the powers of the Crown in Australia as much as in England. The power conferred by s. 5 (2) and s. 9 (2) is the very antithesis of legislative power. It is in no sense of a legislative character. If it were legislative the function of the Governor-General would be to state a rule or command known to all the world and capable of being obeyed by the people. Instead of that, the only rule is the rule which lies secret in the minds of the Executive Government. It is not the rule of law. It is the arbitrary fiat of a supreme

(1) (1925) 37 C.L.R. 36. (2) (1943) 67 C.L.R. 116.

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power which need never follow even its own rule but can adapt each finding or decision to suit the particular person or the particular occasion (cf. *Ex parte Walsh and Johnson* (1)). Laws " to protect the body politic and its system of laws against actual and apprehended threats to its existence " is, in a general way, a possible description of some of the laws which could be passed and have been passed under s. 51 (xxxix.). It is important, however, to insist that the constitutional power of the Parliament is limited to what is expressly granted in the Constitution. Section 51 (xxxix.) covers the protection of all the organs of the Commonwealth, but in every case the enactment as passed must in truth be " with respect to . . . matters incidental to the execution of the powers " which the Constitution itself vests in Commonwealth organs and certain persons. When an enactment is challenged, it is essential to measure the relationship between the enactment and the field or area covered by the exercise by Commonwealth organs of their lawful power. *M'Culloch* v. *Maryland* (2) deals with a different provision. But there, too, it is insisted that the enactment must be in accordance with the letter as well as the spirit of the Constitution, and also that the enactment as passed must be " plainly adapted " to the end which the Constitution itself treats as " legitimate ". But the claim of the Commonwealth in respect of s. 51 (xxxix.) as applied to the Executive power is of a very different character. It seeks through Parliamentary action to achieve an " illegitimate " end, i.e., to elevate the Executive into a position which would be supreme over the judiciary and over the people. The argument overlooks the over-riding effect of covering clause V. of the Constitution itself, for that makes the Constitution binding upon the Executive and it is particularly the duty of the Supreme Executive under the Constitution to obey the Constitution. *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (3) ; *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (4) ; and *Fraser Henleins Pty. Ltd.* v. *Cody* (5) have no application where striking out provisions would alter the legislative plan or the context of the particular enactment. None of them presents any analogy to the present case. The suggestion that it should not be inferred that Parliament " intended the Act to operate as to every matter in s. 5 or s. 9 or not at all," is not the correct test to be applied. The real test is whether there is an " inseparable context " and whether the rejection of

(1) (1925) 37 C.L.R., at p. 136.
(2) (1819) 4 Wheat. 316 [4 Law. Ed. 579].
(3) (1945) 71 C.L.R. 29.
(4) (1943) 67 C.L.R. 1.
(5) (1945) 70 C.L.R., at p. 127.

the invalid part would cause a different operation of the remaining provisions or in some other way produce a different result. Here the proposed severance would produce a result very different from that which the entire enactment would have produced had it been valid (*Bank of New South Wales* v. *The Commonwealth* (1)). It is in a sense true that s. 4 is severable from the remainder of the Act. None the less, if s. 4 is invalid both s. 5 and s. 9 are invalid for reasons already given. This is not even a case where s. 10 (1) (*a*) and (*b*) can be supported independently as an exercise of the power of the Parliament to deal with the Commonwealth's executive officers. It is admitted that a law could be passed giving the Executive power to terminate the services of such officers and in many respects such a power exists at present. But this part of the Act has not been framed to effect such a purpose but to apply consequences merely because of the second part of the Governor-General's declaration under s. 5 (2) and s. 9 (2). The plaintiffs are not directly concerned in this contention of the Commonwealth, but cases like *Attorney-General for Ontario* v. *Reciprocal Insurers* (2) and those already cited would appear to indicate the absurdity and repugnance to the whole scheme of the statute if sanctions applied after the elaborate processes involved in the composite declarations of persons were treated as applicable in respect solely of one set of consequences which could have been enacted under the *Public Service Act*, or a similar provision. There was not any emergency in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (3). The Court is bound by the decision in *Ex parte Walsh and Johnson* (4), which is decisive on the main features of this case so far as s. 5 (2) and s. 9 (2) are concerned. Unlike this case there was a situation of imminent peril or an emergency in *Lloyd* v. *Wallach* (5), *Nakkuda Ali* v. *Jayaratne* (6) and *Liversidge* v. *Anderson* (7). The question of constitutional power did not arise in *Ex parte Walsh* (8). There is nothing like the situation in World War II., when there were nearly 1,000,000 Australians under arms, which the Court can take into account when comparing that external situation with *Ex parte Walsh and Johnson* (4). A statutory authority given to the Governor-General to come to a conclusion which will authorize a declaration made by him is not legislation by Parliament of a subordinate character. The regulation in *Reid* v. *Sinderberry* (9) was subordinate legislation. The

(1) (1948) 76 C.L.R., at p. 371.
(2) (1924) A.C. 328, at pp. 346, 347.
(3) (1914) A.C. 237 ; 17 C.L.R. 644.
(4) (1925) 37 C.L.R. 36.
(5) (1915) 20 C.L.R. 299.
(6) (1951) A.C. 66.
(7) (1942) A.C. 206.
(8) (1942) A.L.R. 359.
(9) (1944) 68 C.L.R. 504.

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Court has never decided that a rational connection with defence is the test of validity of legislation in connection with s. 51 (vi.) of the Constitution. Section 9 (2) depends entirely upon the opinion of the Governor-General, which according to its terms is entirely unexaminable and that is a false basis. The expression " security and defence of the Commonwealth " in the ninth recital does not mean the Commonwealth as a separate body. Under both s. 5 (2) and s. 9 (2) those matters are to be determined by the Governor-General alone, and he must determine the matters as including what is involved in activities prejudicial to the security and defence of the Commonwealth. It is not a law with respect to the security and defence of the Commonwealth, but it is a law with respect to the Governor-General's opinion about the security and defence of the Commonwealth, which is not the same thing. Security goes beyond defence. There has been added to the concept of defence in s. 51 (vi.) a concept of security, and that does not mean external security. Internal security was the problem in *Burns* v. *Ransley* (1) and *R.* v. *Sharkey* (2) : see also *Quick and Garran* (1901), pp. 561, 565, and *Liversidge* v. *Anderson* (3). The Governor-General may regard an activity as being prejudicial to security and defence which is not an activity sufficiently related to the constitutional head of power, namely, naval and military defence of the Commonwealth. It is intended under the Act that the Governor-General shall decide everything. He decides the scope of the statutory power, and whether activities of the person come within it ; he decides it finally and without appeal. He not only decides whether the activities are prejudicial to the security and defence of the Commonwealth, but he also decides whether they are prejudicial to the execution or maintenance of the Constitution, and again without appeal. The words are of the utmost vagueness. They are the words indicating the measure of certain powers referred to in the Constitution. That position similarly applies in connection with the maintenance of the laws of the Commonwealth. These features bring this case directly within the authority of *Ex parte Walsh and Johnson* (4). Thus the Act is not a law with respect to the defence of the Commonwealth or a law under s. 51 (xxxix.) of the Constitution. The sections cannot be read down under s. 15A of the *Acts Interpretation Act*. It has been said that the bona fides of the King's representative cannot be challenged in the King's Court (*Duncan* v. *Theodore* (5)).

(1) (1949) 79 C.L.R. 101.
(2) (1949) 79 C.L.R. 121.
(3) (1942) A.C., at p. 232.
(4) (1925) 37 C.L.R., at pp. 59, 66, 67.
(5) (1917) 23 C.L.R. 510, at p. 544.

[WILLIAMS J. referred to *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* (1).]

The Act imposes sanctions and civil laws by reason solely of the opinion of the executive government that persons are in its opinion likely to be injurious in some way to the constitutional functions of the Commonwealth. There must be a real tangible connection between the enactment and the head of power, and it is not possible, by vagueness or indefiniteness, to get outside the constitutional provision (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2)). The Act is not a law with respect to any head of power. The Act evidences a complete usurpation of the authority of the legislature. The Court looks at the operation of the enactment and then, in the circumstances, sees whether it is in truth and in fact a law with respect to a subject matter mentioned in the Constitution. A law which provides that no person shall be guilty of any conduct prejudicial to defence or the maintenance of the Constitution could not be a law within power because it would simply be a law the meaning of which no one could ascertain. There would be no sufficient connection with the subject matter of power for it to be regarded as a law and a topic. Never has there been such a law. Section 5 and s. 9 were purposely enacted in vague terms. *Ex parte Walsh and Johnson* (3) clearly invalidates s. 5 (2) and s. 9 (2) and consequential sections. In measuring every enactment that is challenged the Court does not ignore the machinery of the enactment and the point of view of any notions which would appeal to the organs of the judicial power (*Jehovah's Witnesses Case* (4)). An analysis of s. 5 (2) and s. 9 (2) shows that the purpose of the Act is to make provision for certain persons who have had or have some association with the Australian Communist Party to be ejected from office in trade unions as and when the Government thinks fit. The Act is not a law justified in relation to the executive power and that brings down the whole Act. As to whether the Governor-General is satisfied on a point is a question of construction. There is not in the first part of the declaration contemplated by s. 5 (2) anything to indicate the ground of satisfaction in regard to the body being a body to which the section applies. The real significance is the question of severability. Section 9 gives a right to follow the formula and establishes the duty of doing it. As regards s. 9 (2) the first thing is to interpret the word " accordingly ". There is nothing in the Act that requires the Governor-General to indicate more than is contained

(1) (1947) 177 L.T. 455, at p. 459.
(2) (1909) 8 C.L.R., at p. 415.
(3) (1925) 37 C.L.R. 36.
(4) (1943) 67 C.L.R. 116.

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in the section. The general plan of s. 5 (2) and s. 9 (2) is the same. The Governor-General does not give any particulars as to how the section applies. It is intended by the scheme of appeal that the individual or the body concerned should be referred to in accordance with the form of the statute and no other, and that when the matter comes to the Court, if there is an appeal, the proceeding is not like a case where a charge is made against the body or the person. The declaration is prima-facie evidence. The incidental power is covered by the principle in *Ex parte Walsh and Johnson* (1) *a fortiori*. The exercise of a discretion or the formation of an opinion by any non-judicial person can never have any effect in bringing a Federal statute within the Federal legislative power. *A fortiori* a statute which enables the executive officer or the Minister or the Governor-General to impose or to make an order or declaration which results in detrimental consequences to the individual, can never be based upon the opinion of the Minister or the Governor-General as to some interference with the constitutional subject matter (*Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (2)). Laws as to the matters incidental to the exercise of the executive power cannot be made under the legislative power in s. 51 (xxxix.) of the Constitution (*Burns* v. *Ransley* (3) ; *R.* v. *Sharkey* (4) ; *R.* v. *Kidman* (5)). Although there are legal limits of the executive power of the Commonwealth under s. 61 of the Constitution, power may be taken to include the operation of the prerogative referable to Commonwealth power (*Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (6)). The common law power is very narrow (*Law Quarterly Review*, vol. 34, p. 392, *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (7)). The Act, ss. 5 (2) and 9 (2), is not a law with respect to matters incidental to the carrying out of the executive power. On the face of it it is a matter relating to the carrying out or execution not of the executive power itself but of what the Executive deems to be the executive power of the Commonwealth. It is not correct to say that the subject matter of ss. 5 (2) and 9 (2) is subversive organizations. The notions of the discretion have a character completely arbitrary, completely unlimited, and are absolutely alien to the law. It is not denied that s. 51 (xxxix.) of the Constitution permits of additions to legislation in relation to the executive power (*Le Mesurier* v. *O'Connor* (8) ; *R.* v. *Kidman* (5) ;

(1) (1925) 37 C.L.R. 36.
(2) (1922) 31 C.L.R. 421.
(3) (1949) 79 C.L.R. 101.
(4) (1949) 79 C.L.R. 121.
(5) (1915) 20 C.L.R. 425.
(6) (1916) 1 A.C. 566, at pp. 585, 587.
(7) (1920) A.C. 508.
(8) (1929) 42 C.L.R. 481.

Commonwealth v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (1)). Primarily in Australia the suppression of domestic violence and disorder is exclusively a matter for the States. The Commonwealth's powers are powers to act either in aid of the States upon request, or when its own institutions or officers are threatened. Dealing with the matter in relation to what might be called a situation of emergency in the country and the Commonwealth's powers in relation to it, s. 51 (xxxix.) does enable strong powers to be exercised. However, they must be relevant to what are the lawful powers of the Executive or some other organ of Government. What par. (xxxix.) aims at more than anything else is the protection of Parliament as an institution.

[DIXON J. referred to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (2).]

Paragraph (xxxix.) is an important power. The incidence of the other subject matters is substantially covered by the subjects themselves. A law with respect to a subject matter must contain within it, or contemplate within it, the inclusion of the incidents to it; things that are incidental and so close to it: that is the basis of the emergency power (*Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (3); *Hamilton* v. *Kentucky Distilleries and Warehouse Co.* (4)). Whatever enactment is passed by the Commonwealth Parliament, it must be referable to one or other of the various heads of power, but under par. (xxxix.) the broad power deals with the protection of institutions which are carrying out their responsibilities under the Constitution, but it does not give the Executive power to say that if in its opinion a person might turn out to be or is likely to be a menace to those institutions he shall be deported from the country or thrown out of his employment or his property taken from him. The Court should have regard to the whole of the enactment.

[DIXON J. The common law position of Colonial Parliaments was dealt with in *Barton* v. *Taylor* (5).]

The principle is self-protective (*Willis* v. *Perry* (6)). Neither s. 5 (2) nor s. 9 (2) is authorized, either by the defence power or by the incidental power as applied to the exercise of the executive power. *Ex facie* s. 9 would not apply to the persons mentioned in s. 9 (1) (*a*) if s. 4 were invalid because the date of the dissolution of the Party would not arrive. The bodies referred to could not

(1) (1922) 31 C.L.R. 421.
(2) (1914) A.C. 237.
(3) (1923) A.C., at pp. 703, 706.
(4) (1919) 251 U.S. 146 [64 Law. Ed. 194].
(5) (1886) 11 App. Cas. 197; 7 L.R. (N.S.W.) 30.
(6) (1912) 13 C.L.R. 592; 12 S.R. (N.S.W.) 470.

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be declared unlawful just because they were affiliated or in some way connected with a body which is not unlawful because s. 4 fails. The provisions are closely connected. The subordinate or associated body would not be in the view of Parliament regarded as a fit subject for dissolution and forfeiture of property if the parent body is not. The recitals, under one view, are findings of Parliament intended to be incontrovertible and conclusive. That would be a finding of facts and a usurpation of judicial power by Parliament in charges of crime and therefore could not be conclusive. Parliament cannot by expressing an opinion create a link with power: see *R.* v. *Taylor* (1). There must always be a factual connection between the power and the enactment.

[LATHAM C.J. referred to *Reid* v. *Sinderberry* (2).]

The Court takes judicial notice of the dimensions of a conflict (*Jehovah's Witnesses Case* (3); *Stenhouse* v. *Coleman* (4)). Other views of the recitals are: (i) that they are persuasive and are partly rebuttable; or (ii) that they are expressions of opinion. The opinion of Parliament as to the dangerous nature of an organization operating in the Commonwealth in relation to defence matters is completely irrelevant in itself as a basis for any legislation. So far as subversive associations are concerned the Commonwealth Parliament has no power to deal with them unless it remits the determination of the facts and the adjudication thereof to a court, except, perhaps, on occasions like *Jehovah's Witnesses Case* (5). It is the function of the Court to determine the matter not only in regard to facts alleged to be relevant, but also in relation to the reality of the danger to the community. The very nature of the recitals and the charges involved in them shows that they should be completely ignored. Recitals cannot be used for the purpose of establishing power or linking with the subject matter of power something that is completely inconsistent with the Federal constitutional system. The existence of an emergency in fact may enable the legislature to do certain things, but the judgment of the legislature as to whether any emergency exists is irrelevant. The emergency does not give the legislature any additional power to make a finding or something of more persuasive effect than otherwise would be the case. An "emergency period" was dealt with in *Gratwick* v. *Johnson* (6) and *Ex parte Walsh and Johnson* (7): see also *Chitty* on *Prerogatives of the Crown* (1820), pp. 43, 44. The principle laid down in *Ex parte Walsh and*

(1) (1949) 79 C.L.R. 333.
(2) (1944) 68 C.L.R. 504.
(3) (1943) 67 C.L.R., at pp. 161 et seq.
(4) (1944) 69 C.L.R., at pp. 471, 472.
(5) (1943) 67 C.L.R. 116.
(6) (1945) 70 C.L.R., at pp. 11, 12.
(7) (1925) 37 C.L.R., at p. 134.

Johnson (1) was then applied to an executive power, but the reasoning (2) shows it applies in the appropriate circumstances to the legislative power itself. That principle applies in this case to ss. 4, 5 (2) and 9 (2). An enactment of the Commonwealth Parliament has no support in constitutional subject matter if the declaration or recital or whatever it is depends upon the Executive or legislative opinion as to the constitutional subject matter and that is challengeable : see *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Victoria* (3) and *Bank of New South Wales* v. *The Commonwealth* (4). An application of the principle in a slightly different form is shown in *Williamson* v. *Ah On* (5). Persons adversely affected by a recital are entitled to show that it is in fact false (*Earl of Leicester* v. *Heydon* (6)). The recitals in the Act are merely expressions of opinion or could be regarded as a statement of reasons and therefore cannot in themselves constitute the link with the subject matter necessary to give them constitutional validity (*South Australia* v. *The Commonwealth* (7)). The recitals are silent as to many aspects of the factual operation of the Act relating, *inter alia*, to ss. 5, 7 and 9, including information as to membership, " communist " as defined, or what constitutes " activities ". Evidence on those matters is clearly admissible and necessary if they were regarded as relevant to any question of validity, to show some *nexus* matter of powers. The importance of looking at the framework of an enactment to ascertain to what it is addressed is shown in *Australian Railways Union* v. *Victorian Railways Commissioners* (8) ; *Huddart Parker Ltd.* v. *The Commonwealth* (9) ; and *Attorney-General for Ontario* v. *Reciprocal Insurers* (10). Nothing happens until the matter reaches the Governor-General. It may never reach him or do so only after the lapse of a great length of time and very remote from a person's membership of the Party. The subject of loyalty tests and guilt by association was dealt with in 61 *Harvard Law Review*, p. 592. There is not any link between the person described in s. 9 and the subject matter of the power that is asserted —and not even asserted—in the recital ; the same applies to the affiliated bodies. An inquiry would be necessary to determine what are the activities of the Party and whether those activities are (a) wholly lawful, or (b) partly lawful and partly unlawful,

(1) (1925) 37 C.L.R. 36.
(2) (1925) 37 C.L.R., at pp. 61-72.
(3) (1942) 66 C.L.R., at pp. 508, 509.
(4) (1948) 76 C.L.R., at pp. 183-187.
(5) (1926) 39 C.L.R. 95.
(6) (1571) 1 Plow. 384 [75 E.R., at pp. 603, 605, 606].
(7) (1942) 65 C.L.R., at pp. 432, 465, 466.
(8) (1930) 44 C.L.R., at p. 386.
(9) (1931) 44 C.L.R., at pp. 512, 513.
(10) (1924) A.C., at p. 347.

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or (c) wholly unlawful. On the narrowest grounds ss. 4, 5 and 9 fail, because if ss. 5 (2) and 9 (2) are looked at afresh with s. 4, the link has not been actually proved of subversive conduct on the part of the body or on the part of the person, but on the executive opinion about it or Parliamentary opinion about it—wrongly assuming against the main argument—the principle of *Jehovah's Witnesses Case* (1) is exactly applicable here. The correct test as to whether an enactment is within the defence power is: "Is the law one with respect to the defence of the Commonwealth?" (*Bank of New South Wales* v. *The Commonwealth* (2); *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (3)). That demands a factual or substantial connection with defence. The division by the defendants of the defence power into two topics is quite artificial. The Court must always have regard to the enactment, either as a whole or as to what is done under an enactment; all those things are relevant: see, *inter alia*, *Jehovah's Witnesses Case* (4). To say that the immediate subject matter of the Act "is conduct, activities, both organized and individual, prejudicial to the defence of the country" is completely wrong, factually. The subject matter of the Act is not "conduct and activities": it is the opinion of the executive or the Parliament as to that subject matter. How Parliament deals with organizations and persons in relation to their conduct or activities is as much part of the enactment as the subject matter of the enactment. As to topic, there is only one question—is the enactment relevant to defence, in respect of defence? The "consequences" said by the defendants to follow upon the declaration are not relevant consequences; they extend far beyond relevance. There is not any basis for s. 4 except in the recitals, and there is not any tangible basis there. If the Act can only be supported as to defence, &c., and if ss. 5 (2) and 9 (2) leave it open to the Governor-General to make the necessary declarations although he is satisfied only as to execution and maintenance of the Constitution, then the whole Act is bad. Section 27 postulates a choice at some time after the Act became law. The real substance of s. 10 (1) (*a*) and (*b*) is not public service but a declaration of disloyalty. Judicial power does not depend on going through the forms of courts (*Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (5)). As relating to the Constitution it means a power which cannot be

(1) (1943) 67 C.L.R., at pp. 166, 167.
(2) (1948) 76 C.L.R. 1.
(3) (1942) 66 C.L.R. 488.
(4) (1943) 67 C.L.R. 116.
(5) (1949) A.C. 134.

exercised by the Executive or the Parliament: *Harrison Moore, Constitution of the Commonwealth*, 2nd ed. (1910), p. 319. The forfeiture of property is the very essence of judicial power in this context. Political organizations and individuals are within the subject matter protected by s. 92 of the Constitution (*Bank of New South Wales* v. *The Commonwealth* (1); *James* v. *The Commonwealth* (2)). Under the Act there is an absolute prohibition of activities, inter-State or otherwise, and, in the case of an individual, a loss of his inter-State avocation. It is a complete, absolute, unconditional, final prohibition of all activities. *Adair* v. *United States* (3) is not now received as an authority on the topic: see *Huddart Parker Ltd.* v. *The Commonwealth* (4).

F. W. Paterson, in reply. Responsible government is fundamental to all State Constitutions. That rests upon the right of citizens of each State to organize themselves into political parties, associations and organizations to select or support candidates for State Parliaments, to advocate policies for incorporation in State legislation or execution by State Governments. Although it is within the power of States themselves to control those bodies, any extra-State law abrogating their existence or the existence of any of them in whole or in part is a direct invasion of the State constitutional right of self-government. The indicia of judicial power are correctly stated in the propositions submitted by *Webb* K.C. In the absence of any pre-existing standard or rule of conduct, even impliedly, how was it possible to determine whether the Party should be dissolved? Parliament must have formed some opinion about the Party, that opinion must relate to something which was done: and must be that the Party had done something prejudicial to defence. It must have been a determination of fact and of law, otherwise it would not have known whether the determination of fact came within the constitutional power, and by doing that it instantly affected the rights of every member of the Party. On the principle of *R.* v. *Local Government Board for Ireland* (5) this is a clear case of an exercise of judicial power by Parliament in s. 4 and an exercise of the judicial power by the Governor-General in s. 5 and s. 9. The prohibition of the Party which is engaged in inter-State trade and intercourse, is in conflict with s. 92 of the Constitution. The extent to which the Party is engaged in subversive activities, if

(1) (1948) 76 C.L.R. 1.
(2) (1936) 55 C.L.R. 1; (1936) A.C. 578.
(3) (1908) 208 U.S. 161 [52 Law. Ed. 436].
(4) (1931) 44 C.L.R. 493.
(5) (1902) 2 I.R. 349.

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at all, should be determined by evidence (*Tasmania* v. *Victoria* (1)). The prohibition is all-embracing and applies equally to the Party's harmless activities as to activities which may be regarded, doubtless wrongly, by Parliament, as harmful. Whether or not the Party is a healthy political organization is a matter which should be determined by the court before which the matter of the validity of the Act is in question. The Act is punitive. Any action taken under the heading of preventive must be reasonably necessary for the circumstances (*Barton* v. *Taylor* (2)). It is not reasonably necessary to forfeit the property of an association no matter how bad that association might be, if its badness arises only during a temporary period. In *R.* v. *Halliday* (3) and *Lloyd* v. *Wallach* (4) the preventive action was only during the time of the war, or until the war was wound up. The very basis of the validity of preventive action is that it must be reasonably necessary; therefore it is the duty of the Court to inquire into whether the consequences are commensurate or incommensurate, and whether Parliament's requirements could be obtained without resorting to drastic measures. The Act, being punitive, is invalid as an invasion of the judicial power. General control over thoughts and liberties of the people is vested in the States; particular control is in the Commonwealth only under some specific power which must be proved (*Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (5)). There is not any mention in the Act of any emergency. The doctrine of *salus populi est suprema lex* does not apply (*Ex parte Walsh and Johnson* (6); *Gratwick* v. *Johnson* (7)). With reference to s. 4 the situation must be the situation as it existed on the date of the passing of the Act, namely, 20th October, 1950. Until the character and nature of the Act is decided, it cannot be decided whether the Act is within any power in s. 51 of the Constitution. A declaration under s. 4 is an unchallengeable determination. The point raised in Question 1 (a) of the case stated does not depend only upon a judicial determination or ascertainment of the facts in the recitals, but it depends on other facts and questions, which have to be determined by evidence. The validity of an Act cannot be determined on the basis of psychology or an inner consciousness. Nor can the Act be determined on the basis of the facts alleged by the defendants to be notorious.

(1) (1935) 52 C.L.R. 157.
(2) (1886) 11 App. Cas. 197; 7 L.R. (N.S.W.) 30.
(3) (1917) A.C. 260.
(4) (1915) 20 C.L.R. 299.
(5) (1914) A.C. 237; 17 C.L.R. 644.
(6) (1925) 37 C.L.R. 36.
(7) (1945) 70 C.L.R. 1.

C. A. Weston K.C., in reply. The arguments addressed to the Court on behalf of the defendants on the topic of the examinability of the opinion of the Governor-General, are inconsistent *inter se*.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. In these proceedings the Court is required to adjudicate upon the validity of the *Communist Party Dissolution Act* 1950. The question comes before the Court upon a case stated under the *Judiciary Act* 1903-1948, s. 18, by which *Dixon* J. has referred to the Court two questions which arise in each of eight actions in which the plaintiffs claim declarations that the Act is invalid. The questions submitted to the Court are as follows :— " 1. (a) Does the decision of the question of the validity or invalidity of the provisions of the *Communist Party Dissolution Act* 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth ? 2. If no to either part of question 1 are the provisions of the *Communist Party Dissolution Act* 1950 invalid either in whole or in some part affecting the plaintiffs ? "

The plaintiffs in the actions are the Australian Communist Party, certain trades unions registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1949, a trade union not so registered, and individual persons who hold positions as officers of one or other of the plaintiff unions. The Communist Party is not shown to be a legal person and therefore is not a competent plaintiff. But there are individual persons as co-plaintiffs in the action to which it purports to be a party.

1. I propose first to summarize the provisions of the Act.

The Act is introduced by a preamble which states, *inter alia*, that the Australian Communist Party is a revolutionary party using violence, fraud, sabotage, espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of government of Australia and, particularly by means of strikes or stoppages of work, causing dislocation in certain industries which are declared to be vital to the security and defence of Australia. The Act dissolves the Australian Communist Party and forfeits its property (s. 4). The

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Act provides, subject to a declaration by the Governor-General, means for the dissolution of bodies of persons associated in the manner specified in the statute with the Communist Party or communism (s. 5) and for the forfeiture of the property of such associations (s. 8). The Act also contains provisions penalizing acts which are directed towards the continuance of the activities of an association (s. 7). The Act (ss. 9 and 10) deals also with individual persons and provides, subject again to a declaration by the Governor-General, that persons with specified communist associations shall be ineligible for holding office under or for employment by the Commonwealth or for holding office in an industrial organization which the Governor-General declares to be an organization to which s. 10 applies.

An association can be declared to be an unlawful association under the Act only if it falls within one of the descriptions contained in s. 5 (1). These provisions all specify some degree of association with the Communist Party or with communism. Further, it is necessary (s. 5 (2)) that the Governor-General should be satisfied that the body of persons to which it is proposed to apply the law is a body of persons to which the section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth (s. 5 (2)). Where these conditions are satisfied the Governor-General may declare the body of persons to be an unlawful association.

Section 5 (3) contains a provision that the Executive Council shall not advise the Governor-General to make such a declaration unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security and two other persons appointed by the Governor-General in Council. This committee consists of responsible persons but it is not a court and the Governor-General is not a judicial officer.

Section 5 (4), (5) and (6) provide for an application to a court to set aside the declaration on the ground that the body in question is not a body to which the section applies. Thus a body would be able to challenge before a court the declaration that it was associated in the manner set out in s. 5 (1) with the Communist Party or with communism, but would not be able to challenge in a court the declaration of the Governor-General as to the other element which is the condition of making a declaration, namely

that the continued existence of the body would be prejudicial to defence or to the maintenance and execution of the Constitution, &c. (The defendants have argued, it is true, that the decision of the Governor-General as to the last-mentioned matter is examinable in a court to some extent. I deal with this question later.)

In the case of individuals, their disqualification for union office or employment by or under the Commonwealth is governed by s. 9. This section applies to persons who have the association with communism specified in s. 9 (1). Section 9 (2) provides that where the Governor-General is satisfied that the person is a person to whom the section applies and that that person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may make a declaration accordingly. This section contains provisions corresponding to those contained in s. 5 with respect to the consideration of material by a committee and an application to a court to set aside the declaration on the ground that the person is not a person to whom the declaration applies. As in the case of s. 5, s. 9 does not provide for any application to a court in respect of the declaration that the person is engaged or likely to engage in the prejudicial activities specified in the section.

2. I will now summarize the principal arguments adduced on behalf of the plaintiffs and then set out the provisions of the Act in greater detail. The plaintiffs were represented by several counsel and the arguments presented on behalf of them respectively were naturally not identical.

First, it is objected by the plaintiffs that the Act is invalid because it is not a law with respect to any subject with respect to which the Commonwealth Parliament has legislative power. More particularly it is contended that it is not a law which is authorized by s. 51 (vi.) and s. 51 (xxxix.) of the Constitution. These paragraphs provide that the Commonwealth Parliament may make laws with respect to—" (vi.) 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 : . . . (xxxix.) 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 61 of the Constitution provides :—" The executive power of the Commonwealth is vested in the Queen and is exerciseable by

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the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

In support of this objection the plaintiffs rely upon many decisions of the Court that there must be a real and substantial connection with the subject matter of power before a law can be held valid. It is contended that, apart from the preamble to the Act, there is nothing to show that the existence of the Communist Party or of affiliated organizations or the continuance in offices of persons belonging to or associated with that Party have any relation to defence or to the maintenance of constitutional government. It is contended that the statements contained in the preamble are irrelevant to all questions affecting the validity of the Act because the Commonwealth Parliament is unable to create legislative power under the Constitution by purporting to determine some particular fact or set of facts in a particular way.

Secondly, it is contended that if the allegations contained in the preamble to the Act are relevant to the determination of the question of the validity of the Act evidence is admissible to show that the recitals are untrue. It is argued that the fact that Parliament was satisfied that they were true is irrelevant to the question of the validity of the Act.

Thirdly, under the Act the Parliament purports, it is said illegitimately, to exercise judicial power in (a) dissolving the Australian Communist Party by direct enactment, and (b) making the provisions of s. 5 (relating to unlawful associations) and s. 9 (relating to individuals) dependent upon the opinion of the Governor-General.

Fourthly, it is argued that the provisions for forfeiture of property are contrary to the provisions of s. 51 (xxxi.) of the Constitution, which provides that the Commonwealth may make laws with respect to the acquisition of property "upon just terms" and not otherwise.

Fifthly, it is contended that as the plaintiff unions are Federal unions and they and their officers have many inter-State activities, s. 92 of the Constitution prohibits the enactment of any law which prevents the carrying out of those activities. It has been argued that no law, Federal or State, can control the inter-State operations of political parties, of unions or of officers of those parties or of officers of unions.

Sixthly, it has been argued that no Federal legislation can, by means other than a judicial decision, put an end to the existence

of any voluntary association if that association has some lawful objectives.

Seventhly, it has been contended that no Federal legislation can by any means put an end to the existence of any voluntary organization which has political objectives and is a political party. Laws which do so are, it is said, not authorized by the Commonwealth Constitution and, further, if the political party is interested in State politics, such a law is inconsistent, it is said, with the Constitutions of the States.

3. I now state the provisions of the Act in greater detail.

The Act is introduced by a preamble which consists of nine paragraphs. The first three paragraphs recite the terms of the Constitution, s. 51 (vi.), s. 61 and s. 51 (xxxix.), to which reference has already been made. The other recitals are as follows:— 4. "And whereas the Australian Communist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat:" 5. "And whereas the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic industrial or political ends by force, violence, intimidation or fraudulent practices:" 6. "And whereas the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature and also engages in activities or operations similar to those, or having an object similar to the object of those, referred to in the last two preceding paragraphs of this preamble:" 7. "And whereas certain industries are vital to the security and defence of Australia (including the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry and the power industry):" 8. "And whereas activities or operations of, or encouraged by, the Australian Communist Party, and activities or operations of, or encouraged by, members or officers of that party and other persons who are communists, are designed to cause, by means of strikes or stoppages of work, and have, by those means, caused, dislocation, disruption or retardation of production or work in those vital industries:" 9. "And whereas it is necessary, for the security and defence of

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Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the Australian Communist Party, and bodies of persons affiliated with that Party, should be dissolved and their property forfeited to the Commonwealth, and that members and officers of that Party or of any of those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry: " It will be observed that these recitals refer not only to the Australian Communist Party as a party operating in Australia, but also to the basic theories of communism, in accordance with which it is alleged that that Party engages in activities in order to bring about a revolutionary situation (par. 4). The Party is stated to be an integral part of the world communist revolutionary movement (par. 6). Persons who are communists are said to be engaged in activities designed to cause dislocation, disruption or retardation of work in vital industries (par. 8). Thus the recitals are not limited to allegations with respect to the Australian Communist Party. They contain allegations with respect to communism generally and with respect to the association of the Party with communism, and with respect to persons who are communists. Paragraphs 4 to 8 consist of allegations of fact. Paragraph 9 expresses the opinion of the Commonwealth Parliament that it is necessary for reasons of defence and the maintenance of the Constitution to enact the provisions of the Act.

The Act came into operation on 20th October 1950 and the statements in the preamble must be regarded as relating to matters as at or about that date.

Section 3 of the Act defines " communist " as a person who supports or advocates the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin. " Industrial organization " is defined as meaning " an organization of employers or employees associated for the purpose of protecting and furthering their interests in relation to terms and conditions of employment or for purposes including that purpose ". " The Australian Communist Party " is defined as meaning " the organization having that name on the specified date, notwithstanding any change in the name or membership of that organization after that date." " The specified date " means 10th May 1948. " Unlawful association " means " the Australian Communist Party or a body of persons declared to be an unlawful association " under the Act.

Section 4 of the Act deals with the Australian Communist Party. Sub-section (1) declares the party to be an unlawful association which by force of the Act is dissolved. Sub-section (2) provides for the appointment by the Governor-General of a receiver of the property of the party. Sub-section (3) provides for the vesting of the property of the party in the receiver. These consequences are produced by direct enactment. The Act does not leave it to any court to determine whether the Australian Communist Party should or should not be suppressed. Parliament has made its own decision on that subject.

Section 5 provides that the bodies of persons described in sub-s. (1) may be declared by the Governor-General to be unlawful associations if he is satisfied as to certain matters specified in sub-s. (2). Before he can make such a declaration the material upon which the advice of the Executive Council to the Governor-General is founded must be considered by a committee. There may be an application to a court to set aside the declaration—but only upon the ground that a body is not a body to which the section applies.

The defendants sought to support these provisions by finding in sub-s. (2) a basis for the Act. That basis was said to be the opinion of the Governor-General that the continued existence of the body would be prejudicial to the defence of the Commonwealth or the maintenance of the Constitution, &c., provided that the decision of the Governor-General could be shown, if challenged, to be an opinion in relation to a matter which was " in fact and in law " comprehended within the subjects mentioned—defence and maintenance of the Constitution, &c. I do not agree with this contention. For reasons which I state hereafter I find what I regard as a good basis for s. 5 in sub-s. (1) and, though it is not necessary for me to do so, I am of opinion that such a basis can also be found in sub-s. (2), even though sub-s. (2) is interpreted in a manner which the defendants disclaim and the plaintiffs support—namely, as making the opinion of the Governor-General unexaminable as to all the matters mentioned in sub-s. (2) except the matter as to which an application to a court is allowed. In order to deal with the various arguments which were based on s. 5, I set out the whole of the section, which is as follows :—" 5. (1) This section applies to any body of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State—(*a*) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act was, or purported to be, affiliated with the Australian Communist Party; (*b*) a majority of the members of which, or a majority of the members of

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the committee of management or other governing body of which, were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party; (*c*) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time within that period, promoted, the spread of communism, as so expounded; or (*d*) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who—(i) were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party, or are communists; and (ii) make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin. (2) Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association. (3) The Executive Council shall not advise the Governor-General to make a declaration under the last preceding sub-section unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security, and two other persons appointed by the Governor-General. (4) A body of persons declared to be an unlawful association under sub-section (2) of this section may, within twenty-eight days after the publication of the declaration in the *Gazette*, apply to the appropriate court to set aside the declaration, on the ground that the body is not a body to which this section applies. (5) At the hearing of the application, the applicant shall begin; if evidence is given in person by such officer or officers of the applicant as the court is satisfied is or are best able to give full and admissible evidence as to matters relevant to the application, the burden shall be upon the Commonwealth to prove that the applicant is a body to which this section applies, but, if evidence is not so given, the burden

shall be upon the applicant to prove that the applicant is not a body to which this section applies. (6) Upon the hearing of the application, the declaration made by the Governor-General under sub-section (2) of this section shall, in so far as it declares that the applicant is a body of persons to which this section applies, be prima-facie evidence that the applicant is such a body."

All the bodies referred to in pars. (*a*), (*b*), (*c*) and (*d*) of s. 5 (1) possess the characteristic of being associated in some degree with the Australian Communist Party or with communism—both of which have been defined by Parliament in the preamble to the Act as public dangers. If Parliament has the power to suppress any such body by direct legislation, it might have done so by declaring them, as well as the Australian Communist Party itself, to be unlawful associations and dissolving them. Parliament has not done so. It has required that other conditions also be satisfied, namely, that the body should, in the opinion of the Government (the Governor-General advised by the Executive Council) be a body the continued existence of which would be prejudicial to defence, &c. Another condition is that the material on which the Government acts should have been considered by a committee. A further condition is that the declaration may be set aside by a court upon the ground that the body is not a body to which the section applies. All these conditions operate to limit what would otherwise have been a more extended operation of s. 5.

Section 6 provides that when a declaration is made with respect to a body of persons it shall, upon the expiration of twenty-eight days after the publication of the declaration in the *Gazette*, be dissolved. Sub-section (2) provides means for postponing the dissolution of the Party in the case of there being an application to a court to set aside the declaration.

Section 7 creates offences with penalties. They are all associated with attempts to carry on the activities of an unlawful association which has been dissolved. As examples I mention s. 7 (1) (*a*)—a person shall not knowingly " become, continue to be, or perform any act as an officer or member of an unlawful association ", and " (*d*) in any way take part in any activity of an unlawful association or carry on, in the direct or indirect interest of an unlawful association, any activity in which the unlawful association was engaged, or could have engaged, at the time when it became an unlawful association." It was argued that the effect of this latter provision was to prevent any person taking part in future in an activity of any kind in which the association had been engaged or should have engaged. For example, an association

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might collect money for hospitals. It was argued that this section would make it an offence for any person, after the association was declared, to collect money for hospitals. This argument finds no support in the words of the section. What is prohibited under par. (*d*) is taking part in any activity *of an unlawful association*, that is to say, as such an activity, and it also prohibits carrying on activities of the association in the direct or indirect interest of an unlawful association. Accordingly there is no ground for the contention that the Act prohibits the doing by any person of anything that an unlawful association has done or could do, however innocent.

Section 8 relates to the appointment of a receiver of the property of an unlawful association. Section 9 is a section dealing with individual persons corresponding to s. 5, which deals with associations. The section contains the following provisions:—"(1) This section applies to any person—(*a*) who was, at any time after the specified date and before the date upon which the Australian Communist Party is dissolved by this Act, a member or officer of the Australian Communist Party; or (*b*) who is, or was at any time after the specified date, a communist. (2) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, make a declaration accordingly." (Section 9 (1) (*a*) cannot come into operation unless the Act does effectively dissolve the Australian Communist Party.)

These provisions are followed by provisions requiring an examination of material by a committee and giving a right to apply to a court to set aside a declaration made in respect of an individual "on the ground that he is not a person to whom this section applies". The comments made upon s. 5 apply also to s. 9.

Section 10 (1) provides that a person in respect of whom a declaration is in force under the Act—"(*a*) shall be incapable of holding office under, or of being employed by, the Commonwealth or an authority of the Commonwealth; (*b*) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth; and (*c*) shall be incapable of holding an office in an industrial organization to which this section applies or in a branch of such an industrial organization."

Section 10 (3) provides—"Where the Governor-General is satisfied that a substantial number of the members of an industrial

organization are engaged in a vital industry, that is to say, the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry or the power industry, or any other industry which, in the opinion of the Governor-General, is vital to the security and defence of Australia, the Governor-General may, by instrument published in the *Gazette*, declare that industrial organization to be an industrial organization to which this section applies."

Section 11 provides in sub-s. (1)—" If, upon the making of a declaration in respect of a person under this Act, that person holds any office referred to in sub-section (1) of the last preceding section or is employed by the Commonwealth or by an authority of the Commonwealth, that person shall, by force of this Act, be suspended from the office or employment."

Section 12 provides that if an industrial organization is declared under s. 10 (3) any office in that organization held by a declared person shall become vacant.

These sections deprive declared persons of contractual rights and limit the power of appointment to offices in Commonwealth employment and in industrial organizations.

Section 15 provides that it shall be the duty of the receiver of an unlawful association to take possession of the property of the association, to realize it, to discharge the liabilities of the association and to pay or transfer the surplus to the Commonwealth.

Section 16 provides for an application to the High Court to determine any question relating to the property or liabilities of the association or to the performance of his duties or the exercise of his powers under the Act.

Section 27 provides as follows:—" Where the Governor-General is satisfied that the continuance in operation of this Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a Proclamation accordingly and thereupon this Act shall be deemed to have been repealed."

4. By pleading and by affidavit the plaintiffs have denied the statements contained in the fourth, fifth, sixth, eighth and ninth recitals of the preamble to the Act. The plaintiffs propose to adduce evidence in support of these denials with a view to establishing that the Act is not authorized by the legislative power of the Commonwealth and is therefore void. An affidavit of one of the plaintiffs sets out the allegations, contrary to the recitals, which that plaintiff desires to establish by evidence. Further affidavits

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show that the Australian Communist Party, the plaintiff unions and their officers engage in substantial inter-State activities, including inter-State correspondence.

5. The principal argument of the plaintiffs related to the alleged connection of the Act with the subjects of defence of the Commonwealth (Constitution, s. 51 (vi.)) and protection of the constitutional government of the Commonwealth (Constitution, s. 51 (xxxix.) and s. 61). It has been decided on many occasions that Commonwealth legislation can be valid only if it has a real connection with a subject matter of legislative power which is assigned to the Commonwealth Parliament by the Commonwealth Constitution. Many cases might be cited in support of this proposition. I refer only to the following cases among those upon which the plaintiffs particularly relied (*Victoria* v. *The Commonwealth* (1); *Victorian Chamber of Manufactures* v. *The Commonwealth* (2); *Bank of New South Wales* v. *The Commonwealth* (3)).

The plaintiffs also relied upon decisions of this Court to the effect that Parliament cannot define or extend its constitutional power by reciting facts or by a legislative statement of connection between a particular law and a head of power. The powers of the Commonwealth Parliament are defined, and therefore limited, by the Constitution. The Court has held on several occasions that the opinion of the Parliament or the opinion of the Governor-General or of a Minister that a particular matter is within the legislative power of the Commonwealth Parliament did not affirmatively establish that the matter actually is within such power. The plaintiffs relied particularly upon *Ex parte Walsh and Johnson* (4). See also *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (5); *Reid* v. *Sinderberry* (6). It is therefore argued for the plaintiffs that the statements in the preamble to the Act certainly cannot be taken to be conclusive proof of the facts stated and, indeed, that they are not even prima-facie proof—that the Court itself must be satisfied that they are true before they can form a foundation for such legislation as that contained in the Act. Thus it is argued that the Act really operates in a vacuum by dissolving the Australian Communist Party, no connection between the continued existence of the Australian Communist Party or of the other associations mentioned in the Act and the subject of defence or maintenance of the Constitution, &c., being shown. In relation to such other associations and to individuals, the operation of the

(1) (1942) 66 C.L.R. 488, at pp. 506, 507, 509.
(2) (1943) 67 C.L.R. 413.
(3) (1948) 76 C.L.R. 1, at p. 186.
(4) (1925) 37 C.L.R. 36.
(5) (1942) 65 C.L.R. 373, at p. 432.
(6) (1944) 68 C.L.R. 504.

Act depends, not only upon the conditions of ss. 5 (1) and 9 (1) being satisfied, but also upon the opinion of the Governor-General that the association or the individual is concerned in activities prejudicial to the matters mentioned in the Constitution, s. 51 (vi.) and (xxxix.), that is, defence of the Commonwealth and maintenance of the Constitution and laws of the Commonwealth. Such an opinion, it is said, cannot establish a real connection of the Act with the subjects to which it purports to relate.

The defendants did not dispute the authority of the cases mentioned, but, relying upon statements in those cases that a statement by Parliament should be treated with respect, though not as conclusive, argued that, unless the Court had judicial notice of facts which showed those statements to be untrue, the statements should be accepted as conclusive. The defendants also asked the Court to take judicial notice of the truth of a series of propositions relating to communism, communist propaganda and motives, and generally as to dangers of war in the existing international situation. It was contended that the facts stated in those propositions provided a constitutional basis for the Act.

6. Before examining the relevance to the present case of the authorities cited I propose to refer to some general considerations affecting the nature of the defence power and of the power to make laws to protect the existence of constitutional government.

These powers are, I propose to show, essentially different in character from most, if not all, of the other legislative powers of the Commonwealth Parliament. The exercise of these powers can be intelligent only when they are used in relation to some national objective which is concerned with protecting the country against what is regarded as a danger. The most important question which arises in these cases is whether legislation for such a purpose approved by Parliament cannot be valid unless it is also approved by a court after hearing evidence as to the existence of national danger.

These powers are perhaps the most important powers intrusted to the Parliament of the Commonwealth. The continued existence of the community under the Constitution is a condition of the exercise of all the other powers contained in the Constitution, whether executive, legislative or judicial. The preservation of the existence of the Commonwealth and of the Constitution of the Commonwealth takes precedence over all other matters with which the Commonwealth is concerned. As Cromwell said, "Being comes before well-being". The Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot

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perform their functions unless the people of the Commonwealth are preserved in safety and security.

Any Government which acts or asks Parliament to act against treason or sedition has to meet the criticism that it is seeking not to protect government, but to protect *the Government*, and to keep itself in power. Whether such a criticism is justified or not is, in our system of government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. The contention that such an argument affects the validity of a law reminds me of the decision of a court in another country, when I was there, in a case of alleged treasonable conspiracy. The Court held that the accused did not intend to destroy government, but only to bomb public offices and assassinate ministers and generals and others. As they intended to take over the task of governing the country themselves, they were not guilty. I did not then, and do not now, agree with such a decision.

The exercise of these powers to protect the community and to preserve the government of the country under the Constitution is a matter of the greatest moment. Their exercise from time to time must necessarily depend upon the circumstances of the time as viewed by some authority. The question is—"By what authority—by Parliament or by a court?"

The defence power is, it has been held by this Court, a power which is essentially related to purpose. There is no difference in this respect between the defence power and the power to protect the community against attacks upon or undermining of constitutional government. The exercise of either power may affect the rights and duties of persons in Australia, whether or not the country is at war. What I say in this judgment about the former power applies equally to the latter power.

I therefore proceed to consider what matters are, or normally may be, taken into account in ascertaining whether dangers exist against which laws passed under the defence power may be directed.

Defence policy depends upon the identification in some manner of dangers against which, it is thought, the community should be protected. No defence policy can be determined merely upon an examination of facts proved by legally admissible evidence.

(a) In the first place, there must be a decision as to the objectives of national policy. What are to be regarded as dangers to be guarded against? If the national policy aims at, for example, an alliance with Russia, the identification of the dangers against which legislation should be directed will be entirely different from the identification of such dangers if policy is directed to the creation

or development of friendship with certain other countries. If the policy is for communism, there will be one complex of real or apprehended dangers. If the policy is against communism, there will be a completely different complex of such dangers. Thus the acceptance of some national objective is the governing consideration in determining against what dangers the Commonwealth should be guarded by the exercise of one or both of the legislative powers now under consideration. Policy frequently aims at the changing of facts in accordance with ideas. Persons with different ideas upon national policy will almost certainly approve different policies in relation to the same facts. No finding of facts by a court can provide an answer to the problem of identifying national dangers against which the people are to be defended. Thus the most important question in these cases is whether the Parliament of the Commonwealth, responsible to the people, has the decisive power to determine whether Australia is for communism or against communism, and to legislate in accordance with its decision, or whether it can do so only if a court agrees with its decision. Precisely the same question would arise if Parliament had legislated against Nazism or Fascism at a time when, in the judgment of Parliament, it was thought wise to do so. My reasons for judgment would be the same in any such case as in this case.

(b) In the next place, defence policy includes defence against internal enemies and against real or suspected internal agents or supporters of actual or potential external enemies. The power of defending the people committed by the Constitution to the Commonwealth would be a weak protection if it did not extend to protecting the people against internal attack by means of subversive and treasonable activities. Such activities may assume many forms. In addition to actual assistance given to an enemy in time of war, fifth-column work prepares the way for an enemy by undermining the morale of a people and by hindering the exercise of governmental powers in the community. It is a great help to a potential enemy to have inside a country a body (with activities which are ostensible and innocent) which engages in propaganda designed to make people think that potential invaders will be actual liberators. This is a well-established form of revolutionary technique. One of the most effective forms of fifth-column work is to use any real or pretended dispute—political, industrial or religious—as a means of promoting social confusion and dislocating the economy of a country. The aim will be to prevent the production of coal and steel for military and other purposes and particularly for munitions and to make it impossible to build up

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reserves of oil, coal, steel and other materials which are essential in modern war. Any interference with industries vital to defence will help any external enemy.

(c) Thus, in determining whether there should be legislation against what the adoption of a policy has decided are national dangers against which defence is necessary, many circumstances may, and generally will, be taken into consideration. There may be extensive examination of the international situation, the views upon which may determine whether action should be taken against an external power or against persons who are regarded as agents for an external power which is a potential future enemy and against which cautionary action, or possibly even war, is necessary. Whether another country is a friend or not—whether a change in its government or in the policy of its government is likely—these are matters of judgment, not of fact in the ordinary sense. It can only be a question of opinion and not a question of fact upon which a court can make a decision as to whether the international situation is " set fair " or " stormy " and in what quarter a storm is likely to arise. A person with one set of political ideas may approve an existing international situation, whereas a person with another set of political ideas may take an exactly contrary view. These are not matters for a court to consider.

(d) In addition to information of all kinds relating to the international situation and opinions with respect to such information, the capacity of a country to defend itself will be taken into account. Thus it will be necessary before determining upon a particular course of action in relation to defence matters, external or internal, to consider the strength and readiness of the naval, military and air forces, the peaceful or disturbed state of the industry of the country, its material resources, the morale of the country, the readiness of the people to fight, their ideas upon what is nationally right and wrong, their national hopes and fears, emotions and apprehensions ; all of these matters will enter into the consideration of defence policy. Thus the internal situation may be a matter of the greatest importance. The responsible authorities, in making up their minds upon these matters, will act upon diplomatic reports, intelligence reports from many countries, security reports, rumour, suspicion—upon much information which is necessarily secret—and upon other material which is highly relevant but which could not possibly be proved or used in any way in accordance with legal rules of evidence. No Government could produce such material in a court. Much of it would be derived from friendly foreign chancelleries and would necessarily be highly confidential. Reports

from its own representatives and officers would, in the interests of public safety, also necessarily be confidential, and the identity of the security officers who made the reports could not be disclosed. Publication of such reports might well bring about a situation of aggravated danger which they were designed to prevent or forestall.

This is the kind of material which lies at the basis of any responsible defence policy. No authority can make a sensible decision in relation to such policy unless such material is available to it. Such material cannot be made public in a court and most of it would be inadmissible in evidence.

(e) The next stage in determining policy consists in answering the question whether the situation as so estimated and assessed contains elements of danger to the country. Upon this question there are always different opinions. What to some is a dangerous threat is to others a promise of paradise. Even men who agree in general policy may have different ideas as to whether real danger exists. Such a question cannot possibly be determined merely by evidence as to facts. The plaintiffs' argument really means that in Australia such debates as took place between Pitt and Fox and between Burke and Paine must take place, not only in Parliament and before the people, but ultimately, and then only with final significance, in the courts.

(f) If, upon the basis of what are regarded by Ministers and Parliament as relevant matters, it is considered by the Government and Parliament that there is a danger to the country, the next question is whether legislation should be passed to meet the danger or whether it is wiser to ignore it. As to the proper character and extent of that legislation opinions will differ.

The Government and Parliament are responsible to the electorate for the policy of "fight" or "not fight" which they adopt after such consideration as is thought proper has been given to all the above matters.

The matters mentioned under the above headings (a) to (f) are mainly matters purely of policy and of opinion. They are not actual or objective facts which can be "found" by a court. Such matters of "fact" as are involved have no significance except in relation to some policy. Many of the relevant matters, as already stated, could never be made public. The plaintiffs contend that the view of the Government and Parliament, based upon the considerations mentioned, is irrelevant when the validity of legislation is to be determined. If a court agrees with Parliament that certain legislative action is really for the defence of Australia the Court will hold an Act to be valid. If the Court disagrees with

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the view of Parliament, then it must, it is argued, hold the Act to be invalid.

That this is the question involved in these cases was most clearly put on behalf of the Australian Communist Party. In a written argument submitted on behalf of that plaintiff the following submission is made with reference to legislative measures sought to be supported as laws for the purpose of maintaining the Constitution :—" It is for the Court to determine (a) whether the measures might reasonably be considered to be necessary, and (b) what is the nature and extent of the actual threat to the maintenance of the Constitution and the execution of the laws of the Commonwealth." It is obvious that as a matter of principle the same argument must apply to the defence power, and the case was so argued on behalf of all the plaintiffs. I take the following statement, in relation to the defence power, from the reasons for judgment of my brother *Williams* :—" The legislation would have to define the nature of the conduct and the means adopted to combat it, so that the Court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose." In my opinion this proposition accurately expresses the principal contention against the validity of the Act. The plaintiffs contend that when it is sought to support legislation under the defence power, before a court can hold the legislation to be valid, the court first must be satisfied upon legally admissible evidence as to the existence of the " actual or objective facts " relied upon as a basis for the legislation ; secondly, the Court must be satisfied that those facts constitute a danger to the Commonwealth ; and thirdly, the Court must be satisfied that the legislation is reasonably necessary for the alleged defensive purpose ; that is, to repeat what was said in argument, the legislation must not " go too far " or " be incommensurate " or " be too drastic ".

All the arguments for the plaintiffs upon this question depended upon the acceptance of a principle that it was for a court and not for a Government or a Parliament to determine whether interference with, resistance to, and undermining of a defence policy approved by a Government and by the Parliament to which it was responsible was proved to exist by admissible evidence of actual happenings and whether it was sufficiently dangerous to the community to justify an exercise of the defence power for the purpose of destroying what the Government and Parliament regarded as a hostile and traitorous organization.

7. I proceed to consider what, upon the basis of the acceptance of this contention, would be the function of a court in considering the validity of any Commonwealth statute directed against a body which was alleged to be subversive or traitorous. The question may conveniently be considered in connection with the recitals contained in the Act now before the Court.

There are three possible views with respect to the allegations contained in the recitals.

(a) One communist might well admit without any apology that the recitals were all true, but would contend that they represented an entirely justifiable protest, to the point of revolution, if necessary, against an intolerable condition of society. To a person holding such an opinion the proof of the truth of the recitals would not establish the existence of *any* real danger to Australia, and therefore could not possibly justify any legislation under the defence power. History shows many instances of the application of a principle that a moderate amount of assassination, and civil war itself, is quite justifiable in an endeavour to create a better world. Whether suppressing communist organizations and organizations associated with them can be regarded as action in defence of Australia or not depends, *whatever facts may be established by evidence*, on the political opinion with respect to communism of the judge or other person who answers the question.

(b) Another communist might vigorously deny the truth of the recitals and argue that therefore the alleged danger did not exist. If legally admissible evidence did not show that the recitals were true, then, on the plaintiffs' argument, the Act would be invalid. This is the attitude which, in these proceedings up to the present time, the plaintiffs have adopted. It would be open to them later to change their ground, and, if the facts asserted in the recitals were proved against them, to argue that what was being done was being done in the true interests of Australia, and that it was not shown that the proved activities constituted a danger which justified legislation under the defence power. Then the Court would have to decide whether or not it was in the true interests of Australia that there should be a revolution. This would be a decision upon policy and would necessarily depend upon the political views of the judge.

(c) An anti-communist might say that the recitals, or many of them, were true, and that the facts therein stated obviously showed the existence of a very grave public danger against which defence was expedient and reasonable and, indeed, necessary. Judges who

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were anti-communist in political opinion would agree with this proposition.

Accordingly the question whether the defence of Australia requires the suppression of communist activities cannot possibly be determined by any decision upon facts. Facts which are viewed with abhorrence by persons of one political opinion are greeted with applause by their opponents. It is not for a court either to abhor or applaud. Even if all the facts stated in the recitals in the present Act were proved to be true the decision as to whether the Australian Communist Party could constitutionally be suppressed or not would, upon the arguments for the plaintiffs, be made to depend entirely upon the political opinions of the judges. The Court should, in my opinion, have no political opinions.

It will be protested that the arguments for the plaintiffs do not really involve the proposition that a court should make up its mind upon any question of policy. In my opinion the express arguments of the plaintiffs do necessarily involve the consideration by the Court of what must be a question of policy and not of law. In addition to what I have already said I suggest that it may usefully be considered what the duty of the Court would be in relation to the present Act if the Act had been so framed as to allow a court to determine what the plantiffs contend must be determined by a court before such an Act could be held to be valid. Let it be supposed that the parties adduced evidence with respect to the truth or untruth of the recitals. Let it be supposed that the Court found that some of the recitals were true, and that others of them were false. What would be the position then? Obviously on the argument of the plaintiffs the Court would have to determine whether enough facts were left to constitute a danger which called the defence power into operation. The decision upon such a question would inevitably and necessarily depend upon the political opinion of the judge as to whether communism was a good thing or a bad thing—whether what was proved showed a real danger to the people.

I am aware that it is sometimes said that legal questions before the High Court should be determined upon sociological grounds—political, economic or social. I can understand courts being directed (as in Russia and in Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the court is provided with at least a political standard. But such a proposition as, for example, that the recent *Banking Case* (1) should have been determined upon political grounds

(1) (1948) 76 C.L.R. 1.

and that the Court was wrong in adopting an attitude of detachment from all political considerations appears to me merely to ask the Court to vote again upon an issue upon which the electors and Parliament had already voted or could be asked to vote, and to determine whether the nationalization of banks would be a good thing or a bad thing for the community. In my opinion the Court has no concern whatever with any such question. In the present case the decision of the Court should be the same whether the members of the Court believe in communism or do not believe in communism.

In my opinion the arguments for the plaintiffs show no adequate appreciation of the functions of the executive and of Parliament in a system of government under a Federal constitution. The governing questions in relation to defence and to the protection of constitutional government are questions of policy with which a court has nothing to do. It is not the case that all the questions which arise in government are " questions of fact " or " questions of law "—the former possibly for a jury and the latter for a court. When those responsible for the safety of the country determine to go to war they may be moved by all kinds of considerations and circumstances, many of which could never be stated in the form of categorical propositions which would be capable of proof by legally admissible evidence. Entry into a war may be determined from one point of view readily and easily as a matter of self-preservation. But where some people take this view others may take a contrary view. It is notorious that in 1939 and 1940, though Parliament and the Government considered that the defence of Australia made it necessary to fight Germany, there were those in Australia and elsewhere who contended that the war was merely an " imperialist adventure " that had nothing whatever to do with the defence of Australia.

8. It is in the light of these considerations that I come to the decisions of this Court upon which the plaintiffs rely.

Upon the arguments submitted by all the plaintiffs in this case it would have been open to a defendant who was prosecuted under the *War Precautions Act* 1914 or the *National Security Act* 1939 to contend that it was wrong for the Court to consider merely whether the legislation had a real connection with the prosecution of the war, and that the Court should consider and decide whether the war itself was really an operation for the defence of Australia. Neither in the First World War nor in the Second World War did the Court ever consider any such matter. The Court in each case accepted without question the determination of those responsible

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for the defence of the Commonwealth that these wars were wars fought in defence of the Commonwealth. Entry into war as being for the defence of Australia was a purely executive act. It was the decision of the Government, and not the decision of any court, that the war undertaken was for the defence, or " could reasonably be thought to be " for the defence of Australia, which provided the constitutional foundation for legislation under the defence power. In such legislation the Parliament adopted and approved the executive act. It was not open to any court to pass upon such action of the Government or of the Parliament.

The exercise of the power to make laws with respect to defence has never been held in this Court to be dependent on the actual existence of war at the time when the legislation was passed. The Defence Act itself was passed in a time of peace, and preparation for war and against war is included within the defence power. The power does not cease to be available when actual hostilities cease (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1); *Dawson* v. *The Commonwealth* (2); *Real Estate Institute of New South Wales* v. *Blair* (3); *Hume* v. *Higgins* (4)).

The defence power authorizes the Commonwealth Parliament if it thinks proper to enact laws not only to punish but also to prevent injurious activities. It is not necessary for the Government and Parliament to wait until war is actually raging and a crisis is upon us before preparing for war contingencies and legislating against hostile acts, whether internal or external, and whether actually performed or only apprehended. I repeat as to this matter what I said in the case of *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (5):—" In pursuance of the powers so conferred [by s. 51 (vi.) and s. 61 of the Constitution], the Commonwealth can defend the people, not only against external aggression, but also against internal attack, and in doing so can prevent aid being given to external enemies by internal agencies. No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people. These activities, whether by way of espionage, or of what is now called fifth column work, may assume various forms. Examples are to be found in obstruction to recruiting, certainly in war-time, and, in my opinion, also in time of peace. Such obstruction may be both punished and prevented."

(1) (1945) 71 C.L.R. 161.
(2) (1946) 73 C.L.R. 157.
(3) (1946) 73 C.L.R. 213.
(4) (1949) 78 C.L.R. 116.
(5) (1943) 67 C.L.R., at p. 132.

See also *Burns* v. *Ransley* (1) and *R.* v. *Sharkey* (2), where the Court held that the Commonwealth had power to legislate against such activities.

In my opinion the defence power, executive and legislative, would enable the Government to act and the Parliament to legislate with respect to a civil war. These constitutional organs, and not the judiciary, would decide whether or not fighting on one side or the other was defending the Commonwealth and the Constitution.

The plaintiffs do not contend that there is no power to pass some laws dealing with traitorous and subversive activities. Such laws may provide for the punishment of individual persons. But it is argued that a voluntary association cannot be suppressed and its property forfeited unless a court (as well as Parliament) determines that it is engaged in proved activities as actual and objective facts (i.e., as actual happenings), and unless the courts, as well as Parliament, are satisfied that the proved facts constitute a real danger, legislation against which is reasonably necessary. Unless these propositions are established to the satisfaction of a court, it is argued that no real connection with the subject matter of defence or protection of the Constitution is made out. The substance of the plaintiffs' arguments is that Parliament cannot legislate against an enemy unless the Court decides on evidence legally admissible (and the Court can have no other evidence) that it is an enemy and that the law is necessary or reasonable. In my opinion it is for the Government, subject as it is to the control of Parliament and the electors, and not for any court, to identify the enemies of the Commonwealth, internal or external.

In my opinion these arguments, based as they purport to be upon many decisions of this Court, are answered by the consideration to which I have already adverted, namely that the Court did not in any case consider whether the war which was being fought was really a war in defence of Australia. That question was dealt with and determined by the Government and by Parliament itself. This Court accepted the decision of the executive and legislative authorities upon the question of policy. The decisions to fight Germany and Japan were not made by the Court. The Court was not asked, and did not presume, to hold laws valid or invalid on the ground that the war was or was not really a war for the defence of Australia. The laws were held valid not because the Court agreed with the policy of the Government and Parliament in regarding Germany and Japan as enemies, but because the legislation was held to have a real connection with the war against

(1) (1949) 79 C.L.R. 101. (2) (1949) 79 C.L.R. 121.

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Germany and Japan. In other words, the action of the Government in declaring war and of Parliament in adopting that decision and legislating in pursuance of it *itself created a defence situation which provided a basis for the legislation.* Upon the basis of the recognition of this fact, actually created by the political decision of the Government and Parliament, the Court in its decisions applied a rule that there must be a real and substantial connection between the legislation *and the defence situation so created* in order that the legislation could be valid, but the Court never considered whether what Germany and Japan had done or might do could be regarded as a danger to Australia so as to warrant legislation under the defence power. The end to be pursued—the object to be achieved, namely, winning a particular war—was determined by the Government and Parliament. The only question which the Court considered in any of the cases referred to was whether a law had a real connection with that end or object.

The Court acted upon the same basis as Lord *Parker* when he said in *The Zamora* (1):—"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."

In my opinion the Court had no authority to review the entirely political decisions in 1914 that Germany was an enemy of the Commonwealth, or in 1939 and 1941 that Germany and Japan constituted a danger to the Commonwealth. No distinction can be drawn between defence against external attack and defence against internal attack, which is more insidious than direct external attack and in some respects, because it is often secret, more difficult to combat. If Parliament decides that there is an internal danger sufficiently serious to justify legislation, in my opinion the Court has no authority to overrule Parliament upon the ground that Parliament has made a mistake as to "the facts", or that, even if Parliament is right as to the facts, the facts show no real danger to Australia. The Government is responsible to Parliament and Parliament is responsible to the people for such decisions. If Parliament disagrees with the Government, or the people disagree with either the Government or the Parliament, our system of government provides a political means of changing the policy. The courts have nothing whatever to do with such decisions.

For the reasons which I have stated those who wish to challenge the truth of what Parliament has said in the recitals in this Act

(1) (1916) 2 A.C., at p. 107.

can do so in Parliament and before the people, but, in my opinion, not before any court.

It is not in my opinion a function of a court to determine whether legislation "goes too far" or "is incommensurate" or "is too drastic" or "is or is not reasonably necessary". The only function of a court when the validity of legislation is challenged as *ultra vires* the Commonwealth Constitution is to determine whether it is legislation "with respect to" a specified subject matter. If a law has a connection with a subject matter which is real, it is not the function of a court to ask whether the law was in fact "reasonably necessary". In the recent case of *Bank of New South Wales* v. *The Commonwealth* (1) the Court had to consider the validity of the *Banking Act* 1947. Some sections of that Act provided penalties of £10,000 per day in the case of certain conduct, but no argument was heard (in a case which was fully argued) that the legislation "went too far". I agree with what *Dixon* J. said in *Miller* v. *The Commonwealth* (2) :—"On a question of *ultra vires*, when the end is found to be relevant to the power and the means not inappropriate to achieve it, the inquiry stops. Whether less than was done might have been enough, whether more drastic provisions were made than the occasion demanded, whether the financial and economic conceptions inspiring the measure were theoretically sound, these are questions that are not in point. They are matters going to the manner of the exercise of the power, not to its ambit or extent."

This decision was given with respect to a law of a financial and economic character enacted in reliance upon the defence power. The principle stated is applicable in the case of all Commonwealth legislative powers. On this aspect of the case I refer to what *Griffith* C.J. said in *Farey* v. *Burvett* (3) :—"It is then contended that the necessity and desirability of making the law are questions of fact to be adjudged by the Court. In answer to that argument I refer to another well-known passage in the judgment of *Marshall* C.J. in *M'Culloch* v. *Maryland* (4) ; also quoted by my brother *Barton* in the *Jumbunna Case* (5) :—'Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.'"

(1) (1948) 76 C.L.R. 1.
(2) (1946) 73 C.L.R. 187, at p. 203.
(3) (1916) 21 C.L.R. 433, at p. 443.
(4) (1819) 4 Wheat. 316, at p. 423 [4 Law. Ed. 579].
(5) (1908) 6 C.L.R. 309, at p. 345.

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I respectfully agree with *Griffith* C.J., *Barton* J. and *Marshall* C.J. The contentions of the plaintiffs are, in my opinion, inconsistent with the principles stated in the passages which I have quoted.

The cases relied upon by the plaintiffs in their main argument accordingly, in my view, when their significance is properly appreciated, do not support that argument but, on the contrary, provide an effective reply to it. Legislation of the character of the Act now under consideration may be an abuse of power. For abuse of power the Parliament is answerable to the people. When the validity of a law is challenged in the courts, the courts are concerned only with the question whether the law was, as a matter of law, within the power of Parliament.

I summarize my conclusions upon this matter by saying that it is not for a court (either at the present stage of these cases, or at any later stage) to ask or to answer the question whether or not it agrees with the view of Parliament that the Australian Communist Party and organizations and persons associated with it are enemies of the country. It is for the Government and Parliament to determine that question, and they have already determined it. Whether they are right or wrong is a political matter upon which the electors, and not any court, can pass judgment. The only question for a court, therefore, is whether the provisions of the Act have a real connection with the activities and possibilities which Parliament has said in its opinion do exist and do create a danger to Australia.

9. In my opinion there is no difficulty in answering this question. Section 4, dissolving the Australian Communist Party, is the most obvious means of preventing its activity. It is equally obvious that the dissolution of the bodies mentioned in s. 5 (1) and the exclusion from the offices and employments mentioned in s. 10 of the persons referred to in s. 9 are directly and immediately connected with the suppression of that against which Parliament has decided the community is to be defended.

In order that the suppression of the associations in question should be effective the associations must obviously be deprived of their means of action, that is, of their property, and the fact that this deprivation is permanent in my opinion constitutes no sound objection to the legislation. It was put that this legislation was legislation to meet a temporary emergency. It is, in my opinion, wrong to base a judicial decision upon an assumption that, if there is an emergency, it is only temporary. I do not know how anybody knows that it is a temporary emergency. If

the allegations in the recitals are true—as to which, as I have said, it is not for the Court to give any decision in these cases—the success of the Australian Communist Party would present Australia with a permanently altered system of government. This cannot seriously be denied. Why opposition to the Australian Communist Party and protection against subversive activities should be described as necessarily temporary in character I am unable to understand. Whether the alleged emergency is temporary or not may depend upon whether the policy of Parliament succeeds or fails. It is suggested that the property of unlawful associations ought to be held in trust for them so that later on they will be able to re-establish themselves and resume their operations. This is not like legislation for the winding up of a company. It was enacted to meet what Parliament has declared to be a national peril. The very object of the Act is to put the associations out of existence and to prevent their re-establishment. Such legislation is most directly connected with the defence of the community against the activities of these bodies. Many people, perhaps most people, particularly in our hitherto peaceful community, do not like such legislation. But that fact has nothing to do with its validity.

If, however, the Act ought to be regarded as legislation " introduced to meet a temporary emergency ", I do not agree that it cannot be allowed to have permanent effects. Defence legislation which has been upheld because it was passed to meet a particular emergency which has proved to be temporary most obviously can have permanent results. An ex-serviceman who obtains a war-service home retains the home after the war is over. A traitor who assists an enemy during what may be a quite short war and has been shot remains dead after the war is over. It may be added that while a war is in progress no-one can say whether the war will be " temporary " or whether it will go on for many years.

10. The plaintiffs on many occasions referred to the old saying which is quoted in *Chitty* on *The Prerogatives of the Crown* (1820), p. 43—*ubi bellum non est pax est.* In my opinion the events of recent years require a reconsideration of this maxim. Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of " peace "

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may not unfairly be described as an unreal application of what has become an outmoded category. The phrases now used are "incidents", "affairs", "police action", "cold war". The Government and Parliament do not regard the present position as one of perfect peace and settled security, and they know more about it than the courts can possibly know as the result of considering legally admissible evidence. I have already referred to the authorities which show that neither the technical existence of war nor actual fighting is a condition of the exercise of the defence power. At the present time the Government of Australia is entitled, in my opinion, under the defence power to make preparations against the risk of war and to prepare the community for war by suppressing, in accordance with a law made by Parliament, bodies believed by Parliament to exist for the purpose (*inter alia*) of prejudicing the defence of the community and imperilling its safety. It is immaterial whether the courts agree with Parliament or not.

11. The result of what I have said is that, in my opinion, it was competent for Parliament to identify communist organizations and associated persons as internal enemies of the Commonwealth and to legislate for the purpose of preventing the continuance of the existence of such organizations and for suppressing their activities and forfeiting their property. Thus (subject to some other arguments still to be considered) I am of opinion that s. 4, dissolving the Australian Communist Party, is valid.

I am further of opinion that ss. 5 and 9 are valid by reason of the provisions contained in sub-s. (1) of those sections. Sub-section (1) in each case states that the section applies to bodies of persons or to individuals who have certain communist associations. Sub-section (2) then limits the application of the sections in respect of bodies of persons or individual persons to such of those bodies or persons as the Governor-General has declared in pursuance of sub-s. (2) of the sections to be acting in a manner prejudicial to the defence of the Commonwealth or the maintenance of the Constitution. In my opinion it is not necessary to go to sub-ss. (2) of ss. 5 and 9 to provide a constitutional basis for these provisions. These sub-sections operate by restricting the operation of the Act within a smaller sphere than would have been the case if they had been absent. The legislation, in particular ss. 4, 5 (1) and 9 (1), upon the view which I have stated, is brought within the defence power and s. 51 (xxxix.) of the Constitution by the Parliamentary condemnation of communism. When the sections are so construed the fact that the operation of ss. 5 and 9 depends in part upon the

opinion of the Governor-General cannot be an objection to the validity of the sections. The opinion of the Governor-General upon any matter may validly be made a condition of the operation of the legislation. Section 5 (2), for example, might have provided for a proclamation of the Governor-General based upon any matter whatever; for example, provision might have been made that the Governor-General should not declare an organization under the section unless it had a certain proportion of foreign-born members or unless it had existed for ten years or for twenty years or unless the Chief of the General Staff or a State Commissioner of Police made a report to him on the matter.

12. Other arguments raised other points with respect to ss. 5 (2) and 9 (2). What is said as to s. 5 (2) applies also to s. 9 (2). The only difference between the sub-sections is that under s. 5 (2) the declaration made is simply that an association is an unlawful association, whereas under s. 9 (2) the Governor-General is authorized to " make a declaration accordingly "—i.e., that he is satisfied as to the matters mentioned in the sub-section. I quote s. 5 (2) again :—" Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association." It was argued for the plaintiffs that all the matters mentioned in this sub-section are remitted to the unexaminable opinion of the Governor-General except in the case of the first element, namely, whether a body of persons was a body to which the section applies, in respect of which element there is provision for an application to a court. But the plaintiffs contended that the section left it to the Governor-General to determine conclusively whether the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution, &c. It was argued that this left it to the Governor-General to determine what was the defence of the Commonwealth and what was the execution or maintenance of the Constitution, &c., and also to determine whether the continued existence of the body would be prejudicial to such matters. Similarly under s. 9 (2) the plaintiffs contended that the Governor-General determined finally what activities the person was engaged in and whether those activities were prejudicial to what the Governor-General

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considered was the defence of the Commonwealth or the execution or maintenance of the Constitution, &c. The plaintiffs relied upon what has been said on this matter in a number of authorities. It is sufficient perhaps to refer to *Reid* v. *Sinderberry* (1).

The defendants did not dispute the rule laid down in these decisions, but contended that the opinion of the Governor-General was examinable in part. It was said to be examinable in relation to the question whether what was considered by the Governor-General to be defence, or execution or maintenance of the Constitution was really defence, &c. This contention meant that a court would be able to consider whether the Governor-General had a correct conception of the meaning of defence and the execution, &c., of the Constitution. It was said that if this element in the Governor-General's opinion were shown to be correct a sufficient connection with the subject matter of power was established. I did not fully appreciate this argument. The question whether the Governor-General had a proper conception of defence, &c., could arise only in a particular case. If he were shown to be wrong, it would be the declaration, and not the Act, which, upon this view, would be invalid.

In my opinion the contention of the plaintiffs as to the construction of s. 5 (2) and s. 9 (2) is correct. On the words of the subsections it is impossible to draw a distinction between any of the matters (other than the first element) as to which it is required that the Governor-General shall be satisfied. There is no ground for distinguishing in the case, for example, of s. 9 (2), between the examinability of his opinion as to what is defence and his opinion as to whether a person is or was a communist or whether he has been engaged in particular activities or whether those activities are prejudicial to defence. From a practical point of view it would be very difficult indeed to give effect to the contention of the defendants. It was not suggested that any means existed for discovering what the Governor-General's conception of defence or of the maintenance of the Constitution, &c., was.

Thus I agree with the plaintiffs' argument upon the construction of ss. 5 (2) and 9 (2) in this respect, but this conclusion does not necessarily provide a reply to the argument that the opinion of the Governor-General (which is really the opinion of the Government of the day, because the Governor-General acts upon the advice of his Ministers—see s. 9 (3)) cannot in itself provide sufficient support for the provisions contained in ss. 5 and 9. I deal with this matter in par. 16 hereafter.

(1) (1944) 68 C.L.R. 504.

13. Argument was heard as to whether the Governor-General had to be satisfied under both sections, and make a declaration under s. 9 (2) specifically, as to matters affecting defence and also as to matters affecting the maintenance of the Constitution, &c., or whether it would be sufficient for him to be satisfied as to one only and (under s. 9 (2)) to "declare accordingly". In my opinion this question of construction cannot affect a decision as to the validity of the Act upon the view which I take of the operation of s. 5 (1) and (2) and s. 9 (1) and (2). Whether a particular declaration is valid or not is a question which arises only after a declaration has been made. If the question should arise it should, in my opinion, be answered by simply following the decision in *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (1).

14. The plaintiffs relied very greatly upon the decision in *Ex parte Walsh and Johnson* (2) as a decision that no legislation could depend for its validity upon any opinion, except that of a court, to establish a connection with a subject matter of Federal legislative power. But if sub-ss. (2) of ss. 5 and 9 are read in the manner which I suggest, that is as merely providing a condition of the application of other operative provisions which are themselves valid, the objection based upon *Ex parte Walsh and Johnson* (2) ceases to have any application. In *Ex parte Walsh and Johnson* (2) the Court expressly approved the decision in *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (3). There the Court held that s. 8A of the *Immigration Act* 1901-1920 was valid. The operation of that section (authorizing deportation) depended upon "the Minister being satisfied" that within three years after the arrival in Australia of a person who was not born in Australia that person was a person who advocated the overthrow by force or violence of the established government of the Commonwealth or of any State or of any other civilized country, &c. Thus the application of the section depended upon the opinion of the Minister. It was held that the law was a law with respect to immigration and was valid. In *Ex parte Walsh and Johnson* (2) the Court had to consider the validity of s. 8AA in the *Immigration Act* 1901-1925. That section was held to be valid as a law with respect to immigration, but not as a law with respect to other matters. The validity of sub-s. (1) was not challenged, although the case was most exhaustively argued. Sub-section (1) of s. 8AA was in the following terms:—"If at any time the Governor-General is of opinion that

(1) (1916) 22 C.L.R. 268.
(2) (1925) 37 C.L.R. 36.
(3) (1923) 32 C.L.R. 518.

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there exists in Australia a serious industrial disturbance prejudicing or threatening the peace, order or good government of the Commonwealth, he may make a Proclamation to that effect . . ." The application of the rest of the Act depended upon such a a proclamation being in force. It will be observed that the proclamation required was in most general terms. It referred to the "peace, order or good government of the Commonwealth" and not to any specific power. It was not suggested that such a proclamation could not be a condition of the operation of legislation otherwise within power. Section 8AA (2) of the Act provided that when any such proclamation was in force the Minister, if he were satisfied as to any of various matters—obstruction of transport of goods or passengers, provision of service by departments or public authorities of the Commonwealth, &c., might call upon a person to show cause why he should not be deported from the Commonwealth. This section was held to be valid in its application to persons who really were immigrants. It was not held that the fact that its operation depended upon the opinion of a Minister as to transport or the provision of services by the Commonwealth, &c., prevented the Act from being valid. A distinction between this case and the case of *Ex parte Walsh and Johnson* (1) is that in that case it was considered that the alleged law prohibited no act, enjoined no duty, created no offence, imposed no sanction for disobedience to any command and prescribed no standard or rule of conduct (per *Knox* C.J. (2)). This Act does prohibit acts, create duties and offences, provide for sanctions and prescribe rules of conduct. It prohibits the continued activity of certain associations—it forfeits property: it creates disqualifications for office: and it creates offences with penalties. All of these matters relate to defence if Parliament has, as the Act assumes, the constitutional right to decide against what defence should be provided.

15. The argument for the defendants sought to support s. 4, and consequentially ss. 5 and 9, upon the basis of alleged facts of which (it was said) the Court should take judicial notice. These allegations of fact were made by Mr. *Barwick* in the course of argument and were challenged by the plaintiffs. They were stated in propositions lettered from (a) to (t). They referred to international tension and to tension with Russia. They included allegations that certain States, including China, were satellite States of Russia, that forces against which Australia was fighting in Korea were communist-supported forces, that an extension of that conflict was feared, that communism was a world movement, was supra-

(1) (1925) 37 C.L.R. 36.

(2) (1925) 37 C.L.R., at p. 69.

national in character, and that communists sympathized with Soviet Russia, the great communist State. In my opinion the matters referred to in these statements are matters which a government and parliament may properly consider in reaching a decision upon policy, though some of them would be incapable of proof by any legal evidence. None of them, in my opinion, are matters of which the Court should take judicial notice, except perhaps the general statement that the world is in a state of uneasy apprehension and that war preparations (always stated to be defensive) are going on throughout the world. The Court may be allowed to know as much as that, but I can see no justification for the Court taking judicial notice of the other disputed and disputable propositions which Mr. *Barwick* has submitted. The Court can take judicial notice of notorious facts, and one thing which is notorious about what Mr. *Barwick* has submitted is that the allegations are matters of vigorous dispute.

16. I have stated my opinion that the validity of ss. 4, 5 and 9 and the associated provisions may be established without relying upon the declaration of the opinion of the Governor-General, for which provision is made in ss. 5 (2) and 9 (2). But, apart from what I have already said as to ss. 5 (1) and 9 (1) being within power, I do not agree that an opinion of an executive authority is irrelevant when the question under consideration is that of connection with defence or with the maintenance of the Constitution. Operations against an enemy (external or internal) are conducted by the Executive Government under the control of Parliament and not by courts. They require action. They often require prompt and decisive action. What action should be taken must frequently be left to the judgment of a responsible person. It is true, as has been held in this Court, that Parliament cannot extend its powers with reference to trade and commerce by passing laws about something which is not trade and commerce, though, in the opinion of a Minister, it is trade and commerce, and that Parliament cannot by enactment make a man an immigrant if he is not an immigrant. But in the case of defence the opinion of those responsible for defence may validly be made by Parliament the crucial matter in determining under a law whether particular action should be taken to protect the community. Thus, in *Lloyd* v. *Wallach* (1), the Court considered the validity of a provision in a regulation that where the Minister for Defence " has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in

(1) (1915) 20 C.L.R. 299.

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military custody in such place as he thinks fit during the continuance of the present state of war ". It was held that the regulation was valid and that the Minister could not be called upon as a witness to state the grounds of his belief. *Griffith* C.J. said :—" Having regard to the nature and object of the power conferred upon the Minister, and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it " (1). His Honour added :—" Having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings." (2). *Isaacs* J. agreed, saying that the Minister is " the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency or the reasonableness of the belief founded upon them. He is presumed to act not arbitrarily nor capriciously, but to inform his mind in any manner he considers proper " (3). This decision was followed and applied in *Ex parte Walsh* (4) and in *Little* v. *The Commonwealth* (5) by *Dixon* J. The latter was also a case of internment, and his Honour said that he did not think that the order was examinable upon any ground affecting the Minister's opinion short of bad faith. In *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (6) the Court considered the question of the validity of a *Trading with the Enemy Act* which applied to companies which became identifiable only by means of a proclamation of the Governor-General and a declaration of the Attorney-General that a company was in his opinion managed or controlled, &c., by persons of enemy nationality. The Act was held to be valid. In all of these cases it was the opinion of the Governor-General or of a Minister as to the relation between a person and the defence of the Commonwealth in a particular war, and nothing else, which provided the constitutional foundation for the law. These cases must, in my opinion, be overruled if the arguments for the plaintiffs on the point now under consideration are accepted. Otherwise they become unintelligible exceptions to a supposed universal rule that the opinion of a Government or a Minister or a Parliament—on either fact or law—cannot provide any link between a law and a subject of legislative power.

(1) (1915) 20 C.L.R., at p. 304.
(2) (1915) 20 C.L.R., at pp. 304, 305.
(3) (1915) 20 C.L.R., at pp. 308, 309.
(4) (1942) A.L.R. 359.
(5) (1947) 75 C.L.R. 94.
(6) (1916) 22 C.L.R. 268.

Such exceptions cannot be made intelligible by saying that in "times of crisis", when there is "an enemy in our midst", much must be left to the discretion of other than judicial authorities. The doctrine for which the plaintiffs contend means that the courts, and not "merely" the Government and the Parliament of the country, should be satisfied that there really is a crisis of sufficient significance to justify the law—that there really is an enemy in our midst. A court, in reaching a conclusion upon such an issue, should, the plaintiffs contend, take into account both facts of which the Court can take judicial notice and facts duly proved by admissible evidence. The defendants, on the other hand, argue that the Court should be limited, in relation to this issue, to the consideration of facts of which it can take judicial notice. In my opinion, as already stated, the problem as to whether there is, or is likely to be, a crisis or position of danger requiring the exercise of the defence power or the power to protect constitutional government is a question which Parliament may properly determine for itself. If it is held that it can be determined only by a court, I have difficulty in seeing how a conclusion could be based only upon facts of which the Court could properly take judicial notice. A court could not take judicial notice of a "crisis" before the crisis had happened. A court could not take judicial notice even of widespread espionage and sabotage, most of which would in any case be secretly organized. A court could not determine, by the application of any doctrine of judicial notice, whether a particular interference or a series of interferences with production in vital industries was really industrial in character (as some would assert) or really political and subversive (as others would allege). The limitation of the principle of judicial notice to facts which are notorious—which are so clear that no evidence is required to establish them—appears to me to prevent a court from ever reaching a conclusion based only upon such facts with respect to an issue of actual or potential public danger calling for the exercise of the legislative powers now under consideration. On the other hand, if evidence is admissible, as the plaintiffs contend, to prove or to disprove the actual or possible existence of such a danger, the validity of Commonwealth laws will be decided upon the basis of the evidence which litigants choose to submit in particular cases. Upon the evidence called in one case, the law would be held to be valid. Upon the evidence called in another case the same law would be held to be invalid. According to the plaintiffs' arguments, if the Court, after hearing such evidence as was brought before it, thought that the suggested crisis was imaginary, or that

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it was not sufficiently serious to justify particular legislation, it should hold that the law was invalid, notwithstanding the contrary opinion of Parliament upon both points.

This conclusion cannot be escaped (whether the Court is limited to the consideration of facts judicially known or not) by reference to such Ciceronian apophthegms as "*Silent enim leges inter arma*" and "*Salus populi suprema est lex*". Such pithy proverbs represent not an application, but a negation, of law. In my opinion the Constitution of the Commonwealth has not been so imperfectly framed that, in what the Government and Parliament consider a time of crisis when the national existence is at stake, they can act promptly and effectively, by means of executive action and legislation, only by breaking the law. Upon my understanding of their functions and of the nature of the defence power, they can act within the law to meet the crisis without being subject to the risk of being told by a court that they were acting illegally. In such a case, the Government and Parliament are not left by the Constitution to action under a cloud of legal doubt. It might well happen that the crisis would be over—one way or the other—before the Court had heard the evidence (which could easily be made very lengthy) upon the question whether there was really a crisis or not. In my opinion the Constitution does not create such perilous situations.

17. The case of *Ex parte Walsh and Johnson* (1) is not, in my opinion, inconsistent with the last-mentioned decisions. That case in its relevant aspects was a decision with respect to the immigration power, the trade and commerce power, the power to legislate with respect to Commonwealth departments, and with respect to the interpretation of a general phrase referring to all Commonwealth legislative powers, whether they had been actually exercised or not. It was there held that the Minister's opinion that a man was an immigrant could not make him an immigrant if he really was not an immigrant and that similarly the Minister's opinion that certain matters fell within the subject of trade and commerce would not bring them within that subject if in fact they did not fall within it—and so also as to the other subjects mentioned. But, for reasons which I have already stated, the position is quite different in the case of the defence power. The Government of the day decides matters of defence policy subject to parliamentary control and, in so doing, it determines what the people are to be defended against. Such a decision is not a finding of fact or an opinion upon law. It is a decision of policy as to what ought to be done in the interests of

(1) (1925) 37 C.L.R. 36.

the country. Often action must be taken upon the opinion of a responsible authority—sometimes upon suspicion and not upon proved fact. When, for example, a Minister, under the Acts mentioned in the cases referred to, or the Governor-General, under the Act now under consideration, declares that a person is acting prejudicially to the defence of the Commonwealth, he is engaging in the discharge of a function which is committed by the Parliament to the Executive Government, and his opinion in itself may legitimately bring the law within the constitutional power.

It was said in the House of Lords by Lord *Atkinson* in *R.* v. *Halliday* (1) :—" As preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof." His Lordship went on to say that it was not necessary to wait until a person performed an act by which the public safety and the defence of the realm might be prejudicially affected, and that after the Minister received a recommendation with respect to a particular person, and came to the conclusion that by reason of his hostile origin or association it was expedient for securing the public safety and the defence of the realm that he should be interned, it would be " as mischievous as absurd to require that the Minister, though fully warned, should remain quiescent and look on helplessly, waiting for the time when one of the crimes mentioned in [the regulations] should be committed, and the perpetrator, if caught, and if sufficient proof were forthcoming, should be brought to justice and punished." (2).

In my opinion the arguments for the plaintiffs which I have been considering do not show that any of the provisions of the Act are invalid.

18. It is now necessary to refer to other arguments adduced on behalf of the plaintiffs or on behalf of some of them. It was argued that no Federal law could permanently suppress a voluntary association. It was conceded that individuals might be punished for subversive or traitorous activities, but it was said that Parliament itself could not suppress any voluntary association of people associated for any objects. This contention was supported by the argument that defence legislation, assumed to be valid only in respect of what was called " a temporary emergency ", could not be allowed to have " permanent " effects. I have already stated my opinion as to this proposition. The plaintiffs were able to concede, for the purposes of the present case, that a court could,

(1) (1917) A.C. 260, at p. 275. (2) (1917) A.C., at p. 276.

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if authority were given to it under a statute, perhaps suppress a voluntary association, but contended that Parliament could not. Thus, if Parliament had said that, if a court were satisfied of the existence of the facts alleged in recitals Nos. 4 to 8, the Court might dissolve the Australian Communist Party, such a law might possibly be valid. As this Act is not such a law the concession had no significance. I therefore only record my dissent from the frequent statements in the course of argument that only the opinion of a court as to a fact and that only the opinion of a court on a matter of law can produce legal consequences. I refer to what I say hereafter on the subject of judicial power.

19. It was argued that political parties and trade unions, because they are political parties and trade unions, enjoy some form of exemption from law—though the proposition was not put in that precise form. The Court heard many protests against the Act based on the fact that it applied to a political party and to trade unions. It was put that, even if such organizations engaged in subversive activities, they also had innocent activities, and that Parliament could not by closing them down prohibit their innocent activities. A subversive or traitorous association would naturally keep its significant activities secret until it was strong enough to declare them, and in the meantime would pose as an innocent and well-meaning political party or cultural society or something like that, simply and sincerely striving for a better world. The fact that such bodies may have innocent activities as well as activities of the character described in the statute is not, any more than in the case of individuals, a ground for excluding the application of laws designed either to prevent or to punish unlawful activities. A burglar does not secure exemption from the law because he is a good father.

It is further contended that the legislation affects civil rights of union officers and others by terminating contracts of employment. This is certainly the case, but I am unable to understand why it should be thought to be an objection to the validity of legislation. Most legislation affects civil rights. If such an obvious proposition requires support from authority it is sufficient to refer to *West* v. *Gwynne* (1), where *Buckley* L.J. said: "Most Acts of Parliament, in fact, do interfere with existing rights". There is no constitutional ground whatever for holding that Federal legislation with respect to matters within Federal power cannot affect civil rights, proprietary and others.

(1) (1911) 2 Ch. 1, at p. 12.

It was said that the legislation interfered with the " fundamental right " of trades unions to choose their own officers. It certainly places limitations upon the right which the law has hitherto allowed to trades unions to choose their own officers. This right, however, exists only by reason of law and depends entirely upon law. It is subject to control by laws made by Parliaments which have power with respect to the matters to which the laws relate.

Similar questions have arisen in the United States of America. Some of them were considered in *American Communications Association* v. *Douds* (1). In that case the Supreme Court upheld a statute which provided that, as a condition of a union utilizing the provisions of a *Labor Management Relations Act* 1947, each of its officers should file an affidavit stating that he was not a member of the Communist Party or affiliated with it and that he did not believe in, was not a member of or supported any organization that believed in or taught the overthrow of the United States Government by force or by any illegal or unconstitutional methods. Much of the reasoning in the judgments relates to provisions in the Constitution of the United States which are not present in the Australian Constitution. Apart from these matters, the case deals with several matters which have been discussed in the case now under consideration. The statute was passed under the trade and commerce power. It was held that Congress had power to remove obstructions to inter-State commerce consisting in " political strikes ", namely " strikes instigated by communists and others proscribed by the statute who infiltrate union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy require such action ". The Supreme Court further declared that notwithstanding the express protection given to freedom of speech by the Constitution of the United States, " those who, so Congress had found, would subvert the public interest, cannot escape all regulation because, at the same time, they carry on legitimate political activities ". It was also held that Congress and not the courts was primarily charged with the determination of the need for regulation of activities affecting inter-State commerce. It was objected that the law was invalid because it would bring about the removal of union officers who refused to take the prescribed oath. This objection was not upheld. Congress had legislated to protect unions from domination and control by employers. Without expressing any agreement with the general

(1) (1950) 339 U.S. 382 [94 Law. Ed. 925].

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judgment of *Jackson* J., I quote what he said upon this particular matter :—" I cannot believe that Congress has less power to protect a labor union from Communist Party domination than it has from employer domination " (1). These matters are related not only to foreign and inter-State trade and commerce, but also to defence and the maintenance of the Constitution. In my opinion the Commonwealth Parliament has the same power to protect unions in Australia as in America. Opinions may differ as to the wisdom or desirability of such protection (and it has not been welcomed by the plaintiffs), but that fact has nothing to do with the validity of the legislation.

20. The case was argued by some counsel as if the Commonwealth Constitution contained provisions corresponding to those contained in certain other constitutions. In the Constitution of the United States of America there are provisions preventing the enactment of laws impairing the obligation of contracts or depriving persons of life, liberty or property without due process of law. In the Canadian Constitution " property and civil rights within the province " is a subject as to which the provincial legislatures are declared to have exclusive power (*British North America Act* 1867, s. 92). None of these provisions appear in the Constitution of the Commonwealth, and in my opinion there is no basis whatever for the attempt to create such provisions by arguments based upon the judicial power and s. 92 of the Constitution and the natural dislike of suppressive laws. The Act does affect civil rights. It does affect proprietary rights. It does affect contracts of employment. But there is no reason why it should not do all of these things if it is legislation with respect to a subject upon which the Commonwealth Parliament has power to make laws—an aspect of the case with which I have already dealt.

21. It was argued that no Federal legislation could abolish a body which had Federal political objectives or State political objectives. It could not suppress a body in the former case because, it was contended, the Federal Constitution, which provided for voting by electors, impliedly provided that there should be political parties and therefore impliedly provided that the electors should have the constitutional right to vote for any body of persons which was a political party and that therefore the Constitution impliedly provided for the existence of any political parties which any persons chose to form and, accordingly, that the Commonwealth Parliament had no power to suppress any party. It was argued that if a political party had State objectives as well as Federal objectives, if the Commonwealth Parliament suppressed the party altogether

(1) (1950) 339 U.S., at p. 433 [94 Law. Ed., at p. 962].

there was an interference with the constitutions of the States. It was conceded that the constitutions of the States, like the Constitution of the Commonwealth, say nothing about political parties. It is also true that the Commonwealth Constitution gives a plenary power to the Commonwealth Parliament to legislate upon the subjects committed to it. But it was said that the State constitutions, like the Commonwealth Constitution, assumed the existence of political parties and that therefore all political parties can continue to exist notwithstanding any legislation directed against them. It is obvious that the objections to Federal legislation directed against a body which took part in State politics would equally apply to State legislation directed against a body which elected to take part in Federal politics. The conclusion of these arguments is that bodies, however traitorous and subversive, are entitled to continue to exist if they are political parties though individual persons could be punished if they were prosecuted for and convicted of offences.

It is difficult to deal with an argument so insubstantial. The Commonwealth Parliament has full power to make laws with respect to traitorous and subversive activities of persons, whether they act individually or in association. If that be so, the fact that the bodies have other characteristics—political, athletic, artistic, literary &c.—cannot possibly exclude the application of such laws.

22. *Section* 92. The plaintiffs submitted an argument based on s. 92 of the Commonwealth Constitution. The Australian Communist Party and the industrial organizations to which the Act refers, like most other bodies of any consequence in Australia have inter-State activities and write letters from one State to another. Also union officers travel from State to State in pursuance of their duties. It is argued that they are exempt from any law which inhibits those activities.

The Act says nothing about trade, commerce or intercourse. When the Act operates it will restrict various activities, including inter-State activities, of the persons to whom it applies. So also does an Act which provides for imprisonment for any offence. So also does any Act which requires persons to take out licences or to possess qualifications before they can follow certain occupations in a particular State. So do quarantine Acts. So do scores of other Acts. In all such cases the relation to inter-State trade and commerce is " remote " within the meaning of the *Banking Case*: *The Commonwealth* v. *Bank of New South Wales* (1). In that case the Privy Council held that s. 92 did not prevent the exclusion

(1) (1950) A.C. 235; 79 C.L.R. 497.

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from passage across the frontier of a State of creatures or things calculated to injure its citizens. Thus the transit inter-State of diseased cattle and noxious drugs could be prevented by law consistently with s. 92. There can be nothing more injurious and dangerous than traitorous and subversive activities. If, in order to stop them, certain action is thought necessary by Parliament, if it is otherwise within power it is no objection to such action that it has the effect of preventing all those activities and other activities, whether inter-State or intra-State.

23. *Acquisition of Property.* The Act forfeits the property of the Australian Communist Party and provides for the forfeiture of the property of the associations declared to be unlawful. Section 51 (xxxi.) of the Constitution provides that the Parliament may make laws for the acquisition of property upon just terms. It has been held that this is the only power of the Parliament to legislate for the acquisition of property (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1)). The Act forfeits the property because the party or the association engages in or is connected with activities of the kind described in the recitals, that is, activities which are considered by Parliament to be traitorous or subversive. If this is to be regarded as a law " for the acquisition of property " I fail to see anything unjust in Parliament forfeiting the property of an association which in the opinion of Parliament possesses those characteristics. This legislation is seen to be very mild when it is compared with the common form of legislation in many countries with respect to espionage, sabotage and the like activities directed against the state, the penalty for which is often death.

24. *Judicial Power.* It is argued on behalf of the plaintiffs that the Act contravenes s. 71 of the Constitution, which provides that the judicial power of the Commonwealth shall be vested in courts. It was said that whenever any decision as to either a fact or a law produces a legal consequence that decision must be made by a court. Reference was made to *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (2) and other cases. Upon this ground s. 4, dissolving the Australian Communist Party, was attacked. It was argued that the Australian Communist Party could be dissolved only by a court because the dissolution affected the rights of persons. Section 5 (2) and s. 9 (2) were also attacked upon this ground because it was said that the opinion of the Governor-General could not be made an element in determining any matter affecting the rights, " civil or proprietary ", of any person. The contention of

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

(2) (1944) 69 C.L.R. 185.

the plaintiffs really is that every determination of a question of law and every determination of fact where the determination produces any legal consequences is a matter for a court. This proposition, interpreted and applied universally and with precision, would not only prohibit much quite ordinary legislation which affects civil rights, but would also mean that no right or duty could be made to depend upon a decision of any administrative officer. The acceptance of such a proposition would make administration impracticable. Every day administrative officers apply and interpret laws and make decisions as to facts. The position stands as they determine it, with the results which follow according to law from their determination. The position validly so stands unless for some reason it is set aside by superior authority or is determined by a court to have been made without authority. If a decision as to the meaning of a statute or as to the existence of facts (many hundreds of which are made every day in the ordinary course of administration) is an exercise of judicial power then such decisions of administrative officers should count for nothing, independently altogether of the result of any subsequent challenge in a court. They could not be legitimated by subsequent judicial decision that they happened to be right. They would still, according to the argument of the plaintiffs, be an unauthorized exercise of judicial power and therefore entirely invalid.

An effective answer to the plaintiffs' arguments on this aspect of the case is in my opinion to be found in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1), where the question of the nature of judicial power was fully considered. *Isaacs* J. said that " some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government " (2). The case itself upheld the validity of decisions of a Commissioner for Income Tax and of a Board of Review upon questions of fact and of law in determining liability to income tax. His Honour gave other examples from the *Trade Marks Act*, the *Patents Act*, the *Commonwealth Public Service Act* and the *Commonwealth Bank Act* of persons empowered to exercise " the functions of deciding between contestants questions of fact and discretion and of doing so with the effect in some way of

(1) (1926) 38 C.L.R. 153. (2) (1926) 38 C.L.R., at p. 178.

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binding the rights of one or more of the contestants" (1). The judgment of *Isaacs* J. was approved upon appeal to the Privy Council (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2)). In the High Court *Higgins* J. put the matter very succinctly when he said:—"The fact that a policeman has to consider the law as well as the facts in exercising his power to arrest does not make him a judicial officer" (3).

The Parliament might have remitted to a court, if it had thought proper to do so, the decision of the question whether a body of persons was subversive or traitorous. But, as I have said, it was not bound to do so. It is not difficult to think of reasons connected with the nature of the subject matter of the legislation which may have been regarded as relevant by Parliament as reasons for legislating directly, without prescribing the intervention of a court. Parliament may have thought that prompt action was necessary. It may have been influenced by the obvious circumstance that a propagandist subversive body believed to be working in conjunction with similar bodies in other countries could ask for nothing better than an opportunity to give evidence and produce argument in court upon such matters as have been tabulated under headings (a) to (f) in par. 6 of this judgment. It is not necessary, in order to hold that the legislation is valid, that a court should agree with these or any other suggested reasons for the particular form in which Parliament has framed the law, if the law is within power.

25. The Court has been invited to treat this Act as if it were an Act of Attainder or an Act of Pains and Penalties. Such legislation is always unpopular with those against whom it is directed and in general is detested. An Act of Attainder imposed the penalty of death by legislative action and an Act of Pains and Penalties inflicted a less penalty, again by legislative action. The Parliament of Great Britain adopted a practice of hearing the person with whom the bill dealt, but the result was secured by legislation and not by judicial action. In the Constitution of the United States there is a prohibition of such legislation. Article 1, s. 9, provides "No Bill of Attainder or *ex post facto* law shall be passed". There is no such provision in the Commonwealth Constitution and it has expressly been decided in the High Court in *R.* v. *Kidman* (4) that *ex post facto* laws may be passed. But the present Act is in no sense an Act of Attainder or of Pains and Penalties. It does not convict or purport to convict any person of any act, nor does the Act itself subject him to any penalty. He

(1) (1926) 38 C.L.R., at p. 179.
(2) (1931) A.C. 275; 44 C.L.R. 530.
(3) (1926) 38 C.L.R., at p. 201.
(4) (1915) 20 C.L.R. 425.

may be convicted of an offence against the Act if he is prosecuted before a court, but the Act itself does not produce any of the results of an Act of Attainder or of an Act of Pains and Penalties.

26. Section 10 of the Act relates to the disqualification of declared persons for employment by the Commonwealth or an authority of the Commonwealth and as an officer of an industrial organization engaged in a vital industry: see s. 10 (3). From what I have already said it follows that in my opinion s. 10 is valid. But even if other provisions of the Act are held to be invalid, such a conclusion does not have any bearing upon the full power of the Commonwealth Parliament to make laws with respect to employment by the Commonwealth and to provide by statute, as it thinks proper, for qualifications and disqualifications for the holding of office in industrial organizations registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1949. The *Acts Interpretation Act* 1901-1948, s. 15A, provides in substance that even if part of a statute is held to be invalid the rest of the statute shall be held to operate as far as possible. Even if the rest of the Act is invalid, s. 10 may in my opinion properly be held to be valid as a law applying to persons in or seeking Commonwealth employment and to officers of registered industrial organizations. Section 5 of the Act distinguishes between such organizations which are registered and unregistered organizations. But in one respect s. 10 depends upon ss. 4 and 9. If s. 4 is invalid persons described in s. 9 (1) (*a*) will not be subject to s. 10, because the application of s. 9 (1) (*a*) depends upon the Australian Communist Party having been dissolved by the Act (i.e. by s. 4) upon a certain date.

27. Section 27 of the Act provides that when the Governor-General is satisfied that the continuance in operation of the Act is no longer necessary *either* for the security and defence of Australia *or* for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a declaration accordingly and that thereupon the Act shall be deemed to have been repealed. Sections 5 (2) and 9 (2) provide that before declarations are made under the Act the Governor-General must be satisfied with respect to prejudice to *either* of the two matters mentioned—defence of the Commonwealth or maintenance of the Constitution &c. The condition would be fulfilled if he were satisfied as to either one or both. The plaintiffs contended that these provisions show that the intention of Parliament was that the Act should not operate unless it could be supported as legislation with respect to *both* of the subjects mentioned, and that therefore if it could not be supported under the latter head it ceased to

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operate as a defence measure, and *vice versa*, and therefore in either case ceased to operate altogether. In my opinion these sections have the contrary effect. Sections 5 (2) and 9 (2) provide that the Governor-General may make a declaration if he is satisfied as to the character of an association or of a person in relation to *either* of two matters. If therefore he is satisfied as to one of them the sections are to operate. Section 27 provides that when the operation of the Act is in the opinion of the Governor-General no longer necessary in relation to *either* of those subjects the Act is repealed. It appears to me that the intention of Parliament is quite clear that the Act shall operate so long as in the judgment of the Governor-General it is necessary for *either* purpose. This question, however, is unimportant if the Act is valid in all its terms in relation to both of the subjects mentioned, and in my opinion the Act is so valid. Accordingly it is unnecessary for me to consider whether any difficulty in maintaining the validity of the Act would arise if for some reason it were held that these sections prevented any severability of the provisions of the Act so as to hold them valid in relation to one subject but not in relation to the other subject.

It was argued that these three sections deal with two subjects. The Governor-General might make a declaration upon the basis of one of them, subject A, and, if the Act were valid only in relation to subject B, the Act would be misapplied. Upon the view which I have taken of the Act it is unnecessary to consider this argument, but if the Act is construed (as I think it should be construed) upon an assumption of honesty in the Governor-General such a question cannot arise.

Finally, I do not see that a provision that a statute is to be deemed to be repealed in a certain event, whatever that event may be, can in any way affect the question of the initial and continuing validity of the statute until such repeal takes place. The time for repeal of a statute may be fixed by reference to any event whatever. The nature of that event cannot in my opinion possibly affect the question whether the statute was validly enacted.

28. For the reasons which I have stated I answer all the questions in the case—No.

DIXON J. In these proceedings the validity of the *Communist Party Dissolution Act* 1950 is in question. The primary ground upon which its validity is attacked is simply that its chief provisions do not relate to matters falling within any legislative power expressly or impliedly given by the Constitution to the Commonwealth Parliament but relate to matters contained within the residue of legislative power belonging to the States.

The leading provision in the Act carries out the intention indicated by the short title. By direct enactment it purports to dissolve the Australian Communist Party *eo nomine*. The provision is s. 4, which says that the Australian Communist Party is declared to be an unlawful association and by force of the Act to be dissolved. The section goes on to require the appointment by the Governor-General in Council of a receiver of the property of the body and upon the gazettal of the appointment to vest the property in the receiver, subject in the case of land to registration of title.

It is of course true, as a general statement, that the law governing the formation, existence and dissolution of voluntary associations of people falls within the province of the States. The legislative power of the Commonwealth does not extend to the subject as such, and if any part of it may be dealt with constitutionally by Federal statute it is as incidental to some matter falling within the specific powers conferred upon the Parliament of the Commonwealth. To sustain the validity of s. 4, it is therefore necessary to find a subject of Federal legislative power to which the enactment of such a provision is fairly incidental. The powers upon which for this purpose reliance is placed in support of s. 4 are two. Primarily it is sought to refer s. 4 to the power conferred by s. 51 (vi.) of the Constitution to make laws for 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. But reliance is also placed upon the power which the Federal legislature undoubtedly possesses to make laws for the protection of the Commonwealth against subversive designs, whether that power be attributable to the interplay of s. 51 (xxxix.) with s. 61 or forms part of a paramount authority to preserve both its own existence and the supremacy of its laws necessarily implied in the erection of a national government.

The purpose shown by s. 4 of the *Communist Party Dissolution Act* of dissolving associations of communists as unlawful is carried a step further by s. 5 of the Act. Section 5 is directed against bodies of persons possessing communist affiliations or connections of certain forms, which are defined, but it does not apply to industrial organizations registered under the law of the Commonwealth or of a State. If a body possesses any one of the required forms of communist affiliation or connection, then by sub-s. (1) the section is made applicable to the body. The body is not, however, made unlawful by reason only of its falling within the section. Whether it is to be declared unlawful is a matter confided to the decision of the Governor-General in Council. It is to be done in

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pursuance of a power conferred by sub-s. (2), which is expressed as follows :—" Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association." By the next sub-section (sub-s. (3)) an official committee is set up and a direction is given to the Executive Council not to advise the Governor-General to make a declaration unless the material on which the advice is founded has first been considered by the committee. It does not restrain the Governor-General in Council from making a declaration unless such a declaration is recommended by the committee. All that is made necessary is that the materials shall first be " considered " by the committee. By sub-s. (4) the body is given an appeal to a court from a declaration by the Governor-General, but the appeal is confined to the question whether the section applies to the body, that is to say to the question whether the body possesses any of the defined forms of connection or affiliation with the Australian Communist Party or communism. There is no review of the Governor-General's opinion that the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws. The section contains two further sub-sections ; they deal with the hearing of the appeal and give directions as to the right or duty of the appellant to begin and as to the testimony and presumptions.

In stating the kinds of communist connection or affiliation which will bring a body within the application of s. 5, sub-s. (1) embraces two periods ; a period of some two years and five months before the operation of the Act, beginning on 10th May 1948 and ending on the day when the Act was assented to and took effect, viz. 20th October 1950, and secondly the period of its operation prospectively. The date 10th May 1948 is chosen because the national congress of the Australian Communist Party was then held and the constitution adopted. It is enough if the conditions the sub-section specifies are satisfied after the Act comes into operation or if they were satisfied at some time in the antecedent period of two years and five months. The conditions which sub-s. (1) specifies consist of four alternative sets providing four tests, fulfilment of any one of which will suffice. The first set of the specified conditions upon which the application of s. 5 depends is that the body either

is or purports to be affiliated with the Australian Communist Party or at any time during the antecedent period was or purported to be so affiliated. There is no definition of the rather vague word "affiliated", but in *Bridges* v. *Wixon* (1) the Supreme Court of the United States said of the word when used in a not very different context that it imported less than membership and more than sympathy and that acts tending to show affiliation must be of a quality indicating adherence to or furtherance of the purposes of the proscribed body as distinguished from mere co-operation with it in lawful activities. The second alternative set of the specified conditions takes membership of the Australian Communist Party or of its central or governing committee by a majority of members of the body to which s. 5 is to apply or by a majority of the committee of management of the body or other governing body and makes any of such descriptions of common membership a test of the application of s. 5. Again it is enough if the required situation existed at any time after the Act begins to operate or at any time within the antecedent period. The third in the list of conditions upon which the application of s. 5 depends relates to the support of communist doctrine or the spreading of communism by the body. It will come within s. 5 if the required support of doctrine is given or the spreading of communism is done after the commencement of the Act or at any time within the antecedent period. The required support may take the form of the advocacy or support by the body either of the objectives the policies the teachings or the practices of communism. The communism must be as expounded by Marx and Lenin. Theoretically there may be a difficulty in saying how the provision applies if the body subscribes to some but not to all of the objectives, policies, teachings or practices, but probably it has no practical importance. The fourth alternative set of conditions specified depends upon the communistic character of the persons who govern the policy of the body to which s. 5 is to apply and the use they make of the body. It is enough that the policy of the body is either directed, controlled, shaped or influenced wholly or substantially by them. But their communistic character must consist in membership of the Australian Communist Party or in being persons who are communists in the sense that they support or advocate the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin (s. 3 (1), s.v. communist). Again it is only necessary that the character of a member of the party or communist as defined should exist at some time after the commencement of the Act or at some

(1) (1945) 326 U.S. 135, at p. 143 [89 Law. Ed. 2103, at p. 2109].

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time within the same antecedent period. But there is an additional requirement, namely that they must make use of the body as a means of advocating propagating or carrying out the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin. This appears to mean that as at the time of the application of the section to the body the persons must make use of the body for the purpose stated.

It will be seen from the foregoing account of s. 5 that it provides tests of communistic connection or affiliation which must be satisfied in fact before the body becomes liable to be declared unlawful and it prescribes the manner in which the body may apply to the courts if it denies that it possesses a character fulfilling the tests. Section 23 (3) requires that such an application should be dealt with by a single judge whose decision should be final and conclusive, but that is not presently important. In sharp contrast with this objective nature of the tests for the application of s. 5 to the body the actual decision of the question whether the body ought to be considered unlawful and dissolved accordingly is left completely to the final determination of the Executive. Being satisfied that s. 5 applies to the body, a matter which the body can submit to a single judge for review, the Governor-General in Council by sub-s. (2) is then to be satisfied of what may be called a compound proposition and thereupon under the word " may " is to exercise a discretion as to declaring the body unlawful. The compound proposition is expressed indefinitely and covers a large field with no certain boundaries. It contains a number of alternatives. The proposition is that the continued existence, that is the continuance of the association, of the body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

Two things appear to me to be clear about this. The first is that it leaves to the opinion of the Governor-General in Council every element involved in the application of the proposition. Thus it would be for the Governor-General in Council to judge of the reach and application of the ideas expressed by the phrases " security and defence of the Commonwealth ", " execution of the Constitution ", " maintenance of the Constitution ", " execution of the laws of the Commonwealth ", " maintenance of the laws of the Commonwealth " and " prejudicial to ". In the second place the expression by the Governor-General in Council of the result in a properly framed declaration is conclusive. In the case of the Governor-General in Council it is not possible to go behind such

an executive act done in due form of law and impugn its validity upon the ground that the decision upon which it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application, as a court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage. The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law (*Duncan* v. *Theodore* (1): cf. (2)). An order, proclamation or declaration of the Governor-General in Council is the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown. The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council. It matters not whether the attempt to invalidate an order, proclamation or other executive act is made collaterally or directly. One purpose of vesting the discretionary power in the Governor-General is to ensure that its exercise is not open to attack on such grounds and the inference that such a purpose animates sub-s. (2) is confirmed by sub-ss. (4), (5) and (6) giving as they do a special and guarded means of obtaining relief from the conclusion of the Governor-General in Council that the communistic connections of the body would bring it within the application of s. 5 and from that conclusion only.

As part of an argument that sub-s. (2) was in itself based upon the legislative power with reference to defence either alone or together with that enabling the suppression of subversive designs and combinations, two contentions were advanced as to the meaning and effect of sub-s. (2). The first was that it did not intend to make the opinion of the executive decisive as to all the elements making up the compound proposition sub-s. (2) contains, but that some of them must have an independent existence in fact. Unless, therefore, the facts existed independently of the opinion the declaration would be ineffectual.

The contention was put forward in a form which presented more than one choice as to the amount of objective fact the subsection should be construed to require. But the point of the contention was, so to speak, to transfer from the realm of opinion every matter of fact and law affecting the question whether the operation of sub-s. (2) might extend beyond proper subjects of a

(1) (1917) 23 C.L.R. 510, at p. 544. (2) (1919) A.C. 696, at p. 706.

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law with respect to defence or a law directed against subversive actions or designs.

The second argument was that, although no prerogative writ could go to the Governor-General in Council, yet in a suit for an injunction or in collateral proceedings the validity of a declaration under s. 5 (2) could be impugned by invoking the same principles as govern discretionary powers confided to subordinate administrative officers or bodies. Those principles have been explained and applied in this Court in a succession of cases beginning perhaps with the judgment of *O'Connor* J. in *Randall* v. *Northcote Corporation* (1), the latest being *Water Conservation and Irrigation Commission (N.S.W.)* v. *Browning* (2), except for *Avon Downs Pty. Ltd.* v. *Federal Commissioner of Taxation* (3), where sitting as a primary judge I dealt with the matter.

These two contentions were pressed, but all I shall say about them is that the first depends upon a construction or constructions of the provision of which it is clearly incapable and the second upon applying to the Governor-General in Council rules of law which have never been applied to him and are inapplicable as well as being inconsistent with the plain meaning of the subsection.

The consequences of the making of a declaration under s. 5 are prescribed by other provisions. By s. 6 the body is dissolved at the end of the time for appealing or when an unsuccessful appeal is disposed of. Section 8 requires that the declaration shall be accompanied by the appointment of a receiver of the property of the body. When it is gazetted the property is to vest in the receiver, subject, in the case of land, to registration of title. Section 7 imposes certain negative obligations upon officers, members and others as a result of a body becoming an unlawful association and some further negative duties as a result of the dissolution of the body. The section applies to the Australian Communist Party, which s. 4 dissolves as an unlawful association as well as to bodies which may similarly be dealt with by the Governor-General in Council under s. 5. The effect of s. 7 is to make it an offence once a body has become an unlawful association for anyone to act as an officer or member, to contribute or solicit subscriptions for its benefit, or take part in any of its activities, or, in its interest direct or indirect, to carry on any activity open to it; and to make it an offence once the body has been dissolved for any one

(1) (1910) 11 C.L.R. 100, at pp. 109-111.

(2) (1947) 74 C.L.R. 492.

(3) (1949) 78 C.L.R. 353, at p. 360.

to seek to maintain it in existence or to continue its activities or to treat it as if it were not dissolved.

In aid of the attack upon the validity of the Act a very wide operation was ascribed to this provision and it was sought to give it a meaning which would make it an offence for anybody to do almost anything which an unlawful or dissolved association had ever made one of its activities. But it seems clear enough that to be an offence the thing must be done or carried on as an activity of the unlawful or dissolved body or in its interest. A matter of more importance is the fate of the property vested in the receiver. By s. 15 (1) it is made his duty, after realizing the property and discharging the liabilities of the unlawful association, to pay or transfer the surplus to the Commonwealth. There is thus a forfeiture which is neither part of a punishment for a breach of the law nor an acquisition for the purposes of the Commonwealth upon just terms but something in the nature of a final or permanent deprivation of property as a preventive measure taken by direct legislative or executive action. A number of provisions are made with reference to the powers, duties and responsibilities of a receiver under the Act and for the purpose of preventing the defeat of his rights and interests, but the provisions are consequential and in the view I take need not be discussed (see ss. 15 (2), 16, 17, 18, 19, 20, 21, 22). The remaining provisions of importance are concerned not with associations of persons but with the disqualification for certain offices and positions of individuals who are or have been members of the Australian Communist Party or communists. Section 9, which in form is constructed after the general pattern of s. 5, vests in the Governor-General in Council the power of bringing about the disqualification. Sub-section (1) brings within the application of the section first any person who between 10th May 1948 " and before the date upon which the Australian Communist Party is dissolved by this Act ", and second any person who is or was at any time after 10th May 1948, a communist, an expression defined to mean a person who supports or advocates the objectives, policies or teachings, principles or practices of communism as expounded by Marx or Lenin (s. 3 (1)). Then sub-s. (2), which closely resembles s. 5 (2), makes the following provision :—" (2) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Common-

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wealth, the Governor-General may, by instrument published in the *Gazette*, make a declaration accordingly."

Sub-sections (4), (5) and (6) of s. 9 follow the plan of sub-ss. (4), (5) and (6) of s. 5. The appeal with which they deal is limited to the application of s. 9 to the person affected by the declaration made under sub-s. (2) and does not allow of his appealing against the opinion of the Governor-General in Council concerning the prejudicial character of his activities. It will be seen that sub-s. (2) of s. 9 differs from sub-s. (2) of s. 5 in the kind of declaration to be made. In the former case the declaration is that the body is an unlawful association; in the latter the Governor-General, if he decides to exercise his power, is to "make a declaration accordingly", which means in accordance with the conclusion he has reached in conformity with sub-s. (2). There is a question whether he must declare that he is satisfied in the terms of the provision with all its alternatives or whether he must condescend upon one or other of the alternatives. I should think that he could do either and that a declaration in either of the two forms would comply with the section. But I pass this question by as one which, in the view I take, is unimportant.

What may be of more importance is that, as with s. 5 (2), the authority which sub-s. (2) of s. 9 is designed to confer on the Governor-General in Council would enable him to express a conclusive decision covering every element involved in the application to a given case of any or every limb of the alternatives contained in the formula concerning the actual or potential prejudicial activities of the person declared. The consequences which ensue from the making of a declaration under s. 9 in reference to a person are given by ss. 10, 11, 12, 13 and 14. Briefly the person declared becomes incapable of holding an office or employment under the Commonwealth or an authority of the Commonwealth, whether incorporated or not, and, if the Governor-General declare an industrial organization to be one to which s. 10 applies, then he cannot hold any office in that organization or in any branch of it. The section may be so applied to an organization if a substantial number of its members are employed in a vital industry. The vital industries are coal mining, iron and steel, engineering, building, transport, power and any other industry which, in the opinion of the Governor-General in Council is vital to the security and defence of Australia. As the declaration of the prejudicial nature of a man's actual or probable activities may be made before or after the declaration of a vital industry and as at the time when the second is made he may be in process of appealing

from the first declaration on the ground that s. 9 (1) does not apply to him, and, further, as he may be an officer of the industrial organization when the later of the two declarations is made, special provisions are made for these various contingencies. The effect is to suspend him pending the final outcome and then, if the declaration against him stands, to vacate his office. For the purpose of his rights to any superannuation or retirement benefit, it is enacted that he shall be deemed to have resigned (s. 11 (5)). An injunction may be granted against him restraining him from performing any act, duty or function or exercising any right as the holder of an office in such an industrial organization. While a declaration against him is in force, the man may not contract or agree with the Commonwealth in respect of any services on his part for reward (s. 14). It is to be noticed that s. 9 is not limited to persons who occupy or are likely to be appointed to or engaged for any of the offices or employments mentioned in s. 10 (1) or who contract for services with the Commonwealth or are likely to do so. It enables the Executive to make a declaration against anybody falling within the description of sub-s. (1) of s. 9, although there may be no prospect in his case of a situation to which the consequences are relevant ever arising.

The Act is to remain in operation until the Governor-General makes a proclamation that its continuance is no longer necessary. He must be satisfied that it has ceased to be necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth (s. 27). The duration of the Act is therefore indefinite and the power of the Governor-General under s. 5 (2) and his power under s. 9 (2) will remain exercisable for possibly a long time after the occurrence of the facts which in the former case bring the body of persons within the application of s. 5 and in the latter case the individual within the application of s. 9.

From the foregoing discussion of the Act and its meaning it will be seen that in the cardinal provisions the Act proceeds against the bodies and persons to be affected, not by forbidding a particular course of conduct or creating particular offences depending on facts so that the connection or want of connection with a subject matter of Federal legislative power may appear from the nature of the provision, but in the case of the Australian Communist Party itself by direct enactment and in the case of affiliated organizations and persons by empowering the Executive to act directly in a parallel manner. In the one case there is the judgment of the legislature itself that the body is to be dissolved as unlawful and

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in the other cases there is the judgment of the Executive that the affiliated bodies are to be similarly dissolved as unlawful or that a declaration shall be made against the persons who are to be thereby disqualified for certain classes of post. The consequences ensue automatically, the dissolution of the bodies, the forfeiture of their property and the unlawfulness of conduct tending to keep them or their activities alive, the loss of office by the individuals, their disqualification and their incapacity to contract with the Commonwealth for services. The Commonwealth Parliament has power to legislate with respect to the public service and under s. 51 (xxxv.) it may impose conditions upon the registration of industrial organizations under the *Commonwealth Conciliation and Arbitration Act*. But I shall put aside for subsequent examination the possibility of a justification being found in these powers for s. 10 (1) and in relation to it of s. 9. Subject to this reservation the validity of the chief provisions of the statute can find no support unless in the power to make laws with respect to the defence of the Commonwealth or in s. 51 (xxxix.) or in an implied power to legislate for the protection of the Commonwealth against subversive action and preparation. For otherwise the subject with which the law deals, the dissolution as unlawful of voluntary and corporate associations of people, whether because of their purposes and tendencies or for other reasons, and the disqualification of persons for descriptions of employment, does not in itself form part of any of the enumerated powers of the Parliament. Further, it cannot in itself, that is to say, because of its nature, lie within the defence power. It can fall within it, if at all, only as a means to accomplish or further some end which because of its nature is within the proper scope of defence. In the same way it can fall within the power to legislate against subversive actions and designs only as a means to the end for which that power exists. That is to say, constitutional support for the law must be sought not within what may be called the substance of any power but in the authority of the Parliament to enact what is ancillary or calculated to bring about an end within its legislative competence.

An attempt was made thus to sustain the law upon the ground that s. 5 (2) and s. 9 (2) in terms require the Governor-General to be satisfied of matters which, it was said, must fall within one or other of the two legislative powers mentioned and that of themselves or with the aid of the preamble and context they showed that s. 4 was based upon a legislative satisfaction of like matters in relation to the Australian Communist Party.

The matters of which the Governor-General is to be satisfied are described most indefinitely—activities prejudicial to security and defence, activities prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth. The source in s. 61 of the Constitution of much of the language of the second expression and the frequent use in relation to the prosecution of two actual and existing wars in statutory instruments of expressions like the first do not make it less true that as they are used here they express no specific connection with the subject matter of the defence power and no specific connection with any definite course of subversive conduct or design. The sub-sections commit to the Governor-General in Council complete authority over the application of these vague expressions ; and how they are applied is left to depend upon the conceptions of the Executive Government. Under those conceptions conduct to which specific legislation could not be validly directed in purported exercise of the power to make laws with respect to defence might be treated as " prejudicial to the security and defence of the Commonwealth ". It must be borne in mind that what may be regulated from time to time in pursuance of the defence power must often depend on the closeness or distance of the connection seen between the matter to be regulated and the purposes of the power. The decided cases provide many examples of this in the midst of war and in the course of restoring a country organized for war to conditions of peace. The decision of this Court with respect to the continuance of petrol rationing and the regulation of women's employment and of landlord and tenant (*R.* v. *Foster* (1)) supplies the most recent illustration and contains a discussion of the nature and application of the power. There is nothing unreal in the possibility that the degree of connection constitutionally necessary might be misconceived and misapplied administratively. For in the complexities governing the life of a community some connection may be traced between the defence of the country and the greater number of factors which go to make up or influence any part of its economy or of its thought. But even at a time when war placed the greatest strain upon the national life a regulation for determining the number of stud nts who might be enrolled in a faculty in a university and giving no directions what the rest should do was held to be too remote from the purposes of the power (*R.* v. *University of Sydney : Ex parte Drummond* (2)).

It is thus apparent that in committing to the Executive Government an authority to say whether the continued existence of a

(1) (1949) 79 C.L.R. 43. (2) (1943) 67 C.L.R. 95.

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body or the activities of a person are prejudicial to the security or defence of the Commonwealth, the sub-sections provide a most uncertain criterion depending on matters of degree. However much care and restraint there might be in the use of the power, the likelihood would remain very great of matters being considered prejudicial to security and defence which could not possibly be made the subject of legislation. Unlike the power conferred by s. 5 of the *National Security Act* 1939-1943, the present power is administrative and not legislative, it is not directed to the conduct of an existing war, and its exercise is not examinable and is not susceptible of testing by reference to the constitutional power above which it cannot validly rise.

So much of the sub-ss. (2) of ss. 5 and 9 as refers to prejudice to the execution or maintenance of the Constitution or of the laws of the Commonwealth exhibits no apparent connection with the defence power. Its apparent reference is to s. 61 of the Constitution as affording a subject upon which s. 51 (xxxix.) might operate. But it is hardly necessary to say that when the country is, for example, actually encountering the perils of war measures to safeguard the forms of government from domestic attack and to secure the maintenance and execution of at least some descriptions of law might be sustained under the defence power, even if it were thought that their nature took them outside the scope of s. 51 (xxxix.) in its application to s. 61.

There is even less ground in my opinion for the claim that the second part of the formula used in sub-ss. (2) of ss. 5 and 9 may be sustained as enacted in exercise of a power given by a combination of s. 61 and s. 51 (xxxix.) than can be seen for the claim to base the first part upon the power to make laws with respect to defence. In the first place s. 51 (xxxix.) relates to matters arising in the course of executing the power to which the paragraph is applied, in this case the executive power, to incidents in its exercise. This is shown by the language of the paragraph and is confirmed by the decision of the Privy Council in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1). See further the discussion of incidental powers in *Le Mesurier* v. *Connor* (2). Some specific matter, or reasonably definite description of event, act or thing must be dealt with by the law as an incident attending or possibly attending the execution of the power, in this case the executive power, in aid of which s. 51 (xxxix.) is invoked. The sub-ss. (2) give no such specific or reasonably

(1) (1914) A.C. 237; (1913) 17 C.L.R. 644.

(2) (1929) 42 C.L.R. 481, at pp. 497, 498.

definite description of any act, matter, thing or event, attending the exercise of the executive power. There is nothing but the vague or intangible conception of the existence of a body or the activities of a man being prejudicial to the executive power.

Again, if the scope given for the opinion of the Governor-General in Council as to what is prejudicial to the security or defence of the Commonwealth is incapable of legal restraint within the limits of constitutional power, what is to be said of his opinion as to what is prejudicial to the maintenance of the Constitution, to its execution, to the maintenance of the laws of the Commonwealth or to their execution? The facility with which the laws are administered as a whole or this or that provision of the voluminous laws of the Commonwealth is executed might appear to the Executive Government to be impaired by an "activity", manifested in speech or deed, or by the purposes for which an association of persons exist, although in point of objective fact it could never be held a matter which a law made under s. 51 (xxxix.) might validly cover.

I am unable to see that the adoption of these formulas in s. 5 (2) and s. 9 (2) affords any reason for sustaining the grant of power to the executive to make the declarations which s. 5 and s. 9 assume to authorize or the imposition of the consequences consisting in the dissolution of the bodies as unlawful associations, the forfeiture of their property, the restriction upon the actions of officers and others and the disqualification of individuals for certain offices and employments.

For myself I do not think that the full power of the Commonwealth Parliament to legislate against subversive or seditious courses of conduct and utterances should be placed upon s. 51 (xxxix.) in its application to the executive power dealt with by s. 61 of the Constitution or in its application to other powers. I do not doubt that particular laws suppressing sedition and subversive endeavours or preparations might be supported under powers obtained by combining the appropriate part of the text of s. 51 (xxxix.) with the text of some other power. But textual combinations of this kind appear to me to have an artificial aspect in producing a power to legislate with respect to designs to obstruct the course of government or to subvert the Constitution. History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of

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constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend. As appears from *Burns* v. *Ransley* (1) and *R.* v. *Sharkey* (2), I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s. 51 (xxxix.) with those of other constitutional powers. I prefer the view adopted in the United States, which is stated in *Black's American Constitutional Law* (1910), 2nd ed., s. 153, p. 210, as follows:—". . . it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government . . ."

In the United States the power is deduced not only from what is inherent in the establishment of a polity but from the character of the polity set up and more particularly from the power of Congress to make laws which shall be necessary and proper for carrying into execution the powers vested in Congress by the Constitution and in the Government or in any Department or officer thereof. Putting aside occasional reliance on a Federal police power, the considerations giving rise to the implied power exist in the Commonwealth Constitution.

My reason for referring to the view I take of the source of the legislative power to put down subversive activities and endeavours is that it perhaps embodies a somewhat different principle, and one to which those who seek to support ss. 5 and 9 on the basis of sub-ss. (2) may appeal. But I think that the appeal must be in vain. The extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the Executive Government thinks proper the vague formula of sub-ss. (2) relating to prejudice to the maintenance and execution of the Constitution and the laws, and by applying it to impose the consequences which under the Act would ensue. I need not repeat reasoning which I think is equally true of the insufficiency of the legislative power I have described to support legislation of such a character. It may, however, be desirable to add that no analogy exists between

(1) (1949) 79 C.L.R., at p. 116. (2) (1949) 79 C.L.R., at pp. 148, 149.

legislation of the kind under consideration and legislation which deals with an unquestioned subject of legislative power and in the course of doing so gives a discretion to the Executive or to an administrative officer the exercise of which affects rights and liabilities which must lie within the subject of the power and therefore may be made to depend on any event or matter the legislature may choose, including administrative opinion. Of this there are many examples in Tax Assessment Acts. The power to tax is exercised whether such an opinion enters into the prescribed basis of the tax or not. So when s. 52 of the *Customs Act* 1901-1947 prohibits the importation of various kinds of goods it deals with commerce with other countries and it does so none the less because wide discretionary powers are given to the administration to add to the imports prohibited: *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1). Nothing can be prohibited but what are in truth imports and imports are necessarily a subject of the power given by s. 51 (i.).

For the reasons I have given I am of opinion that it is not possible to sustain the Act on the ground that sub-ss. (2) of s. 5 and s. 9 are based in terms upon matters falling within the defence power or the incidental power in relation to obstructions to the executive power or otherwise. Indeed I think it may be said that if the validity of the Act can be supported it is rather in spite of than because of s. 5 (2) and s. 9 (2).

The difficulty which exists in referring the leading provisions of the Act to the defence power and the power to make laws against subversive action evidently did not escape the notice of the legislature. For that and perhaps other reasons the Act is prefaced with an elaborate preamble.

The preamble contains nine recitals. Of these the first three do no more than set out portions of ss. 51 (vi.), 61 and 51 (xxxix.) of the Constitution. The fourth states that the Australian Communist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation in which the Australian Communist Party, acting as a revolutionary minority would be able to seize power and establish a dictatorship of the proletariat. The fifth says that the same body also engages in activities designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices. The

(1) (1937) 59 C.L.R. 170.

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sixth recital contains a statement that the body is an integral part of the world communist revolutionary movement which, put shortly, engages in espionage, sabotage, treasonable or subversive activities and activities like those imputed in the previous recital. The seventh recital relates only to what are industries vital to the security and defence of Australia and the eighth recites, in effect, that activities or operations of or encouraged by the Australian Communist Party and by its officers, members and others, being communists, are designed to cause by means of strikes and stoppages of work, and have so caused, dislocation, disruption or retardation of production or work in those vital industries. The ninth recital states that it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth that the Party and bodies affiliated with it should be dissolved and that officers and members of the Party and those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry.

Now it appears to me that the effect of this preamble is to put forward the Act as an exercise of one or other or both of the legislative powers invoked by the first three recitals and to give the reason why such powers should apply by stating the nature of the doctrines, designs and activities of the Australian Communist Party, affiliated bodies and officers and members thereof and other communists.

By making the aims and actions of organized communism the matter bringing into play the defence power and the incidental power, s. 4 as the leading provision in the Act is placed upon an intelligible, even if an insufficient, constitutional foundation. The same foundation is made available for s. 5 and s. 9 in virtue, not of sub-ss. (2), but of sub-ss. (1) of those sections. Doubtless the reference in sub-ss. (2) to security and defence and to the execution and maintenance of the Constitution and the laws assists in showing what the recitals in effect say, namely, that communism is dealt with as a source of danger to the safety of the country and its institutions. But because all is made to rest upon the opinion and discretion of the Governor-General in Council by s. 5 (2) and s. 9 (2), those sub-sections leave the two sections and the provisions by which the consequences are attached to the declarations with no better support as laws with respect to defence or to matters incidental to the execution of the powers of the Executive than has s. 4.

Seeing in the recitals the foundation upon which the Act had been placed as a law with respect to defence or with respect to matters incidental to the executive power, the plaintiffs in the eight actions in which these proceedings arise, alleged that the recitals were not in accordance with fact and proposed to go into evidence for the purpose of disproving them. It appeared to me that the validity or invalidity of the Act might not depend upon the truth of the recitals, and the actions being before me upon interlocutory applications, I stated a case for the Full Court raising the question. That is the proceeding now before us. It is obvious that the Full Court could not pass upon the validity of the Act if the Court was of opinion that the decision of the question depended upon a judicial determination or ascertainment of the facts stated in the preamble or that the plaintiffs were entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside power. So that question is asked first. If, however, the Court is not of that opinion then the question of the validity of the Act is submitted for decision. But the order of the questions cannot affect the logical course which an inquiry into the validity of the Act must take. For, in order to conclude that the question of the validity or invalidity of the Act does not depend on the correctness in fact of the preamble or that evidence to controvert the recitals cannot be offered, the inquiry must be pursued to the point of excluding on the one hand the possibility of the Act being valid although the facts are not in truth as recited and on the other of its being invalid although they or some of them may be as recited. That was shown by the course of the argument. For the defendants, supporting the Act, maintained, not that the preamble was conclusive of the facts it recited and that on that ground the Act was valid but that, treating the preamble as conclusive only as to the existence of the legislative opinions it disclosed and of the reasons it indicated for passing the Act, the validity of the Act was to be sustained. On the part of the plaintiffs and interveners who impugned the validity of the Act, the invalidity of the Act was said to appear irrespective of the truth of the facts recited. But the plaintiffs were prepared to fall back if need be upon an issue as to the correctness of the facts recited. On the other hand, the defendants made no proposal to establish facts by evidence in order to provide a sufficient connection between the defence power and the Act, whether facts stated in the recitals or other facts.

It will be seen from an examination of the recitals that, in spite of the initial reference to the possession of a power to make laws

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with respect to defence there is no direct allusion to any apprehension of external danger. The validity of the Act must be tested as at the date of the royal assent, 20th October 1950, and, so far as public events may be noticed and relied upon, what has happened since cannot be used in support of the validity of the Act.

The sixth recital associates espionage, sabotage and subversive activities in the King's dominions and elsewhere with a world communist movement of which the Australian Communist Party is stated to be an integral part. The eighth recital refers to obstructions to vital industries which the seventh recital says are vital to the security and defence of Australia. There is nothing among the matters recited closer to defence in relation to dangers from outside the Commonwealth than the references in the sixth, seventh and eighth recitals. This may be of some significance if, as I think must be the case, the power to legislate against subversive conduct and designs, whether it be based on s. 51 (xxxix.) or on wider considerations, will not suffice to sustain the validity of the Act on the footing that the operation of ss. 4, 5 and 9 is against communist bodies and communists and that because of the precepts, purposes and actions of such bodies and such persons they become *ex sua natura* subject to the power. If the Act can be supported by a train of reasoning of such a kind it must be under the defence power or not at all. The other power is concerned primarily with the protection of Federal authority against action or utterance by which it may be overthrown, thwarted or undermined. It covers, needless to say, conduct antagonistic to the maintenance of Federal institutions and authority, whether its source is abroad or at home, but its central purpose is to allow the legislature to deal with manifestations of subversive conduct within Australia. Wide as may be the scope of such an ancillary or incidental power, I do not think it extends to legislation which is not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by name or classification or characterization, whether or not there be the intervention of an Executive discretion or determination, and does so not tentatively or provisionally but so as to affect adversely their status, rights and liabilities once for all. It must be borne in mind that it is an incidental or ancillary power, not a power defined according to subject matter. I have said before that in most of the paragraphs

of s. 51 of the Constitution the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy): *Stenhouse* v. *Coleman* (1). In a law operating upon or affecting such a given subject matter or fulfilling such a given description, as the case may be, the legislature is at large in the course it takes, that is provided it observes the restrictions arising from specific constitutional provisions such as s. 55, Chapter III., ss. 92, 99 and 116. But, in considering whether a law is incidental to an end or operation, no such test is supplied. It would, for example, be quite erroneous to say first that communism is within the incidental power and next that therefore any law affecting communism is valid. The power is ancillary or incidental to sustaining and carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth. Indeed, upon the very matters upon which the question whether the bodies or persons have brought themselves within a possible exercise of the power depends, it may be said that the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power. Nor do I think that if a wider basis for the power than s. 51 (xxxix.) is accepted, the power itself would extend to a law like the present Act, using as it does, the legislature's characterization of the persons and bodies adversely affected and no factual tests of liability and containing no provision which independently of that characterization would amount intrinsically to an exercise of the power. To deal specifically with named or

(1) (1944) 69 C.L.R., at p. 471.

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identifiable bodies or persons independently of any objective standard of responsibility or liability might perhaps be possible under the power in the case of an actual or threatened outburst of violence or the like, but that is a question depending upon different considerations.

The foregoing discussion narrows the inquiry as to possible support for the validity of the legislation to what may briefly be described as the use of the defence power against communism as such, that is treating communistic character and connections as at once the sufficient and the sole substantial ground for invoking the defence power for the purpose of a declaration by statute that the Party was unlawful and dissolved and, subject to the Executive discretion, for a similar declaration concerning affiliated bodies and a declaration of disqualification for individuals. The central purpose of the legislative power in respect of defence is the protection of the Commonwealth from external enemies and it necessarily receives its fullest application in time of war. It is a legislative power and therefore affords but the means of establishing all the legal machinery and making all the legal provisions considered necessary and appropriate for the purpose. The responsibility for the practical measures taken in order to protect the country must belong to the Executive. The prosecution of a war is of necessity an executive function and has always been so conceived. It is needless after our recent experiences of war to enlarge upon the extent to which it is necessary in modern war to transfer both power and responsibility to the Executive. The conduct of such a war carries with it the direction and control of men and their affairs in every aspect capable of affecting in any degree the prosecution of the war. A conspicuous purpose of legislation in exercise of the defence power must be to invest the Executive, for the purpose of carrying on a war, with the necessary powers, legislative and administrative. The delegation of legislative power has involved no difficulty because, as I have already said, not only is there a definite war but any exercise of the delegated power is examinable against s. 51 (vi.). But, under the delegated power, and sometimes by direct enactment, the very widest discretions are vested in ministers, administrative boards and officers and in officers of the armed services. Common experience, therefore, shows that, in time of war at all events, a provision made by or under statute is not regarded as necessarily outside power because a minister or an agency of the Executive is authorized according to his or its opinion of the relation of some act, matter or thing to defence or some aspect of defence to give directions or determina-

tions in derogation of the freedom of action and the personal rights of men and of associations of men. For example, I think that at this date it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth: see *Lloyd* v. *Wallach* (1); *Ex parte Walsh* (2); and *Little* v. *The Commonwealth* (3). The reason is because administrative control of the liberty of the individual in aspects considered material to the prosecution of a war is regarded as a necessary or proper incident of conducting the war. One man may be compelled to fight, another to perform directed work, a third may be suspected of treasonable propensities and restrained. But what the defence power will enable the Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant. The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the ever-changing course of events, the practical application of the power will vary accordingly. Hitherto a marked distinction has been observed between the use of the power in war and in peace. "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 conflict with powerful enemies" (*R.* v. *Foster* (4)). Correspondingly it is no doubt true that a mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand. Throughout this case I have been impressed with the view that the validity of the Act must depend upon the possibility of bringing into application as at the date of the assent to the Act the conceptions as to the operation of the defence power which hitherto have been generally regarded as appropriate only to a time of serious armed conflict. Unless this were possible I have failed to see a way of reconciling it with constitutional principle.

(1) (1915) 20 C.L.R. 299; (1915) V.L.R. 476.
(2) (1942) A.L.R. 359.
(3) (1947) 75 C.L.R., at pp. 102-104.
(4) (1949) 79 C.L.R., at pp. 83, 84.

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At the date of the royal assent Australian forces were involved in the hostilities in Korea, but the country was not of course upon a war footing, and, though the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Executive Government has become responsible for the conduct of a war. I think that the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed. Is it possible, however, to sustain the Act on the ground that under the influence of events the practical reach and operation of the defence power had grown to such a degree as to cover legislation providing no objective standard of liability relevant to the subject of the power but proceeding directly first by the pronouncement of a judgment by means of recitals and then in pursuance of the recitals acting directly against a body named, and bodies and persons described, in derogation of civil and proprietary rights ?

Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians (cf. *Read* v. *Bishop of Lincoln* (1), and the note to *Evans* v. *Getting* (2)), and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like (cf. *Darby* v. *Ouseley* (3)), so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And, with respect to our own country, matters of common knowledge and experience are open to us (cf. *Ex parte Liebmann* (4)). But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics, per *Slesser* L.J., *A/S Rendal* v. *Arcos, Ltd.* (5); and per Lord *Wright* s.c. (6).

It is needless to enter into a discussion of the avowed principles of communism, whether in earlier stages of development or in their present state. In a political theory based upon the supposed

(1) (1892) A.C. 644, at p. 653.
(2) (1834) 6 Car. & P. 537 [172 E.R. 1376].
(3) (1857) 1 H. & N. 1, at pp. 8 (*arguendo*) and 12 [156 E.R. 1093, at pp. 1096, 1098].
(4) (1916) 1 K.B. 268.
(5) (1936) 1 All E.R. 623, at pp. 630, 631.
(6) (1937) 3 All E.R. 577, at pp. 582, 583.

irreconcilable antagonisms inherent in a capitalistic system, the inevitability of its decomposition, the necessity of a period of revolutionary transformation from a capitalist to a communist society, the struggle between bourgeoisie and proletariat, the dictatorship of the proletariat during a longer or shorter period of further evolution, the progressive extension of the revolutionary process over the earth and the need to assist and expedite its spread not merely that its supposed benefits may be more widely enjoyed but for the protection of existing systems of communism from counter action and the revolutionary process of development from delay and temporary defeat; in such a political theory there are beliefs calculated to produce action and the interpretation which a parliamentary government places upon events domestic and foreign will be affected by the complexion it gives to the tenets and precepts of the adherents of the philosophy. That complexion need not be the same as the adherents themselves would claim for their doctrines. A harsher or more sinister interpretation may be placed upon some of the sentiments than communists themselves may say is correct. But that is beside the point. The significance of such things must be judged by the Government in the light of all the circumstances of which it is informed.

If it is unnecessary to discuss the principles of communism, it is even less necessary to examine notorious international events. The communist seizure of Czecho-Slovakia, the Brussels Pact of Western Union, the blockade of Berlin and the airlift, the Atlantic Pact, the passing of China into communist control, the events in reference to the problem of Formosa, the entry of the North Korean forces into South Korea and the consequent course of action adopted by the United Nations, and the sustained diplomatic conflict between communist powers and the Anglo-American countries and other western powers at meetings of the Security Council and the General Assembly are all too recent. So far as the internal affairs of this country enter into the question whether events had extended the operation of the defence power, it is enough to refer to the serious dislocations of industry that have occurred—a matter the significance of which it would be within the province of the Government to judge, availing itself of its sources of information.

It ought not, I think, to be denied that the events of the time, some of which I have briefly enumerated, bring within the practical application of the defence power measures which would not have been considered competent—for example, in the state o' affairs prevailing when this Court held its first sittings. But hitherto it has been supposed that only the supreme emergency of war

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itself would extend the operation of the power so far as to support a legislative provision which on a subject not by its own nature within the defence power affects the status, property and civil rights of persons *nominatim* or by other identification without any external test of liability upon which the connection of the provisions with power will depend.

The question remains, however, whether nevertheless, by reason of the application of s. 4 and s. 5 (2) and s. 9 (2) to the Communist Party, affiliated bodies and communists as such, a sufficient connection with the defence power can be established on the footing that recent events had at the date of the Act called the defence power into such wide play as to supply a constitutional justification for the form of the Act. Although this question was not developed in the argument before us, it must be decided. In deciding it there are three considerations to be urged in support of an affirmative answer. They complement one another. In the first place it may be said that the proper view of the defence power is that in a situation such as events had created when the Act became law the power places within the authority of the legislature the decision of all the questions concerned with the defence of the country which may determine legislative action, questions affecting the extent of the operation of the constitutional power. It may be said, further, that public events of common knowledge, without more, made it a matter for the decision of the Parliament what was the real nature of the activities and designs of the Australian Communist Party, of kindred bodies and of communists, what part they played in the dangers considered to threaten the country and what and how great those dangers were. In such a view the decision of the Parliament is to be seen in the recitals and in the provisions of the Act. The decision it would be said leaves no room for any question of power. In the second place it is a commonplace that while the extent of the operation and the application of a power, including the defence power, must be decided by the Court, the reasons why it is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court. In the third place, in all matters relating to defence, not only does the responsibility lie with the Executive Government and thus ultimately with Parliament, but the information at the command of the Government, which often cannot be made public, places it in a special position to judge of what the public interest requires.

In all the cases concerning the validity of statutory regulations made for the war of 1914-1918 and for the war of 1939-1945 the principle was acknowledged or assumed that it was for the Executive Government to decide what was necessary or expedient for the purpose of the war and in doing so to act upon its opinion of the circumstances and conditions that existed and of the policy or course of action that should be followed. Variously formulated as the tests have been for deciding whether regulations made under the war powers were within the power to make laws with respect to defence, they have uniformly been based upon the principle that there is to be no inquiry into the actual effect the regulation would have or be calculated to have in conducing to an end likely to advance the prosecution of the war and that it was at least enough if it tended or might reasonably be thought conducive or relevant to such an end.

But, in *Farey* v. *Burvett* (1) *Griffith* C.J. said : " In making the inquiry the Court cannot shut its eyes to the fact that what could not rationally be regarded as a measure of defence in time of peace may be obviously a measure of defence in time of war." *Barton* J. said : " It is argued that the defence power has the same meaning at all times, whether in peace or in war. I doubt that, but it may not be necessary to determine it, for the true question is whether many things that cannot aid defence in peace and when no enemy is in view, are not urgently necessary when an enemy has arisen who must be defeated if the nation, or family of nations, is to live " (2). His Honour's view treated the power as possessing a fixed meaning with a changing application, as a fixed concept with a changing content.

It would, I think, be an error to draw a definite line between a period after the commencement of actual hostilities and the period before they commence. It is inappropriate to the altered character of war and the changes that appear to have taken place in the manner of commencing war. Imminence of war will enlarge the application of the fixed concept of defence.

I have now completed my statement of the train of reasoning in support of the Act based upon ss. 4, 5 (2) and 9 (2) as laws with respect to communism. I believe that, from the form in which I have stated the reasoning, its full force will appear. But, after giving much consideration to the question whether it will suffice to sustain the Act I have reached the conclusion that it will not. The reasons for that conclusion may be briefly given. When s. 4 names a voluntary association, declares it unlawful and by force

(1) (1916) 21 C.L.R., at p. 442. (2) (1916) 21 C.L.R., at p. 448.

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of the Act dissolves it, and when ss. 8 and 15 (1) attach the consequence of deprivation of property and s. 7 attaches the consequence of a restriction of the civil rights of the members, it provides for matters which, considered as specific subjects, are not of their own nature within any of the enumerated powers of the Commonwealth Parliament and prima facie lie only within the province of the States. If the operation of the law upon the right of association, the common property and the civil rights of the members were made by the statute to depend upon the actual existence or occurrence of any act, matter or thing having a specific relation to the purposes of the power with respect to defence, then, notwithstanding that the immediate subject of the provision did not of its own nature form part of the subject matter of the power, the provision would be brought within it as ancillary to the main purpose of the power. Again, prima facie no opinion of the Parliament as to the actual existence or occurrence of some matter or event which would provide a specific relation of the subject of a law with power can suffice to give the law that relation. It would, for example, be impossible for the Parliament by reciting that a society for research in radio physics planned or carried on experiments causing or likely to cause an interference with wireless transmission to bring within s. 51 (v.) (postal, telegraphic, &c. services) an enactment naming the society and dissolving it *brevi manu*. It would be impossible to bring under s. 51 (xviii.) (patents) a direct grant of a monopoly for a specified manufacturing process by reciting that it was an invention. The pronouncements by Parliament which the recitals in the Act contain, combined with the declaration of unlawfulness and decree of dissolution made by s. 5 and the forfeiture imposed by s. 15 (1), were said by the plaintiffs to amount together to an invasion or usurpation of judicial power. In the case of s. 15 (1) it was also said that, except by a lawful exercise of judicial power, such a forfeiture could not be imposed by reason of s. 51 (xxxi.) of the Constitution. As I am deciding the case on the ground of want of affirmative legislative power, I shall not deal with these arguments, but I mention them because they illustrate the substantial effect and nature of the provisions in question. There should be no confusion about the essential nature of the connection with the defence power which the recitals seek to supply. Essentially it consists in the past acts, the tenets and opinions and the present propensities or tendencies of persons and associations of persons.

Where legislation, subordinate or principal, purporting to exercise the defence power has stated the purpose for which it was enacted

or adopted, this expression of purpose has received effect. In relation to a power largely directed to purpose its importance is evident. It is true that the expression of the nature and existence of the purpose has left open the question whether nevertheless the legislation failed as an exercise of the defence power, because of the nature of the provisions, the prevailing situation, the facts, the remoteness of the means adopted from the avowed object, or some other consideration. But here, so far as the preambles express the existence and the nature of the purpose animating the legislation, that may be conceded. It is, however, but a small step. What is in question is so much of the recitals as concern not the opinions and purposes of the legislature, but the opinions and purposes of the persons against whom the provisions are directed and their past actions. Again, the case is not one where a course of conduct is required or forbidden but only a knowledge of facts outside judicial notice would enable the Court to see how the pursuit of that course of conduct would promote or prejudice, as the case may be, an object within the defence power. It is enough to mention *Sloan* v. *Pollard* (1) and *Jenkins* v. *The Commonwealth* (2), the facts of which provide sufficient illustrations. In such a case the result which the rule laid down produces or is calculated to produce is within the defence power and all that is lacking is an understanding of the process of causation between the conduct prescribed or prohibited and the result. That can be proved. There is no need to stop to inquire precisely how much effect a recital by the legislature of facts of such a nature should receive ; for it is not this case. But, to my mind, recitals of such a character, stating how a law will operate, or for that matter recitals stating the purpose for which an enactment is made, stand on an altogether different footing from what is the essential matter here. The essential matter here is a statement to the effect that persons or bodies of persons have been guilty of acts which might have been penalized in advance under the defence power and have a propensity to commit like acts, this being recited as affording a supposed connection between the defence power and the operative provisions enacted, provisions dealing with the persons or bodies directly by name or description.

At the risk of repetition it is perhaps desirable to add that the case is not one where the legislation is dealing with a subject matter undeniably within power. If the legislature directly dissolved a marriage between named parties, it would at all events be dealing with divorce, whatever other objections might be found

(1) (1947) 75 C.L.R. 445. (2) (1947) 74 C.L.R., at p. 402.

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to the Act. If it directly enacted that a named alien should be deemed naturalized or that a person or persons named or described should be denied the use of the postal, telegraphic and telephonic services, it would likewise be upon the very subject of power. Whatever recitals it thought fit to make would have such effect as it was taken to intend, and whatever conditions it imposed would be valid, subject always, of course, to the relevance of positive restrictions that might be found elsewhere in the Constitution.

It must be evident that nothing but an extreme and exceptional extension of the operation or application of the defence power will support provisions upon a matter of its own nature prima facie outside Federal power, containing nothing in themselves disclosing a connection with Federal power and depending upon a recital of facts and opinions concerning the actions, aims and propensities of bodies and persons to be affected in order to make it ancillary to defence.

It may be conceded that such an extreme and exceptional extension may result from the necessities of war and, perhaps it may be right to add, of the imminence of war. But the reasons for this are to be found chiefly in the very nature of war and of the responsibility borne by the government charged with the prosecution of a war. " The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts may concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm "—per *Williams* J., *Victorian Chamber of Manufactures* v. *The Commonwealth* (1).

A war of any magnitude now imposes upon the Government the necessity of organizing the resources of the nation in men and materials, of controlling the economy of the country, of employing the full strength of the nation and co-ordinating its use, of raising, equipping and maintaining forces on a scale formerly unknown and of exercising the ultimate authority in all that the conduct of hostilities implies. These necessities make it imperative that the defence power should provide a source whence the Government may draw authority over an immense field and a most ample discretion. But they are necessities that cannot exist in the same form in a period of ostensible peace. Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could

(1) (1943) 67 C.L.R., at p. 400.

give rise to the same kind of necessities. The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.

The considerations I have enumerated must, of course, have their effect upon the operation to be attributed to the power, but what I have described as the extreme or exceptional extension of the operation or application of the power necessary to support the Act in virtue of ss. 4, 5 (1) and 9 (1) cannot, I think, be justified.

In the result I am of opinion that ss. 4 and 5, together with ss. 6, 7, 8 and 15, are invalid. I reserved for determination a special consideration affecting s. 10 (1) which might be said to suffice to sustain ss. 9, 10 (partially), 13 and 14. Subject to that matter I think that those sections cannot be supported.

The special consideration affecting s. 10 (1) depends upon the classes covered by paragraphs (*a*), (*b*) and (*c*). The Commonwealth Parliament, of course, has power to make laws governing the Federal public service and laws governing service or employment with any authority of the Commonwealth or any body corporate established by the Commonwealth. Section 10 (1) (*a*) and (*b*) of the Act are as follows :—" A person in respect of whom a declaration in force under this Act—(*a*) shall be incapable of holding office under, or of being employed by, the Commonwealth or an authority of the Commonwealth ; (*b*) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth. . . . "

It is clear that, upon the subject of who shall hold these offices and who shall be disqualified and why, Parliament has complete legislative power in virtue of which any conditions or procedure can be prescribed, that is, subject to any specific restraints such as s. 116 of the Constitution. If s. 9 were confined to serving the purposes of s. 10 (1) (*a*) and (*b*) the provisions could be sustained as legislation with respect to the public service and Commonwealth authorities, corporate or not. Section 10 (1) (*c*) enacts that a person in respect of whom a declaration is in force under the Act shall be incapable of holding an office in an industrial organization to which the section applies or a branch of it. The industrial organizations covered include organizations registered under Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1901-1949. Section 51 (xxxv.) of the Constitution has been interpreted as authorizing some laws affecting bodies so registered and the question arises

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whether s. 10 (1) (*c*) can be thus supported in part. The question is whether by the application of s. 15A of the *Acts Interpretation Act* 1901-1948 it can be confined to registered organizations and upheld as an exercise of the power conferred by par. (xxxv.).

It is convenient to deal with this question at once. I think that to uphold it under s. 51 (xxxv.) is impossible on the simple ground that it is not with respect to the subject of that paragraph that the law is enacted, it is not a law with respect to conciliation and arbitration for the prevention and settlement of two-State industrial disputes. The only way in which the power can be made applicable is through registration. The legislature authorizing registration may, as an incident of the power in virtue of which it does so, impose conditions. But s. 10 (1) (*c*) speaks entirely independently of registration, which it ignores as an irrelevancy. It is not addressed to the organization but to the declared person. No condition or duty is imposed on the body in relation to registration or otherwise. It simply incapacitates the man.

Paragraphs (*a*) and (*b*) of s. 10 (1) stand in quite a different situation. The legislature possesses a power in relation to serving the Commonwealth and contracting with the Commonwealth which is well exercised by a law with respect to the capacity of the individual and it can place that incapacity on any ground and use any procedure. But in this instance I think that the difficulty lies in s. 9. That section ought not, in my opinion, to be sustained as a law enacted with respect to the public service or persons contracting with the Commonwealth for services to it (s. 14). It deals with persons who fall within sub-s. (1) and of whom a declaration is made according to sub-s. (2). A declaration made in pursuance of s. 9 (2) about a man, if validly made, is an absolutely privileged statement in the *Gazette* of a most disparaging description. It must be remembered that this would be its legal and practical nature, whether the opinion of the Executive that the man falls within one of the descriptions of sub-s. (1) is correct or is shown under sub-ss. (4), (5) and (6) to be wrong. It may be published of anybody, whether or not he is in the service of the Commonwealth or an authority of the Commonwealth or whether or not there is any chance of his ever entering such a service. Such a provision cannot, in my opinion, be referred to the power over those serving the Commonwealth or Federal bodies or agencies simply because one consequence assigned to the declaration is that it disqualifies the declared man for such service. I am therefore of opinion that no sufficient support can be found for these provisions. Holding as I do that ss. 4 to 15 (1) are invalid it

follows that the remaining sections of the Act, which are only consequential, fall with them. This conclusion may be thought to bear out *Dicey's* well-known statement that Federal government means weak government: *Dicey's Law of the Constitution*, 1st ed. (1885), p. 157; 9th ed. (1950), p. 171. But it is necessary to remember that we are not here concerned with the extent to which the defence power allows of the suppression of definite conduct as distinguished from definite people and of the dissolution of bodies offending against definite prohibitions or failing to conform to definite requirements as distinguished from bodies made definite by the identification of the legislature or of the Executive. Nor is there any question here of the validity of provisions regulating the burden of proof in legal proceedings.

For the foregoing reasons I answer questions (1) (a) and (b) No and question (2) Yes.

McTiernan J. This stated case raises the question whether the *Communist Party Dissolution Act* 1950 is valid or invalid and also a preliminary question which relates to the recitals forming the part of the preamble of the Act beginning with the fourth recital. This preliminary question is whether the decision of the main question depends on the judicial determination or ascertainment of the facts stated in those recitals. Neither of these judicial processes is a prerequisite to the Court's noticing the recitals. The Court gives to recitals the effect which they have as such and no judicial inquiry into the facts stated in them is necessary to determine that matter, the effect of the recitals. Their effect is that they contain Parliament's reasons for passing the Act; express the opinions which Parliament held; they conclusively show Parliament held those opinions and believed, presumably, that what is recited is true. The recitals are in no way decisive of the question whether the Act is valid or invalid, for that is a judicial question which only the judicature has the power to decide finally and conclusively. If any fact stated in a recital is material to the question whether the Act is valid or invalid, the fact would need to be judicially determined or ascertained. The recitals are not judicial findings and do not bind the judicature on any question within its own exclusive province. The judicature, of course, treats the recitals with respect and regards the views which they express as possible but cannot concede that they are probative of any matter of fact which is material to the question whether the Parliament had or had not the power to pass this Act. The Constitution does not

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allow the judicature to concede the principle that the Parliament can conclusively " recite itself " into power.

It is not the case that the decision of the validity of an Act can never depend upon the judicial finding of any fact. If the Court has not judicial notice, without proof, of the circumstances in reference to which an Act is passed or of the characteristic of some material thing to which an Act applies, evidence of these circumstances or those characteristics, as the case may be, is admissible to show in either case that the Act has, for example, a purpose which is connected with defence. The *Communist Party Dissolution Act* applies to a class of persons upon the assumption that merely as members of that class they have a connection with defence. It cannot be assumed that every person, like every specimen of a material thing, has particular characteristics, although, of course, different persons may do the same class of acts. These acts may be of such a kind that persons who do them come within the range of the defence power or of some other legislative power. But acts done by persons are not made the criterion of the application of the present legislation. The connection between specified conduct and the subject matter of a legislative power is capable of proof by evidence or the Court may be able to take judicial notice of the connection. But if the legislature leaves out of account the acts of persons and deals with them solely on the assumption that they are *per se* related to a subject matter of power it is difficult to see how evidence could establish the assumption or demonstrate that any restrictions which the Parliament imposes on the persons, as such, have any connection in fact with defence or any other subject matter of legislative power. Of course, the persons who are being discussed are not a category which is one of the specified subjects with respect to which the Constitution says that the Parliament has powers to make laws. I think, therefore, that the nature of the *Communist Party Dissolution Act* is such that the decision of the question of its validity or invalidity cannot be aided by evidence as to the activities alleged in the recitals.

It is implicit in the Act that Parliament is of opinion that the persons to whom it applies are indiscriminately *per se* a danger to the Commonwealth. This opinion is insufficient to connect the Act with any subject matter of legislative power and to justify the restriction of their civil liberties. In a period of grave emergency the opinion of Parliament that any person or body of persons is a danger to the safety of the Commonwealth would be sufficient to bring his or their civil liberties under the control of the Commonwealth ; but in

time of peace or when there is no immediate or present danger of war, the position is otherwise because the Constitution has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purpose of defence to impose such a control in peace time. To decide that the present Act is good under the defence power would radically disturb the grant of legislative power made by the Constitution to the Commonwealth Parliament. Indeed the general control of civil liberty which the Commonwealth may be entitled to exercise in war time under the defence power is among the first of war-time powers that would be denied to it when the transition from war to peace sets in, because then there is no emergency to support the constitutional power to maintain a control of that nature. It is, of course, for Parliament to measure the emergency confronting the Commonwealth and to take the legislative measures which are required to meet it. The only question for the Court is whether the measures have a reasonable relation to the emergency, and on that question the Court naturally gives very great weight to the opinion of Parliament; but it could not allow the opinion of Parliament to be the decisive factor, that is to determine the matter finally and conclusively, without deserting its own duty under the Constitution.

Parliament, however, has not declared in the *Communist Party Dissolution Act* that it was passed for the prosecution of any war present or future, or that there is any immediate or present danger of war. At the time the Act came into force the Commonwealth was not engaged in any hostilities except in Korea. The state of affairs was peace not war. Indeed the constitutional position was that the defence power had declined from the zenith to which it had risen in the crisis of the last war practically to the level proper to it in time of peace. The Court has frequently declared, since the end of hostilities in the last war, that the defence power stands in that position. But it was said in argument that when the present Act became law there was tension in international affairs which might suddenly lead to war and therefore there was an emergency which drew the persons dealt with by the present Act within the scope of the defence power.

The Court was asked to take judicial notice of the existence of an emergency of this grave character. There was argument and counter-argument at the bar table as to the state of international relations and as to what they foreboded. A confusing mass of events from which the Court was invited to draw its conclusion was discussed. It does not seem to me that this is the proper way to

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establish the existence of such an emergency as that by which it was sought to support this Act. I think it would have been better if the Court had had the guidance of a formal statement made by the Executive Government of its appreciation of the international situation. The Court would be bound to give very great weight to such a statement, particularly if it positively said that there was an impending danger of war. The existence of an emergency of that nature at the time this Act was passed would contribute enormously to its validity, especially if the enemy was to be the Union of Socialist Soviet Republics, the enemy forecasted in argument. For there are a number of well-known facts relating to the Communist Party which I think are either within judicial knowledge as historical facts or so well known that the Court may take judicial notice of them. The Communist Party is the name of a world-wide movement which is organized as a political party in many countries and is the major and dominant party in the Union of Socialist Soviet Republics; the Australian Communist Party, like the communist parties in other countries, is a political party formed in accordance with Lenin's conception of a world-wide political movement which would strive to establish a proletarian dictatorship and to impose Marxism everywhere; and by reason of these circumstances the Australian Communist Party manifests strong sympathy with the foreign and domestic policy of the government of the Union of Socialist Soviet Republics. It follows that if war occurred in which that State was the enemy or there was imminent danger of such a war, the Commonwealth could take preventive measures against communists and communist bodies just as it could against alien enemies resident in this country. But I cannot agree with the view that at the time this Act was passed there was a situation which provided a constitutional foundation for this Act. It is important to notice an observation which was made by *Romer* L.J. in *Driefontein Consolidated Gold Mines Ltd.* v. *Janson* (1):—"I think that the intention of a foreign Government at any given time ought to be treated by these Courts, for such a purpose as that I am now considering, as conclusively determined by the way in which our Government chooses or has chosen to deal with that foreign Government and its acts, and that, where our Government has not treated the foreign Government as being hostile at a particular time, our Courts ought not to try to ascertain, even by merely regarding its acts, what was then in the minds of the King, President, or responsible Ministers or authorities of the foreign Government". This

(1) (1901) 2 K.B. 419, at pp. 439, 440.

observation was regarded with favour in the House of Lords (1). In that case the question was as to the effect of expected hostilities on legal rights. Perhaps in the present case mere diplomatic relations should not have the same weight with the Court. But at a time when it is the policy of the Government not to treat a foreign power as hostile, that fact makes it very difficult for the Court to divine that the power, even if it is armed to the teeth, is about to show them.

The substantial effects of the *Communist Party Dissolution Act* are produced by s. 4, then by ss. 5 and 6 and finally by ss. 9 and 10. Section 4 singles out the Australian Communist Party by name. The section applies solely to the Party, declares it to be an unlawful association, breaks up the association of persons who form it and provides for the forfeiture, upon dissolution, of all its property to the Commonwealth. The effect of the section is to deprive the members of the Party of their right of association, their interest in the property of the Party and other civil rights. Sections 5 and 6 are directed against bodies, other than trade unions, which are supposedly allied in a fashion to the Australian Communist Party or who have communist connections. These sections authorize the Government of the Commonwealth to take action against any body in these selected categories if it is satisfied that "the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth". This action has the same effect on the body against which it is taken and its members as s. 4 has on the Australian Communist Party and its members. Sections 9 and 10 authorize the Government of the Commonwealth to disqualify Communists from holding trade union office in certain industrial spheres and all Commonwealth positions. The Government is authorized to take this action against any communist to whom s. 9 applies where it is satisfied that he "is engaged or likely to be engaged in activities", described as "prejudicial" to the above-mentioned interests of the Commonwealth. The effect of these sections is to deprive the persons and the trade unions affected by their operation of a contractual capacity and of civil rights in respect of employment. The criterion adopted by the legislature for the application of s. 4 is that the persons to whom it applies are collectively known as the Australian Communist Party. The application of the section does not depend upon anything that the association might do. The same thing is primarily true of ss. 5 and 6 and ss. 9 and 10.

(1) (1902) A.C. 484.

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The recitals in the preamble set forth many activities and operations which, in the opinion of the Parliament, are pursued by the Australian Communist Party and its officers, members and other Communists. But the condition of the application of the Act to the Australian Communist Party or any association or person is merely that it is communist or has communist associations. The connection of the Act with legislative power depends upon the aims and objects which communism implies, rather than upon the actions of the Party, or of its allies, or of individual communists. The scope and operation of the principal sections of the Act determine that it is merely a law with respect to communists of the Lenin-Marx school. The Court may take judicial notice of the fact that persons of this class manifest strong sympathy with the Soviet and sharp antagonism to the existing social and political orders and are desirous of overthrowing them. But their mere aims as communists, apart from their actions, are not sufficiently substantial to give the Commonwealth Parliament a foot-hold on which to enact laws to deprive all the members of the class of civil liberties which in peace time are immune from Commonwealth control. The Commonwealth might, in an emergency of a certain kind (as I have already said) have the constitutional power to assume this control.

It has been shown that ss. 5 and 6 and ss. 9 and 10 are brought into operation where the Government of the Commonwealth is satisfied of certain matters. The scope of these matters depends in the first place upon the meaning of the words security and defence. This combination of words necessarily has a wider meaning than the single word defence. The first word, security, in its application to national interests, is capable of referring to political, social, economic, financial or military security. The constitutional power of the Commonwealth extends to security through military preparedness against an enemy and in war time to other forms of security, for then it is necessary to maintain public order, social security, industrial peace, financial and economic stability for the successful prosecution of war. But, even if the words security and defence mean in the present context no more than is connoted by the word defence, and they cannot mean less, the Act leaves it to the Executive Government to interpret the meaning and scope of that subject matter in the course of executing the Act. There can be no doubt that Parliament legislated on the basis of the constitutional practice governing the performance by the Executive Government of its high duties of state. For this reason there is the strongest presumption that Parliament did not

intend that the decision of the question of prejudice to security and defence which it authorized the Executive Government to make, should be examined by a court—a process which would obviously be objectionable on grounds of public policy. The very framework of the section confirms this presumption because it expressly allows the review by a court of the decision of the Executive Government on the other question, whether the body or the person as the case may be, against whom the executive action was taken, is within the scope of the Act. The result is that the Executive Government is itself the final judge of the other question, that is, of how far it may go in operating these provisions. It may be correct for Parliament to authorize the Executive to bring into operation an Act which is within legislative power, but it is clearly another thing and constitutionally wrong for Parliament to authorize the Executive to decide finally as to the extent of any legislative subject matter enumerated in s. 51 of the Constitution and to bring the Act into operation in such cases as it decides to be within the subject matter. Sections 5 and 6 and ss. 9 and 10 should fail also for the reason that in effect they constitute the Executive Government an arbiter on constitutional power. This ground of invalidity applies with even greater force to the authority which the Act gives to the Executive Government to decide whether there is matter " prejudicial " to the " execution or maintenance of the Constitution or of the laws of the Commonwealth ". It is surely for the Court to decide finally and conclusively what is meant by these expressions which indeed are copied almost verbatim from the Constitution.

The Act was rested also on the power conferred upon the Parliament by par. (xxxix.) of s. 51 of the Constitution. In the case of *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1) the Judicial Committee said : " These words do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law ". The meaning of this paragraph is also explained in the same way in *Le Mesurier* v. *Connor* (2). In the present case it is necessary to apply the sub-paragraph to the power which s. 61 of the Constitution vests in the Executive Government. This section gives it power to exercise the executive power of the Commonwealth and says that this power extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. By the combined effect of

(1) (1914) A.C., at p. 256 ; 17 C.L.R., at p. 655.

(2) (1929) 42 C.L.R., at pp. 497, 498.

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the sub-paragraph and s. 61 of the Constitution the Parliament has power to punish crimes against the Commonwealth and to make laws to aid the Executive Government in the execution of its authority to protect the Commonwealth against violence or acts that would directly lead to violence (*Burns* v. *Ransley* (1); *R.* v. *Sharkey* (2)). The present Act has not the character of a law on any matter which arises in the course of the execution of the power vested by s. 61 in the Executive Government. The Australian Communist Party and other bodies and communists are made liable or subject to the measures which it provides for dealing with them independently of any conduct which would call for the exercise of the executive power of the Commonwealth. It cannot be doubted that the Commonwealth Parliament could make laws, punitive or preventive, for dealing with them on the basis of their activities, if their activities are shown to be of the required description. The criteria upon which bodies other than the Australian Communist Party are brought within the Act and upon which persons are classified as communists are in some respects arbitrary and might strain a power, if it existed, to legislate just on communists.

As regards ss. 9 and 10, I was pressed by the consideration that the exigencies of modern warfare make it necessary for the Commonwealth to rely on industrial undertakings, whether conducted by itself or privately owned, for the production of the war materials which are essential to national preparedness and the defence of the Commonwealth. The Commonwealth has an interest in protecting any industrial undertaking which is engaged or is likely to be engaged in the production of war materials for the Commonwealth and this interest attracts the defence power. The power extends to the prevention or punishment of specific acts of conduct, whether committed by communists or any other persons, which is detrimental to the safety or productiveness or efficiency of these undertakings. But I cannot see that the operation of ss. 9 and 10 is confined to industrial undertakings which positively have this character. If these sections were intended to be a law with respect to industrial undertakings within the ambit of the defence power, I am afraid that their language leaves the sections open to many objections on the score of its width and vagueness. But it seems to me that the sections, in pith and substance, are a law with respect to communists and that the criterion of industries vital to security and defence, even if it does not over-pass the limits of the subject matter of defence, is used only as a peg on which to

(1) (1949) 79 C.L.R. 101. (2) (1949) 79 C.L.R. 121.

hang the disqualification of communists from trade union office and Commonwealth employment.

The legislative power which the Commonwealth has in respect of organizations registered under the *Commonwealth Conciliation and Arbitration Act* will not justify ss. 9 and 10, because these sections apply indiscriminately to registered and unregistered industrial organizations.

Sections 9 and 10 also provide for the disqualification of communists. The Commonwealth Parliament has ample power under s. 52 of the Constitution to make laws to bar from Commonwealth positions persons who, according to any reasonable standard which the Parliament may prescribe, are unfit for Commonwealth employment. The question whether the provision made by ss. 9 and 10 for the disqualification of communists from Commonwealth employment could be justified under s. 52, and, if valid thereunder, it could stand despite the invalidity of ss. 5 and 6 and the rest of ss. 9 and 10, was not specially argued. But s. 9 goes far beyond, dealing with persons within s. 10 (1) (*a*) and (*b*). It would operate at large to enable the Governor-General in Council to declare anybody, however remote the possibility of his even seeking to become a public servant or an officer of a Commonwealth authority. It cannot be regarded as a law with respect to the public service or the service of Commonwealth authorities. It is a law with regard to the subject of " declaring " communists to have prejudicial tendencies. Section 14 is invalid for the same reasons ; it depends on s. 9.

All of the other provisions of the Act inevitably fall with ss. 4, 5 and 6, and 9 and 10.

For these reasons I answer questions 1 (a) and 1 (b) No, and question 2 Yes, that is, that the Act is invalid.

WILLIAMS J. We have before us certain questions asked in a case stated by *Dixon* J. in eight actions brought to obtain declarations that the provisions of the *Communist Party Dissolution Act* 1950, which came into force on 20th October 1950, are *ultra vires* the Constitution and invalid and injunctions restraining the Commonwealth and the Ministers named as defendants from acting thereunder to the prejudice of the plaintiffs. The questions asked in the case stated are as follows :—" 1 (a) Does the decision of the question of the validity or invalidity of the provisions of the *Communist Party Dissolution Act* 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the

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preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth ? (2) If No to either part of question 1, are the provisions of the *Communist Party Dissolution Act* 1950 invalid either in whole or in some part affecting the plaintiffs ? "

The *Communist Party Dissolution Act* contains a number of recitals. The first three recitals refer to the powers of the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth (s. 51 (vi.) of the Constitution), the executive power of the Commonwealth (s. 61 of the Constitution) and the incidental power (s. 51 (xxxix.) of the Constitution) and are of a formal nature. The next six recitals refer to the alleged aims, objects and activities of the Australian Communist Party. They allege that this Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat. They also allege that the party engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial and political ends by force, violence, intimidation or fraudulent practices. They also allege that the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature. They also allege that activities or operations of, or encouraged by the Australian Communist Party and its members or officers and other persons who are communists, are designed to cause, by means of strikes or stoppages of work, and have, by those means, caused dislocation, disruption or retardation of production or work in certain industries vital to the security and defence of Australia (including the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry and the power industry).

The ninth recital states that it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the

Australian Communist Party, and bodies of persons affiliated with that Party, should be dissolved and their property forfeited to the Commonwealth, and that members and officers of that Party or of any of those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry.

Section 3 of the Act defines "communist" to mean a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin. It defines "the specified date" to mean the tenth day of May, One thousand nine hundred and forty-eight, being the last day of the National Congress of the Australian Communst Party by which the constitution of the Australian Communist Party was adopted. It defines "unlawful association" to mean the Australian Communist Party or a body of persons declared to be an unlawful association under this Act.

The Act has three main branches. In the first branch there is s. 4, which declares the Australian Communist Party to be an unlawful association, dissolves it, and provides for the vesting of its property in a receiver.

In the second branch there are ss. 5, 6 and 8. Section 5 (1) provides that the section applies to any body of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State—(*a*) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act, was, or purported to be, affiliated with the Australian Communist Party; (*b*) a majority of the members of which, or a majority of the members of the committee of management or other governing body of which, were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party; (*c*) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time within that period, promoted, the spread of communism, as so expounded; or (*d*) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who—(i) were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central

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Committee or other governing body of the Australian Communist Party, or are communists; and (ii) make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin.

Section 5 (2) provides that where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association. The words "security and defence" do not, in my opinion, connote more than defence and refer to defence against external aggression, while the words "execution or maintenance of the Constitution or of the laws of the Commonwealth" are a composite expression taken substantially from s. 61 of the Constitution and refer to the internal security of the Commonwealth. The words "the laws of the Commonwealth" refer to the system of laws enacted under the Constitution and, so to speak, to the Constitution in action. The sub-section therefore authorizes the Governor-General to make a declaration if he thinks that the continued existence of the body would be prejudicial to the external or internal security of the Commonwealth. There was some discussion during the argument as to whether the Governor-General could make the declaration if he was satisfied that the continued existence of the body would be prejudicial to one or other of these purposes without being satisfied as to either purpose in particular. But it seems to me that before the Governor-General could make a declaration he would have to be satisfied that the body is a body of persons to whom the section applies and that he would also have to be satisfied that the continued existence of the body would be prejudicial either to the security and defence of the Commonwealth or to be satisfied that the continued existence of the body would be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth and that he could be satisfied that the continued existence of the body would be prejudicial to both these purposes. This construction fits in with s. 27 of the Act, which provides that when the continuance in operation of the Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a Proclamation

accordingly and thereupon the Act shall be deemed to have been repealed. Parliament must, therefore, have intended that the Act should continue in operation until the Governor-General is satisfied that it is no longer required for either purpose. If a position should arise in the future where the Governor-General is satisfied that the Act is no longer necessary for the one purpose, but still necessary for the other, it must necessarily follow that he could only make a declaration where he is satisfied that the continued existence of the body would be prejudicial to the purpose for which it is still necessary to keep the Act on foot. But s. 5 (2) does not provide that the declaration should state the ground or grounds of the Governor-General's satisfaction and all that the instrument need declare is that the body of persons is an unlawful association.

Section 5 (3) provides that the Executive Council shall not advise the Governor-General to make such a declaration unless the material upon which the advice is founded has first been considered by the committee therein mentioned. This committee acts in a purely executive capacity, for the threatened body of persons is not given an opportunity to appear before it or see or criticize or deny or supplement the material which the committee is considering.

Section 5 (4) provides that a body of persons declared to be an unlawful association may, within the specified time, apply to the appropriate court to set aside the declaration on the ground that the body is not a body to which this section applies. This subsection confers a right to apply to the court to have the declaration set aside on one ground only and s. 5 does not confer a right to apply to the court to set aside the declaration on the ground that the continued existence of the body of persons would not in fact and law be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

Section 6 provides that a body of persons in respect of which a declaration has been made under the Act, in the absence of a successful application to a court to set aside the declaration, shall, by force of the Act, upon the expiration of twenty-eight days after the publication of the declaration in the *Gazette*, be dissolved.

Section 8 provides that the instrument under the Act declaring a body of persons to be an unlawful association shall appoint a receiver of the property of that body and that upon the day upon which that instrument is published in the *Gazette* the property of that body shall, subject to the section, vest in the receiver.

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Section 15, which applies to the parliamentary declaration by s. 4 that the Australian Communist Party is an unlawful association and to bodies of persons declared to be unlawful associations by the Governor-General under s. 5, provides that it shall be the duty of a receiver of an unlawful association to take possession of the property of the association, to realize that property, to discharge the liabilities of the association and to pay or transfer the surplus to the Commonwealth.

The third branch comprises ss. 9 to 12 inclusive and relates to individuals. Section 9 (1) provides that the section applies to any person (*a*) who was, at any time after the specified date and before the date upon which the Australian Communist Party is dissolved by the Act, a member or officer of the Australian Communist Party ; or (*b*) who is, or was at any time after the specified date, a communist.

Section 9 (2) provides that where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, make a declaration accordingly. It seems to me, applying the same reasoning *mutatis mutandis* as in the case of s. 5 (2), that under s. 9 (2) the Governor-General, before he could make a declaration, would have to be satisfied that a person is a person to whom the section applies and that that person is engaged or likely to engage in activities which are either prejudicial to the security and defence of the Commonwealth or to be satisfied that that person is engaged or likely to engage in activities which would be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth, and that he could be satisfied that that person is engaged or likely to engage in activities prejudicial to both these purposes. The section does not prescribe the contents of the declaration, but it does provide that the Governor-General shall make a declaration accordingly. In the case of s. 9, therefore, unlike s. 5, it would be necessary for the Governor-General specifically to state the grounds of his satisfaction.

Section 9 (3) provides that the Executive Council shall not advise the Governor-General to make such a declaration unless the material upon which the advice is founded has first been considered by the committee therein mentioned (this is the same committee as that mentioned in s. 5 (3)). Under this sub-section,

as in the case of s. 5 (3), the committee acts in a purely executive capacity and the threatened person is not given an opportunity to appear before it or see or criticize or deny or supplement the material on which the advice is based.

Section 9 (4) provides that a person in respect of whom such a declaration is made may, within the specified time, apply to the appropriate court to set aside the declaration on the ground that he is not a person to whom this section applies. This sub-section, like s. 5 (4), confers a right to apply to the court to have the declaration set aside on one ground only, and s. 9 does not confer a right to apply to a court to have the declaration set aside on the ground that the person was not a person who is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

Section 10 (1) provides that a person in respect of whom a declaration is in force under this Act—(*a*) shall be incapable of holding office under, or of being employed by, the Commonwealth or an authority of the Commonwealth; (*b*) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth; and (*c*) shall be incapable of holding an office in an industrial organization to which this section applies or in a branch of such an industrial organization.

Section 10 (3) provides that where the Governor-General is satisfied that a substantial number of the members of an industrial organization are engaged in a vital industry, that is to say, the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry or the power industry, or any other industry which, in the opinion of the Governor-General, is vital to the security and defence of Australia, the Governor-General may, by instrument published in the *Gazette*, declare that industrial organization to be an industrial organization to which this section applies.

Section 12 (1) provides that upon the publication under sub-s. (3) of s. 10 of the Act of an instrument declaring an industrial organization to be an industrial organization to which that section applies, any office in that industrial organization or any branch thereof held by a person in respect of whom a declaration is in force under this Act shall, by force of this Act, but subject to this section, become vacant. The section goes on to provide that if the officer applies to the court to have the declaration set aside he shall be suspended from office pending the determination of the application

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and, if the application is dismissed, the office shall become vacant on the date of dismissal.

The Act contains a number of other important provisions, but they are mostly ancillary to the provisions to which I have referred and the latter provisions are sufficient, I think, to indicate the manner in which the Act operates in its three main branches. The outstanding character of the Act is that, in the words of *Knox* C.J. in *Ex parte Walsh and Johnson* (1), the enactment in its main provisions " prohibits no act, enjoins no duty, creates no offence, imposes no sanction for disobedience to any command, prescribes no standard or rule of conduct ". It operates to dissolve the Australian Communist Party and to forfeit its property to the Commonwealth, and to make other bodies of persons who were in the prescribed period or are likely to be tainted with communism, corporate or unincorporate, liable to be dissolved and their property forfeited to the Commonwealth, and to make persons who were in the prescribed period or are communists liable to be deprived of important contractual rights without creating any offence the commission of which will entail such consequences, and indeed without proof that they have committed any offence against any law of the Commonwealth, without a trial in any court, and without such bodies or persons having any right to prove that they have not done anything prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. In the case of s. 5 (2), it is provided that the Governor-General must be satisfied that a body of persons is a body to which the section applies and that the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or the execution or maintenance of the Constitution or of the laws of the Commonwealth. In the case of s. 9 (2), it is provided that the Governor-General must be satisfied that the person is a person to whom the section applies and that that person is engaged in, or is likely to engage in, activities prejudicial to such security and defence or to the execution or maintenance of the Constitution and of such laws. In the case of s. 4 there need be no similar satisfaction and the basis of the section is that Parliament is satisfied from material within its knowledge, as the ninth recital indicates, that it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth that the Australian Communist Party should be dissolved and its property forfeited to the Commonwealth.

(1) (1925) 37 C.L.R., at p. 69.

Accordingly the Act is in effect an assertion by Parliament that it can decide for itself or leave it to some authority other than a judicial organ of the Commonwealth to decide that facts exist which are sufficient in law to create a nexus between the particular legislation and such one or more of the constitutional legislative powers of the Commonwealth as are relied upon to support the legislation. Such an assertion raises a constitutional question of profound importance.

It was contended on behalf of the defendants that such an assertion does not arise in the case of ss. 5 (2) and 9 (2) because these sub-sections on their true construction impose a condition which does not make the satisfaction of the Governor-General conclusive as to the whole proposition formulated in sub-s. (2), but makes it necessary that certain elements should exist in fact and in law. Thus according to the contention it would be necessary in the case of s. 5 (2) that the continued existence of the body of persons would be in fact and law prejudicial to what is defence in fact and law, and in the case of s. 9 (2) that the persons are engaged or are likely to engage in activities which are in fact and law prejudicial to what is defence in fact and law. In my opinion it is impossible to place such a construction on the sub-sections. The plain grammatical meaning of their provisions is that the Governor-General is to have an unfettered administrative discretion to decide whether the continued existence of the body of persons would be prejudicial or the person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. Further, if there could be any doubt, it is entirely removed by the provisions of ss. 5 (4) and 9 (4), giving the declared bodies of persons and persons the right to have the declarations set aside on the ground that they are not bodies or persons to whom the sections respectively apply. It would be altogether unreasonable to attribute to Parliament an intention that the satisfaction of the Governor-General should be open to review to this limited extent if it were intended that it was to be open to review in other respects. The words are apt and apt only to leave the whole decision to the Governor-General without any qualification. See the illustrations of the effect of similar expressions given by Lord *Atkin* in *Liversidge* v. *Anderson* (1). The effect of such a discretion in the case of a Minister of the Crown is described by Lord *Greene* M.R. in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* (2) as follows: " every Minister of the

(1) (1942) A.C., at pp. 232, 233. (2) (1947) 177 L.T. 455, at p. 459.

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Crown is under a duty, constitutionally, to the King, to perform his functions honestly and fairly, and to the best of his ability; but his failure to do so, speaking quite generally, is not a matter with which the courts are concerned at all. As a Minister, if he acts unfairly, his action may be challenged and criticized in Parliament". This description would, I should think, apply *a fortiori* to a discretion given to the Governor-General, that is, to the Governor-General acting with the advice of the Federal Executive Council. Sections 5 and 9 express a plain intention to keep the courts out of the arena except to the limited extent prescribed. Parliament has sought to decide for itself or to confer on the Governor-General power to decide whether the continued existence of certain bodies of persons or the activities of certain individuals is prejudicial to the security and defence of the Commonwealth or the execution and maintenance of the Constitution or of the laws of the Commonwealth. But it is clear to my mind that it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation. In the case of some legislative powers it may only be necessary that one fact should exist. In the case of s. 51 (xix.) it is sufficient that a person is in fact and law an alien to authorize the Parliament to subject him to a law which is in character and effect a law with respect to aliens. In the case of s. 51 (xxvii.), it is sufficient that a person is in fact and law an immigrant to authorize the Parliament to subject him to a law which is in character and effect a law with respect to immigration. In the case of s. 51 (xxxv.), there must be an industrial dispute which is in fact and law an industrial dispute extending beyond the limits of any one State before the Parliament can legislate under this paragraph. The principle is the same in the case of the defence power, s. 51 (vi.). If legislation under this power is challenged, the Court must be satisfied that the fact or facts exist which bring the legislation within the scope of the power. As the power is one of indefinite extent and expands and contracts according to the dangers to the security of Australia that exist from time to time, the power is peculiarly one with respect to which it is the duty of the Court to be satisfied of such facts. The commencement of hostilities, especially if the conflagration is widespread and in close proximity to Australia, authorizes legislation which would not be justified in times of peace. In recent years it has been the duty of the Court during the second world war and its aftermath to decide on numerous occasions whether legislation was within the scope of the defence power. In those years

the problem was to determine its extent during hostilities and during the period of transition from hostilities to peace. In times of peace Parliament can pass all legislation reasonably necessary to prepare for war, and it is clear, I think, that the extent of the power will increase in times of peace where the international situation is such that it can reasonably be apprehended that hostilities, especially hostilities on a large scale, are likely to break out in the near future. As *Dixon* J. succinctly said in *Sloan* v. *Pollard* (1), the operation of the defence power and the ascertainment of the practical measures which it authorizes " must continue to depend upon the facts as they exist from time to time ". It is not the function of the Court to decide what measures are required from time to time. Questions of policy are not for the Court but for the Parliament and the Executive. But it is the imperative duty of the Court to examine the character and effect of the law and decide whether it is a law with respect to the naval and military defence of the Commonwealth. During hostilities there are many facts which in the public interest cannot be disclosed, and it is necessary that the Parliament and the Executive charged with the defence of the nation should be accorded the widest possible latitude of discretion. In this period the Court should, in my opinion, uphold the legislation if, in accordance with the test laid down in *Farey* v. *Burvett* (2), per *Isaacs* J., " the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence ". In peace time the public interest is not usually such that the relevant facts cannot be disclosed and the test may possibly be more aptly described by substituting the word " reasonably " for the word " conceivably ", and in peace time the legislation, to be reasonably capable of aiding defence, must be reasonably necessary for the purpose of preparing for war. But the distinction is a slight one (*Peacock's Case* (3)).

It follows from what I have said that, in order that s. 4 of the *Communist Party Dissolution Act* could be authorized by the defence power, it must be proved that facts existed on 20th October 1950 which made it reasonably necessary in order to prepare for the defence of Australia that as a preventive measure the Australian Communist Party should be dissolved and its property forfeited to the Commonwealth. The validity of this section raises a problem which is, I think, similar to those which arise with respect to ss. 5 and 9 of the Act, for there is in essence no distinction between

(1) (1947) 75 C.L.R., at p. 471.
(2) (1916) 21 C.L.R., at p. 455.
(3) (1943) 67 C.L.R., at pp. 48, 49.

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Parliament acting in this way on its own initiative and Parliament delegating the initiative to some person or body. This leads to a consideration of the effect of the recitals. In a valid Act recitals should have, in my opinion, the effect that Parliament intends them to have. Parliament can, if it expresses a clear intention, make the facts narrated in the recitals conclusive for the purposes of the Act whether such facts are correct or not. But ordinarily recitals would at most be taken for truth until contradicted and are therefore only prima-facie evidence of the facts: *Halsbury's Laws of England*, 2nd ed., Vol. 31, pp. 568, 569; *Maxwell* on *The Interpretation of Statutes*, 9th ed. (1946), p. 319; *Craies* on *Statute Law*, 4th ed. (1936), pp. 41-44. But where the constitutional validity of an Act is impeached, it is difficult to see how the recitals could be in any different position to the operative part of the Act. In *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1), the Privy Council pointed out that the burden rests on those who affirm that the capacity to pass an Act was put within the powers of the Commonwealth Parliament to show that this was done. The Commonwealth Parliament cannot by including recitals in an Act discharge this burden. Accordingly, where the constitutional validity of an Act is in issue, the recitals cannot, in my opinion, be more than a statement of the reasons why Parliament enacted the law. They indicate to the Court what Parliament believes to be the constitutional basis of the Act.

As the Chief Justice said in the *Uniform Tax Case* (2), "The Court should treat this expression of the view of Parliament with respect . . . But such a declaration cannot be regarded as conclusive". Where the constitutional validity of an Act is challenged, it is the actual facts and only the actual facts which count and the real question that arises is as to the actual facts which are relevant and the legal effect of those facts. During the recent hostilities the only facts before the Court were, in most of the cases, notorious public facts of which the Court could take judicial notice. They were few in number and were confined to such facts as that hostilities were raging, the proximity to Australia of the conflict from time to time, the need for production of war materials, the necessity of making the best use of the available manpower, and the effect upon the national economy of the large number of men and women engaged in the armed forces and the production of munitions and the shortage of essential civilian requirements, particularly houses and certain kinds of goods. It

(1) (1914) A.C., at pp. 254, 255; 17 C.L.R., at p. 653.

(2) (1942) 65 C.L.R., at p. 432.

was the existence of these facts or some of them which induced the Court to hold that many regulations under the *National Security Act* were valid during hostilities which in times of peace would be beyond the scope of the defence power. But it does not seem to me that the Court should be confined to notorious public facts of which it can take judicial notice. All the facts which are relevant to the decision of the constitutional issue must be admissible in evidence and the fact that the Court can take judicial notice of some facts merely expedites the manner of their proof. The facts which are not capable of proof in this way must be proved in such other ways as the laws of evidence allow. Such facts were proved and acted upon in *Jenkins* v. *The Commonwealth* (1) and in *Sloan* v. *Pollard* (2).

Could there be any relevant facts, notorious or otherwise, sufficient to bring the *Communist Party Dissolution Act* within the scope of the defence power on 20th October 1950 ? In my opinion there could not. The defence power in peace time authorizes any legislation which is reasonably necessary to prepare for war, including, as I have said, any legislation which would be authorized by an expansion of the power in view of the increasing probability of imminent war. Any conduct which is reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power. Amongst such conduct there could be included, I should think, most, if not all, of the serious misdoings with which communist bodies and communists are charged in the recitals. But the legislation would have to define the nature of the conduct and the means adopted to combat it, so that the Court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose. The *Communist Party Dissolution Act* does none of these things. On the basis of an assertion by Parliament or the Executive that communist bodies and communists are acting and are likely to act in a manner prejudicial to security and defence the Act proceeds to dissolve these bodies and deprive communists of certain contractual rights. Section 4 of the *Communist Party Dissolution Act* is in substance simply a law for the winding up of the Australian Communist Party and distribution of its assets. Section 5 is in substance simply a law for the winding up of the bodies therein mentioned and distribution of their assets. Sections 9, 10 and 14, which are

(1) (1947) 74 C.L.R. 400. (2) (1947) 75 C.L.R. 445.

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interdependent and must be read together, are in substance simply a law for the deprivation of certain individuals of certain contractual rights. Legislation for the winding up of bodies corporate and unincorporate and the distribution of their assets and for the deprivation of individuals of contractual rights is not legislation which in general falls within the sphere of the Commonwealth Parliament but is reserved to the States. As was said by this Court in *R.* v. *Foster* (1) in analogous circumstances, " 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 also *The University Case* (2); *The Industrial Lighting Regulations Case* (3); *Crouch* v. *The Commonwealth* (4). Sections 4, 5, 9 and 10 of the *Communist Party Dissolution Act* can only come within the defence power if legislation with respect to them is legislation upon incidents in the exercise of the defence power. The defence power can only invade subjects which are in most respects within the domain of State legislation to the extent to which it is reasonably necessary to do so for the purposes of defence. It is therefore largely a matter of degree. The overt acts set out in the recitals alleged to be prejudicial to the security and defence of Australia are that the Australian Communist Party is part of a world communist revolutionary movement which engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature and promotes strikes and stoppages of work and so retards production in vital industries and by inference interferes with preparing Australia for war. But none of this conduct is prevented or prohibited or made an offence by the operative provisions of the Act. If the Act did this, the Court could consider the conduct prohibited and decide whether it was capable of being so prejudicial and, if it considered that it was, pronounce in favour of the constitutional validity of the Act. As a preventive measure the Act could then provide that injunctions should be granted restraining bodies of persons or persons so conducting themselves and as a punishment the Act could provide that bodies of persons or persons convicted of such conduct in a court should be punished, *inter alia*, in the manner provided by the *Communist Party Dissolution Act* or in some other manner. In my opinion legislation to wind up bodies corporate or unincorporate and to dispose of their assets

(1) (1949) 79 C.L.R., at p. 81.
(2) (1943) 67 C.L.R., at pp. 113-115.
(3) (1943) 67 C.L.R., at pp. 427, 428.
(4) (1948) 77 C.L.R., at p. 350.

or to deprive individuals of their civil rights or liberties on the mere assertion of Parliament or the Executive that they are conducting themselves in a manner prejudicial to security and defence, is not authorized by the defence power or the incidental power in peace time. Legislation of this nature can only be valid in times of grave crisis during hostilities waged on a large scale, and it must, even then, be limited to such preventive steps as are reasonably necessary to protect the nation during the crisis.

Two cases which were much canvassed during the argument were *Lloyd* v. *Wallach* (1) and *Ex parte Walsh* (2). In my opinion the legislation there upheld is legislation which could only be justified during such a crisis. In *Lloyd* v. *Wallach* (3) *Isaacs* J. said that the essence of the regulation was the power of detention in military control of naturalized persons where there was reason to believe they were disaffected or disloyal. This regulation was limited to naturalized persons, but the regulation in *Ex parte Walsh* (2) extended to any person with respect to whom the Minister was satisfied that he should be detained with a view to preventing that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth. These cases are strictly only decisions that the regulations there in question were authorized by the *War Precautions Act* and the *National Security Act* respectively, and the nature and extent of the defence power itself was not discussed. But it necessarily follows, I think, from these decisions that it is incidental to defence that during such a crisis a person should be detained without a trial and without having been charged with any offence where a minister is satisfied that he is disloyal (*Little* v. *The Commonwealth* (4)). The case of *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth* (5) was also much canvassed during the argument. The Court was there concerned with certain provisions of the *Trading with the Enemy Act* 1914. Legislation which prohibits or regulates trading with the enemy in war time is obviously within the defence power. It is unnecessary for me to express any opinion upon the correctness of the views expressed by the Court upon the points under the *Trading with the Enemy Act* which actually arose during the argument. Assuming the case was rightly decided, it is not a case that has any bearing upon the extent of the defence power in peace time. It deals with matters which may be left to the judgment of the Executive during hostilities. I cannot, however,

(1) (1915) 20 C.L.R. 299.
(2) (1942) A.L.R. 359.
(3) (1915) 20 C.L.R., at p. 307.
(4) (1947) 75 C.L.R. 94.
(5) (1916) 22 C.L.R. 268.

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agree with the statement of *Isaacs* J. (1) that defence includes every act which, in the opinion of the proper authority, is conducive to the public security. Such a principle was consistently repudiated by this Court in all the cases with respect to the defence power decided during the recent hostilities. Section 13A of the *National Security Act* 1939-1940 authorized the Governor-General to make such regulations making provision for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth as appeared to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which his Majesty was or might be engaged. The Court never considered itself bound by any such opinion of the Governor-General, but examined the operation of the regulations which were made pursuant to that opinion and itself determined whether the regulations were in their operation justified as delegated legislation under the defence power. See, for instance, *Reid* v. *Sinderberry* (2). The *Trading with the Enemy Act* at least laid down a standard of conduct because s. 3 provided that any person who traded with the enemy should be guilty of an offence. It is impossible, in my opinion, to rely on any of these cases when examining the scope of the defence power in peace time and, in any event, the legislation there discussed was legislation of a different character because in *Lloyd* v. *Wallach* (3) and *In re Walsh* (4) the persons detained were not deprived of their contractual or proprietary rights and in the *Welsbach Case* (5) the person had to be convicted of an offence against the Act before he could be imprisoned or fined or his property confiscated.

The case of *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (6) was also much canvassed during the argument. In that case regs. 3 to 6B, both inclusive, of the *National Security* (*Subversive Associations*) *Regulations* were held by *Rich* J. and myself to be beyond the powers conferred by s. 51 (vi.) of the Constitution and the *National Security Act* respectively. *Starke* J. held that the regulations as a whole were inseverable and wholly invalid because they were beyond the powers conferred by the *National Security Act*. His Honour said " Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the Executive Government. The operative clauses of the regulations, such as

(1) (1916) 22 C.L.R., at p. 280.
(2) (1942) 68 C.L.R., at pp. 511, 515, 516, 521.
(3) (1915) 20 C.L.R. 299.
(4) (1942) A.L.R. 359.
(5) (1916) 22 C.L.R. 268.
(6) (1943) 67 C.L.R. 116.

the provision relating to bank credits, forfeitures and unlawful doctrines have little, if any, real connection with the defence of the Commonwealth or the efficient prosecution of the war. Accordingly, in my judgment, the regulations are beyond the power conferred upon the Governor-General in Council by the *National Security Act* 1939-1940, *and, even if enacted by the Parliament itself, they would, I venture to think, transcend the powers conferred upon the Parliament by the Constitution* " (1). (The italics are mine.) The regulations there in question provided that any body corporate or unincorporate, the existence of which the Governor-General, by order published in the *Gazette*, declared to be in his opinion prejudicial to the defence of the Commonwealth or the efficient prosecution of the war was thereby declared to be unlawful. The regulations declared such a body to be dissolved and authorized the seizure of its property and its forfeiture to the King for the use of the Commonwealth. The effect of the forfeiture was to destroy even the rights of creditors against the forfeited property. The power of the Governor-General to make the declaration did not depend upon the body carrying on activities which were in fact prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. It depended upon his mere opinion that the existence of the body had this effect. My own opinion was, and still is, that during the emergency created by a world war the defence power is wide enough to authorize a law empowering Parliament or the Executive to place such a body like an individual in a state of preventive detention, but that the power is not wide enough to authorize a law empowering Parliament or the Executive on its mere *ipse dixit* to liquidate an individual or body or forfeit his or its assets to the Crown. I repeat the views expressed that " For the purposes of defence the Commonwealth can in times of war pass legislation affecting the rights of the States and of their citizens and corporations under State laws to a greater extent than it can in times of peace (*South Australia* v. *The Commonwealth* (2)). But the extent to which it can entrench upon these rights is limited by the reasonable necessities of defence during the period of the war. If it is necessary for the Commonwealth to acquire such property, it can do so subject to s. 51 (xxxi.) of the Constitution. But the mere fact that the corporation or individual or body of individuals is carrying on some activity, which, in the opinion of Parliament or of some Minister, is prejudicial to the defence of the Commonwealth, cannot, in my opinion, conceivably require that the Commonwealth should enact that the property of such

(1) (1943) 67 C.L.R., at p. 154. (2) (1942) 65 C.L.R., at p. 468.

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corporation or individual or body should be forfeited to the Crown, and the rights of all corporators and creditors in that property under State laws completely destroyed." (1).

The fact that the *Communist Party Dissolution Act* preserves the rights of creditors would not, in my opinion, distinguish this Act from the Subversive Associations Regulations. Further, the Act was not passed during hostilities but in peace time and my remarks apply *a fortiori* in times of peace. There is a wide gulf between the reasonable necessities of defence in peace time, even where there is an imminent threat of hostilities, but hostilities have not begun, and during war time. An imminent threat of hostilities would no doubt authorize many precautionary measures, but could not authorize measures which would be beyond the scope of the defence power after hostilities had broken out. Before ss. 4, 5, 9 and 10 of the *Communist Party Dissolution Act* could be held to be valid, the *Jehovah's Witnesses Case* (2) would need to be in effect overruled. They are not, in my opinion, valid exercises of the defence power or the incidental power in relation thereto.

The next question is whether the three main branches of the Act are authorized by s. 61 of the Constitution and the incidental power s. 51 (xxxix.) of the Constitution. Section 61 provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The execution of the Constitution in the section " means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation " (*The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (3)). The maintenance of the Constitution therefore means the protection and safeguarding of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation. The execution and maintenance of the laws of the Commonwealth must mean the doing and the protection and safeguarding of something authorized by some law of the Commonwealth made under the Constitution. The executive power of the Commonwealth at the date of the Constitution presumably included such of the then existing prerogative powers of the King in England as were applicable to a body politic with limited powers. But it is clear that at the date of the Constitution the King had no power by the exercise of his prerogative to dissolve bodies corporate or unincorporate or forfeit

(1) (1943) 67 C.L.R., at p. 163.
(2) (1943) 67 C.L.R. 116.
(3) (1922) 31 C.L.R., at p. 432.

their assets to the Crown or to deprive his subjects of their contractual or proprietary rights. Such action on his part would have been contrary to *Magna Carta* and the subsequent Acts re-affirming *Magna Carta* referred to in *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 450. Such powers to be valid would have to be conferred upon the Executive by a valid law of the Commonwealth Parliament. In *Burns* v. *Ransley* (1) *Latham* C.J. said that s. 51 (xxxix.) of the Constitution authorizes the Commonwealth Parliament "to make laws with respect to matters incidental to the execution of any power vested by the Constitution . . . in the Government of the Commonwealth . . . or in any department or officer of the Commonwealth. Under this provision the Commonwealth Parliament may make laws to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers (see *R.* v. *Kidman* (2))." Most, if not all, of the conduct referred to in the recitals could, I should think, be classed as conduct reasonably capable of obstructing the government in its powers and duties of executing and maintaining the Constitution and the laws of the Commonwealth, so that it would be an exercise of the incidental power to pass laws preventing or prohibiting or regulating such conduct. But the same difficulty again arises as that discussed in dealing with the defence power and the incidental power in relation thereto that ss. 4, 5, 9 and 10 of the *Communist Party Dissolution Act* do not define the conduct alleged to be prejudicial to the execution or maintenance of the Constitution or the laws of the Commonwealth or the means of combating it. In this respect they differ from the legislation under discussion in *Burns* v. *Ransley* (3) and *R.* v. *Sharkey* (4) because that legislation defined conduct the prevention of which could be seen to be reasonably incidental to combating obstructions to the execution of powers vested by the Constitution in the Parliament and the Government of the Commonwealth so that the legislation was authorized by the incidental power. All that the sections do is to provide for the winding up of certain bodies, and the forfeiture of their assets to the Commonwealth, and for the deprivation from certain persons of certain contractual rights because Parliament or the Governor-General is satisfied the further existence of those bodies or the activities or likely activities of those persons would be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth. But it is the function of the Court and not of Parliament or the Executive to decide whether

(1) (1949) 79 C.L.R., at pp. 109, 110.
(2) (1915) 20 C.L.R., at p. 440.
(3) (1949) 79 C.L.R. 101.
(4) (1949) 79 C.L.R. 121.

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the conduct complained of is of such a nature that it could reasonably be capable of interfering prejudicially with the powers and duties of the Executive under s. 61 and therefore be conduct with respect to which Parliament could legislate under s. 51 (xxxix.). Accordingly, these sections are not valid exercises of that power in relation to s. 61 of the Constitution.

From what I have said it naturally follows that, in my opinion, the provisions of the *Communist Party Dissolution Act* are invalid except possibly so far as a declaration could be made under s. 9 which would be effective with respect to s. 10 (1) (*a*) and (*b*) of the Act and also s. 14, which provides that an agreement shall not be made by the Commonwealth or by an authority of the Commonwealth with a person in respect of whom a declaration is in force under the Act under which a fee or other remuneration is payable in respect of the services of that person. Section 9 could only apply even to this limited extent to a person who, in accordance with s. 9 (1) (*b*), is or was at any time after the specified date a communist, because s. 9 (1) (*a*) could have no meaning, since the Act fails to dissolve the Australian Communist Party. The Act purports, as I have said, to rely on the constitutional powers contained in s. 51 (vi.) and (xxxix.) and s. 61 of the Constitution, but this would not prevent the Act being valid to the extent to which it could be upheld by any other constitutional power (*Moore* v. *Attorney General of the Irish Free State* (1)). The Commonwealth has full power under the Constitution to determine whom it shall employ and with whom it shall enter into contracts, so that it would seem that the Act may be valid to this extent. But no civil servant employed by the Commonwealth or any authority of the Commonwealth was represented before us and the question of the validity of these provisions should, I think, be reserved.

I would therefore answer questions 1 (*a*) and (*b*) in the negative, and question 2 that the whole of the provisions of the *Communist Party Dissolution Act* are invalid except the sections subject to this reservation.

WEBB J. Section 4 of the *Communist Party Dissolution Act* declares the Australian Communist Party unlawful for the reasons stated by Parliament in the recitals, which link that Party with, among other things, espionage, sabotage and other treasonable activities. Sections 5 (2) and 9 (2) provide for declarations against bodies of persons, other than registered industrial organizations, whose existence is, and against individuals whose activities are, or

(1) (1935) A.C. 484, at p. 498.

are likely to be, shown, to the satisfaction of the Governor-General, to be prejudicial to (1) the security and defence of the Commonwealth; or (2) the execution or maintenance of the Constitution or of the laws of the Commonwealth; and who in effect are bodies dominated by, or are under the influence of the Australian Communist Party, or who are communists, or were such after 10th May 1948. Such declarations are followed by the dissolution (ss. 4 and 6) and the forfeiture of the property of such bodies (s. 15), and, in the case of individuals, by the disqualification from office or employment in the Commonwealth public service, including the defence force, and from office in industrial organizations associated with vital industries, including coal-mining, iron and steel, engineering, building, transport and power (ss. 10 and 14). Section 7 is directed to preventing the activities of the dissolved bodies from being continued by individuals. A declared body or person is given a right to apply to a court to show the section does not apply to it or him (s. 5 (4) and s. 9 (4)).

Section 27 indicates that the Act may continue in force when it is required for (1) or (2) above; not because it ceases to be within power, but because of the absence of any further necessity for it in the opinion of the Governor-General. That distinction between the power and the necessity is immaterial in ascertaining the intention of Parliament in s. 27. The conclusion I draw from that section and the recitals is, that if the Act is to have full operation it must be shown to be supported both by the defence power in s. 51 (vi.) and by the incidental power in s. 51 (xxxix.) of the Commonwealth Constitution. If it is valid as an exercise of one power, but not of the other, the question of severability arises.

It may be that in some circumstances legislation for the execution and maintenance of the Constitution and of the laws of the Commonwealth would be within the defence power, and not within the incidental power; although I find it difficult to see how the power to legislate to protect the Constitution and the laws of the Commonwealth can be greater under the defence power than under the incidental power. What is incidental is a question of degree, which might be greater in war time but is still within the incidental power. A different position would arise if the words in ss. 5 (2) and 9 (2) "prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth" constituted a single composite expression. If they did either power could support both sections, as the class of conduct would then be so limited as to come within either power. As regards the defence power the requirement that

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the conduct should also be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth would be a mere limitation. So, too, as regards the incidental power, the requirement that the conduct should also be prejudicial to the security and defence of the Commonwealth would be a mere limitation: see *Ex parte Walsh and Johnson*; *In re Yates* (1). However, s. 27 shows that there are at least two composite expressions in the words quoted. This was accepted by the defendants.

Before dealing separately with these two powers I propose to consider three submissions of the plaintiffs: (1) that the Act is an infringement of s. 71 of the Constitution, which section requires the judicial power of the Commonwealth to be exercised only by the courts it specifies, and does not permit of its exercise by Parliament or the Governor-General; (2) that ss. 5 (2) and 9 (2) purport to give the Governor-General power by his unexaminable satisfaction, to enlarge the limits of the legislative power in s. 51 (vi.) and s. 51 (xxxix.), and so are invalid; and (3) that the Act infringes s. 92 of the Commonwealth Constitution, and is invalid.

I do not think that the *Communist Party Dissolution Act* is, or provides for, an exercise of the judicial power contrary to s. 71 of the Commonwealth Constitution. The parts of the Act which the plaintiffs submit constitute an infringement of s. 71 are the recitals, the declaration that the Australian Communist Party is unlawful and the provision for declarations in the case of certain other bodies, corporate and unincorporate, and individuals, the dissolution of such party and bodies and the appointment of receivers and forfeiture of their property, and the permanent disqualification of declared persons from Commonwealth offices and employment and from holding office in industrial organizations associated with vital industries. With the exception of the recitals and disqualifications of individuals, these provisions were included in the *National Security* (*Subversive Associations*) *Regulations*, which this Court dealt with in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (2). In that case *Latham* C.J. (3), *Starke* J. (4) and *McTiernan* J. (5) held that s. 71 was not infringed by those regulations. *Williams* J., with whom *Rich* J. (6) said he was disposed to agree, thought that certain provisions of the regulations which, however, are not repeated in the *Communist Party Dissolution Act*, infringed s. 71. As already stated, there were no recitals to those regulations or disqualifications of persons

(1) (1925) 37 C.L.R. 36.
(2) (1943) 67 C.L.R. 166.
(3) (1943) 67 C.L.R., at p. 138.
(4) (1943) 67 C.L.R., at p. 155.
(5) (1943) 67 C.L.R., at p. 157.
(6) (1943) 67 C.L.R., at p. 150.

similar to the recitals to, and disqualifications provided for in this Act; but I do not think that that is a material difference, as I am not prepared to hold that the recitals to this Act are actually an indictment, or a series of charges, and findings of fact, and reveal the attempted exercise of judicial power by Parliament; or that the disqualifications reveal any exercise of judicial power, if without them there is no such indication. There is nothing in the form of the recitals which suggests that they are anything more than Parliament's reasons for the enactment. That is the usual purpose of recitals, and we are not warranted in gratuitously treating them as an indictment and findings, so as to bring about the invalidity of the Act, or part of it, as being an infringement of s. 71 of the Constitution.

Nor do I think that the Act, or part of it, is invalid as purporting to confer on the Governor-General an unexaminable, and so uncontrollable, discretion to extend the limits of the legislative powers of the Commonwealth, more particularly by s. 5 (2) and s. 9 (2).

Section 5 (2) provides :—" Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association."

Section 9 (2) provides :—" Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth, or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, make a declaration accordingly."

In each of these sub-sections the Governor-General has to be satisfied that the continued existence of the body is, or the activities of the person are, or are likely to be, prejudicial in the way indicated. If the powers of the Federal Parliament were unlimited this satisfaction would, I think, be unexaminable. I draw that conclusion from the reasoning of their Lordships, including Lord *Atkin*, in *Liversidge* v. *Anderson* (1). It is not necessary for the plaintiffs to rely, as they do, on any approval of the dissenting speech of Lord *Atkin* that may appear in the judgment of Lord *Radcliffe* for the Privy Council in *Nakkudda Ali* v. *Jayaratne* (2).

(1) (1942) A.C. 206. (2) (1951) A.C. 66.

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But, as the powers of the Federal Parliament are limited, to make the Governor-General's satisfaction unexaminable as to whether such existence is, or such activities are, or are likely to be, prejudicial in the way indicated would purport to place him in the position of being able to exceed, without check, the limits of the powers of Parliament. Such legislation would be invalid. See *In re Walsh and Johnson*; *Ex parte Yates* (1). In that case, however, the words in s. 8AA (2) of the *Immigration Act*, "any person not born in Australia", were held by the whole Court to be confined to immigrants. For this construction *Isaacs* J. (2) relied on the maxim *ut res magis valeat quam pereat* and on *Macleod* v. *Attorney-General* (3). But his Honour (4) also applied that maxim and decision to the part of s. 8AA (2), which would make it an attempt to enlarge the constitutional area of the subject matter, i.e., the trade and commerce power in s. 51 (i.) of the Constitution; although a majority of the Court appear to me to have thought that that part of s. 8AA was invalid, except under the immigration power, because the Minister's opinion was made unexaminable.

However, in *Reid* v. *Sinderberry* (5) this Court had to consider s. 13A of the *National Security Act* 1939-1943. Section 13A provided that:—". . . the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth, as appears to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth . . . or the efficient prosecution of any war in which His Majesty is or may be engaged."

In a joint judgment *Latham* C.J. and *McTiernan* J. said:—"It is not necessary to construe the section as intended to provide that the opinion of the Governor-General should be made a criterion of constitutional validity. Regulations made under s. 13A cannot be valid unless they appear in the opinion of the Governor-General to be necessary or expedient for what may be described as purposes of defence. But the fact that the Governor-General has such an opinion still leaves open all questions of constitutional validity. A regulation, though complying in terms with the section as being necessary for defence purposes, in the opinion of the Governor-General, could nevertheless not be held to be valid if it was shown that the Governor-General could not reasonably be of opinion that the regulation was necessary or expedient for such

(1) (1925) 37 C.L.R. 36.
(2) (1925) 37 C.L.R., at p. 93.
(3) (1891) A.C. 455.
(4) (1925) 37 C.L.R., at pp. 96, 97.
(5) (1944) 68 C.L.R. 504.

purposes. It was not the intention of Parliament when it enacted s. 13A to authorize the making of regulations upon the basis of an opinion which no reasonable man could hold." (1).

Williams J., with whom *Rich* J. agreed, had no doubt that s. 13A was valid. The validity of the regulations—and necessarily of s. 13A—was unanimously upheld by the Court consisting of five Justices.

In *Stenhouse* v. *Coleman* (2) the Court consisting of five Justices unanimously upheld a Minister's order under reg. 59 of the *National Security* (*General*) *Regulations* made under s. 5 of the *National Security Act* 1939-1943. Section 5 provided :—" The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth . . . and for prescribing all matters which . . . are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged."

Regulation 59 provided :—" (1) A Minister, so far as appears to him to be necessary in the interests of the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide—(a) for regulating, restricting or prohibiting the production, . . . movement . . . distribution, sale, purchase . . . of essential articles " (" essential articles " was defined as meaning : " appearing to a Minister to be essential for the defence of the Commonwealth or the efficient prosecution of the war, or to be essential to the life of the community ").

An order by the Minister under this regulation requiring bakers and others to be licensed was held valid.

Latham C.J. said (3) :—" An identical argument was considered by this Court in *Reid* v. *Sinderberry* (4). There the Court considered s. 13A. . . . It was argued that this section was invalid because it purported to authorize the making of regulations which, though in the opinion of the Governor-General might be necessary for the purposes stated, yet were not in fact necessary for those purposes. My brother *McTiernan* J. and I . . . pointed out that the power of the Commonwealth Parliament in relation to defence was a power to make laws with respect to naval and military defence, and not a power to make laws with respect to any matter which in the opinion of a Parliament or of an authority to which Parliament might confide a power of subordinate legis-

(1) (1944) 68 C.L.R., at p. 512.
(2) (1944) 69 C.L.R. 457.
(3) (1944) 69 C.L.R., at p. 463.
(4) (1944) 68 C.L.R. 504.

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lation was naval or military defence. But we proceeded to say that the section should not be construed as intended to provide that the opinion of the Governor-General should be made a criterion of constitutional validity. . . . "

Dixon J., who was not a member of the Court in *Reid* v. *Sinderberry* (1), referring to s. 13A, said :—" But that is an enactment made under the constitutional power with respect to defence and cannot extend the power or affect the criteria or the materials that must be used in judging whether a regulation made by the Governor-General in Council falls outside the ambit of the constitutional power itself " (2).

It follows, I think, that if s. 13A was not invalid because of the scope it gave to the opinion of the Governor-General, s. 5 (2) and s. 9 (2) are not invalid because of the scope they give to the Governor-General's satisfaction. If the Governor-General's opinion was examinable for power under s. 13A his satisfaction is examinable for power under s. 5 (2) and s. 9 (2).

It is true that the Governor-General has to be satisfied of two things : (1) that the particular body or person is within s. 5 (1) or s. 9 (1), as the case may be ; and (2) that the existence of the body is, or that the activities of the person are, or are likely to be, prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or laws of the Commonwealth. It is also true that the right to apply to a court is given as to (1), while the Act is silent as to (2). However, as the decision of the Governor-General is always examinable for constitutional power, as Parliament knows, an express provision in the Act is not required for that purpose ; and so, I think, no implication arises from the apparently limited right to apply to a court given by s. 5 (4) and s. 9 (4) that excludes the application of any doctrine or rule of construction intended to sustain the constitutionality of statutes of legislatures with limited powers. Really the right to apply to a court is intended to liberalize the statute, i.e., to give such right when the declaration is within power. This does not, I think, render it more vulnerable to attack on constitutional grounds.

It may be thought that there are not only two but three matters on which the Governor-General must be satisfied in the case of persons under s. 9, the further matter being that the person is engaged, or likely to be engaged, in certain activities, apart from their prejudicial character ; but that would be, I think, a refinement having no effect on the inference to be drawn from the

(1) (1944) 68 C.L.R. 504.

(2) (1944) 69 C.L.R., at p. 470.

omission of this additional matter as a subject of a right to apply to a court. It would be like drawing a distinction between an offence and the acts which constitute it, and making them separate issues. In any event it would not apply to bodies under s. 5: a right to apply to a court on the question whether the applicant existed would be a quaint provision.

In the *Jehovah's Witnesses Case* (1) *Starke* J. thought that a regulation declaring unlawful any body, corporate or unincorporate, the existence of which the Governor-General declared to be in his opinion prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, standing alone, was not invalid.

In *Ex parte Walsh* (2) this Court, consisting of five Justices, in refusing special leave to appeal, unanimously treated reg. 26 (1) of the *National Security (General) Regulations* as valid.

Regulation 26 reads:—"The Minister may if satisfied with respect to any particular person that with a view to prevent that person acting in any manner prejudicial to the safety or the defence of the Commonwealth it is necessary to do so make an order (*c*) directing that he be detained in such place and under such circumstances as the Minister from time to time determines and any persons shall while detained, . . . be deemed to be in legal custody".

In that case the Court applied *Lloyd* v. *Wallach* (3), where, however, the regulation provided: "Where the Minister has reason to believe that any naturalized person is disaffected or disloyal he may . . . order him to be detained . . . ".

It will be observed that this regulation did not give the Minister power to explore and determine the limits of the defence power: disaffected and disloyal naturalized persons were clearly within the power. But the fact remains that reg. 26 (1) was unanimously treated as valid.

Ex parte Walsh (2), the *Jehovah's Witnesses Case* (4), *Reid* v. *Sinderberry* (5) and *Stenhouse* v. *Coleman* (6) were decided in war time. But a state of war does not enable the limits of the defence power itself to be extended by Parliament or its delegate. War does not change the meaning of words or the rules of construction. In my opinion, although the content of the defence power increases in war time according to the needs of the situation, there is no alteration by war of the concept of the power.

(1) (1943) 67 C.L.R., at p. 152.
(2) (1942) A.L.R. 359.
(3) (1915) 20 C.L.R. 299.
(4) (1943) 67 C.L.R. 116.
(5) (1944) 68 C.L.R. 504.
(6) (1944) 69 C.L.R. 457.

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In none of the four last-mentioned cases did their Honours find it necessary to state their reasons for what appears to me to have been a rejection of the views of the majority in *Ex parte Walsh and Johnson* (1). I respectfully suggest that their Honours impliedly adopted the reasoning of *Isaacs* J. in that case, and applied the maxim *ut res magis valeat quam pereat* and *Macleod* v. *Attorney-General* (2). But, whatever may have been their Honours' reasons, I intend to follow these four decisions as I understand them.

Then as to s. 92 : it affords protection to industrial organizations and their officials and employees ; but it cannot prevent the operation of the defence power or the incidental power under s. 51, for the same reasons that it cannot prevent the operation of the *Crimes Act.* The effect on inter-State trade, commerce or intercourse of laws made under the defence power or the incidental power is remote. Such laws do not regulate or prohibit inter-State trade, commerce or intercourse contrary to s. 92. They are not laws about inter-State movements or operations. The *Banks Case* (3) is distinguishable.

Dealing next with the defence power : the dissolution of bodies corporate and unincorporate, and the forfeiture of their property, are, the plaintiffs submit, such extreme measures as to be unrelated to the defence power and invalid in the absence of proof, or of judicial notice, of the matters in the recitals involving the Australian Communist Party. If Parliament had made offences of the things it seeks to prevent by this Act the extreme nature of any penalty it might have attached to those offences would not have been a ground for holding that the creation of the offences was beyond power ; but that, I suggest, would be because legal punishment is retributive as well as deterrent. If this Act is to be held valid it is because it is only preventive. If the measures taken by this Act were punitive they would call for the exercise of judicial power.

In the *Jehovah's Witnesses Case* (4) a majority of the Court held that certain regulations made under the *National Security Act* were beyond the defence power and invalid because they were, in their Honours' opinion, of such an extreme nature as to be unrelated to the power : they did not have a real connection with defence. The test of validity of Federal legislation is, I think, its real connection with the power of Parliament to legislate. See *Victoria* v. *The Commonwealth* (5), per *Latham* C.J.

(1) (1925) 37 C.L.R. 36.
(2) (1891) A.C. 455.
(3) (1950) A.C. 235 ; 79 C.L.R. 497.
(4) (1943) 67 C.L.R. 116.
(5) (1942) 66 C.L.R., at p. 508.

In the *Jehovah's Witnesses Case*, *Starke* J. said :—" Any body in respect of which a declaration is made is, by force of the declaration, dissolved. A regulation providing for the precautionary detention of individuals has been upheld under provisions such as in the *National Security Act*. . . . And, so I apprehend, could regulations controlling the activities or operations of any body mentioned in the *Subversive Associations Regulations*, as was done in the case of enemy subjects by the *Trading with the Enemy Act*. . . . But here are regulations of a temporary character which dissolve the body and wind it up. . . . And any property . . . is forfeited to the King. . . . It is not a precautionary detention of property, but a forfeiture of property to the Crown, though no offence is created. . . . A regulation might be legitimate if merely precautionary, but the operation of the Regulations . . . is to forfeit property to the Crown, even though the property be not that of the declared body but only used on behalf of or in its interests . . . Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the executive Government. The operative clauses . . . such as the provision relating to . . . forfeitures . . . have little, if any, real connection with the defence of the Commonwealth " (1). *Williams* J. said : " . . . the mere fact that the corporation or individual or body of individuals is carrying on some activity, which in the opinion of Parliament or of some Minister is prejudicial to the defence of the Commonwealth, cannot, in my opinion, conceivably require that the Commonwealth should enact that the property of such corporation or individual or body should be forfeited to the Crown and the rights of all corporators and creditors . . . destroyed " (2).

Rich J. said he was disposed to agree with the views of *Williams* J. *Starke* and *Williams* JJ. did not rely merely on the dissolution of bodies corporate and unincorporate, and on the forfeiture of their property : they relied also on the disregard of the rights of creditors and others. But I think it is fair to conclude from their reasoning that they would still have held the regulation bad even if the dissolutions and forfeitures had been prescribed without prejudice to the rights of creditors and other third parties. Their Honours contrasted the temporary war situation with the permanent consequences attached to the prejudicial conduct. This was, I think, the main line of their Honours' reasoning, and the real ground of their decision.

(1) (1943) 67 C.L.R., at pp. 152-154. (2) (1943) 67 C.L.R., at p. 163.

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Without the assistance of their Honours' judgments I would, I think, have come to a different conclusion on the ground that, once conduct comes within the defence power, Parliament is at liberty to attach to it whatever consequences it sees fit. In attaching extremely severe consequences Parliament might be guilty of an abuse of power. But the courts are not at liberty to forestall abuses of power by holding the legislation invalid. They can interfere only to prevent a usurpation of power. However, in this matter of reconciling defence requirements with the rights and liberties of individuals, I am satisfied to act upon the reasons shared by a majority of this Court in a relevant case, as I understand those reasons. Moreover, those reasons prevent a conclusion that mere suspects can lawfully be liquidated and their property confiscated. Further, I respectfully suggest that one should hesitate long before rejecting the reasoning of a majority for a decision of this Court in a case in point. That would be warranted if he were one of a majority holding the view that such reasoning was unsound ; but there is, as far as I am aware, no such majority in this case.

If, then, the *Communist Party Dissolution Act* can be connected only with a temporary situation, I think that the *Jehovah's Witnesses Case* (1) shows that ss. 4, 5, 6, 9, 10, 11 and 15, and indeed the rest of the Act, are beyond power and invalid. But if it can be connected with a more or less permanent state of things, then I see no reason why permanent consequences cannot validly be attached to the prejudicial conduct with which it deals, without recourse to punishment and the judicial power. If the Australian Communist Party can be shown to be what the recitals say it is, then it is an evil which constantly threatens, in peace as well as in war, the security and defence of the Commonwealth, as well as the maintenance and execution of the Constitution and of the laws of the Commonwealth ; and so it can validly be declared unlawful and dissolved and its property can validly be forfeited to the Commonwealth.

In *Ex parte Walsh and Johnson* (2) the deportation of an immigrant, even of a British subject, was held to be within the immigration power. That was because Parliament had plenary power to deal with immigration. It was also held that deportation was a preventive measure, and not punitive. But the defence power is also plenary. Moreover, the dissolution of bodies, whether corporate or unincorporate, and even the forfeiture of their property, are mild steps as compared with deportation.

(1) (1943) 67 C.L.R. 116.

(2) (1925) 37 C.L.R. 36.

Dissolution of a subversive body is an effective means of preventing meetings of the body, and the forfeiture of its property prevents the property from being used by the body for subversive purposes.

Subject to what I have to say later about s. 4 and ss. 5 and 9, I think the *Communist Party Dissolution Act* can validly be enacted in peace time. In peace time it is lawful to have a defence establishment and to take steps to protect it against spies, saboteurs, fifth columnists and the like. In other words, it is lawful to prepare for war, and the extent to which such preparations should be made is a matter of policy depending upon the judgment of Parliament on the information it has from time to time. A court is not at liberty, and is not in any case qualified, to revise that judgment of Parliament, which probably would be made, and properly so, on materials not admissible in evidence. And it is open to Parliament to legislate to prevent interference with those preparations by spies, saboteurs, fifth columnists and the like. The greater the preparations the more active are such persons likely to become. Parliament is not obliged to rely solely on the *Crimes Act* in dealing with them. It could, I think, legislate for the deportation of a spy, a saboteur, or a fifth columnist as a preventive step: see *Ex parte Walsh and Johnson* (1), per *Isaacs* J. (2), and per *Starke* J. (3). As an immigrant is at all times within the immigration power, so too is a spy, saboteur, or fifth columnist within the defence power at all times, even if he is a British subject.

I have already held that the satisfaction of the Governor-General under ss. 5 (2) and 9 (2) is examinable to see whether *in the particular case* there is a real connection with the power. The action of Parliament already taken in s. 4 against the Australian Communist Party is also examinable for power, and must be shown to have such real connection if it is to be held valid. Parliament having already acted in s. 4, it is for the Court now to see whether s. 4 has a real connection with the defence power.

Section 4 declares the Australian Communist Party unlawful, dissolves it and appoints a receiver of its property, with the consequence that the property is forfeited to the Commonwealth by s. 15. The reason for this action appears in the recitals; but the recitals alone do not establish a real connection with the power, although they give the reasons of Parliament for the legislation, and the Court must take these to be the true reasons. In a statute of a parliament of unlimited powers recitals are also

(1) (1925) 37 C.L.R. 36.
(2) (1925) 37 C.L.R., at p. 97.
(3) (1925) 37 C.L.R., at pp. 132, 133.

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prima-facie evidence.. (*Craies* on *Statute Law*, 4th ed. (1936), p. 39, and *Maxwell* on *The Interpretation of Statutes*, 7th ed. (1929), p. 269.) And I think they are prima-facie evidence in a statute of a parliament of limited powers where the statute deals with a matter within power. But the onus of proving that a statute of the Commonwealth Parliament, being a parliament of limited powers, is within power is on those who affirm its validity, where, as here, the Parliament assumes to exercise what are ordinarily State powers, i.e., the dissolution of a body and the forfeiture of its property, not being a corporation created by or under a statute of the Parliament (*Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1)). This burden of proof of constitutionality cannot be shifted by resorting to recitals : by putting the evidence and argument in recitals instead of to the courts. It is for the courts to examine and determine the question of constitutionality when that is challenged and for those who affirm constitutionality to prove it in the ordinary way.

I am not prepared to hold that the statements in the recitals involving the Australian Communist Party are notoriously true and judicially noticed. It is, I think, incontestable that when this Act was passed war among the Great Powers, with the Union of Socialist Soviet Republics on one side and the United Kingdom and the United States on the other side, was a distinct possibility within a few years ; and, further, that if it occurred it was not unlikely that Australia would become a belligerent on the side of the United Kingdom. It is also incontestable that communists generally were suspected by a large section of the community of the things imputed in the recitals to the Australian Communist Party. Such being the case it would have been reasonable that Australia should prepare for war on a vast scale, and take all precautions to protect those preparations, by legislation and otherwise, against espionage, sabotage and fifth-column and such like activities. The defence power, being plenary, authorizes measures of prevention as well as of punishment ; of prevention in the case of bodies and persons suspected of subversive conduct, and of prevention and punishment in the case of those proved to be so. In the recitals, however, no reference is made to the possibility of war ; nor is there any such reference in the enacting part of the Act. But that does not prevent this Court, in determining whether the Act is valid, from paying regard to a public situation or emergency, so far as it is judicially noticed, and its effect on the contents of the defence

(1) (1914) A.C., at p. 255 ; 17 C.L.R., at p. 653.

power. However, the possibility or probability of war among the Great Powers, involving Australia as a belligerent, is not a more or less permanent state of affairs calling for action having permanent consequences against mere suspects, such as dissolutions and forfeitures, and disqualifications from office in industrial organizations. Disqualification for the Federal public service and defence force is a matter within power in any circumstances.

As I understand that the defendants do not intend to offer evidence to support s. 4, I hold it is invalid, and so the question of severability arises, unless that intention is changed.

Section 15A of the *Acts Interpretation Act* 1901-1948 provides that: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

Before the enactment of s. 15A, if part of a statute was found to be outside power the whole Act would be invalid, if different consequences from what the legislature intended would result to persons and things affected by the part within power (see *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (1) per *Dixon* J.). It might appear that s. 15A means that the intention of Parliament as to such persons and things is to be disregarded if, nevertheless, the power exists to pass the enactment so far as it affects such persons and things: that the question is to be decided as one of power and not of the intention of Parliament. Of course, Parliament could not require the Court to become its draftsman and reframe the statute; but that is not involved if, when the section beyond power is eliminated, the remaining sections do not require redrafting to be made intelligible. Now if s. 4 is struck out as invalid the remaining sections are intelligible as they stand. But, before coming to any conclusion from this, it is desirable to consider the views expressed in judgments of this Court as to the effect of s. 15A.

In *Bank of New South Wales* v. *The Commonwealth* (2) *Dixon* J. said:—"The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail. To displace the application of this new presumption to any given situation arising under the statute by

(1) (1935) 51 C.L.R. 677, at p. 692. (2) (1948) 76 C.L.R., at p. 371.

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reason of the invalidation of part, it must sufficiently appear that the invalid provision forms part of an inseparable context. The general provision contained in s. 15A . . . produces this effect. . . . But in applying s. 15A . . . the courts have insisted that a provision, though in itself unobjectionable constitutionally, must share the fate of so much of the statute . . . as is found to be invalid, once it appears that the rejection of the invalid part would mean that the otherwise unobjectionable provision would operate differently upon the persons, matters or things falling under it or in some other way would produce a different result. This consideration supplies a strong logical ground for holding provisions to be inseverable. . . . For the inference in such a case is strong that provisions so associated form an entire law and that no legislative intention existed that anything less should operate as a law. Further, where severance would produce a result upon the persons and matters affected different from that which the entire enactment would have produced upon them, had it been valid, it might be said with justice that unless the legislature had specifically assented to that result, contingently on the failure of its primary intent, it could not amount to a law."

It is remarkable if the Australian Communist Party is what the recitals say it is and yet remains free to continue its traitorous activities, whilst bodies dominated or influenced by it are declared unlawful and dissolved and their property forfeited, and individuals are declared subversive and disqualified for office or employment in the Commonwealth public service and the defence force, and for office in industrial organizations in vital industries. Yet that follows if s. 4 is invalid and ss. 5 and 9 are not invalid. But the Act without s. 4 does not increase the liabilities of, or the consequences to, bodies or persons coming within other sections. They are exposed to no greater risk of action or to more serious consequences.

However, there is a further test suggested by *Dixon* J. in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (1), i.e., did uniformity of treatment enter into the determination of the legislative will? The answer is, I think, that there is no principle of construction favouring uniformity of treatment among spies, saboteurs, fifth columnists or subversive or traitorous persons.

I think the decisions on s. 15A, more particularly the two judgments referred to, though helpful, do not dispose of the problem, which is *sui generis*, due to the fact that Parliament has taken the unusual course of dealing directly with the Australian Com-

(1) (1935) 51 C.L.R., at p. 692.

munist Party. Parliament being in possession of information concerning the Party, as the recitals indicate, the Act may, perhaps, be regarded as providing merely for a division of responsibility between Parliament and the Governor-General, in which no legislative intention can be found inconsistent with that expressed in s. 15A. But it may also be taken to reveal that so determined was Parliament that the Australian Communist Party should be destroyed that it took the unusual course of itself declaring it unlawful, dissolving it and forfeiting its property; that it went to the source of the evil to eradicate it as an essential step in coping with the situation, leaving to the Governor-General the task of dealing with contaminated bodies and individuals. And if the destruction of the Party was regarded by Parliament as essential it is impossible to impute to Parliament the intention that, even if the Party should survive, its satellites should succumb. However, when Parliament, believing it is dealing with an evil, seeks to eradicate it, a court should be slow to attribute to Parliament the intention, in the absence of a clear indication to the contrary, that if its action against the evil fails in part it should wholly fail. Nevertheless, having regard to the Act as a whole, and more particularly to the recitals and to the fact that s. 5 (2) and s. 9 (2) are based on the assumption, express in the latter sub-section, and implied in the former, that the Australian Communist Party has been dissolved, I am unable to resist the conclusion that the dissolution of the Party was thought by Parliament to be essential, and such dissolution being of the essence of the scheme, that the operation of s. 15A is excluded.

It becomes unnecessary for me to deal further with the incidental power or with other matters argued but not dealt with above. However, I desire to state three propositions, based mainly on the plenary nature of the defence power, which, in my opinion, are incontestable: (1) that the purpose of Parliament may be expressed in a recital or preamble, as well as in the enacting part of a statute; (2) that in a preventive as distinct from a punitive statute a rule of conduct is not required (*Lloyd* v. *Wallach* (1) and *Ex parte Walsh* (2)); (2) that Parliament, as well as its delegate, may deal with a particular case, subject to the examination by the courts of the facts of the case for constitutional power; otherwise Parliament would have less power than its delegate.

By enacting a general statute, whilst having in mind the activities of the Australian Communist Party in particular, the Parliament might have empowered the Governor-General to deal with the

(1) (1915) 20 C.L.R. 299. (2) (1942) A.L.R. 359.

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Party among others, and in so doing ensured that any contest as to constitutional power would not be on the Act itself but on the action of the Governor-General under the Act. That, however, would have been a matter of choice and not of necessity.

I think the questions stated by *Dixon* J. should be answered :—

Question 1 (a). The decision of the question of the validity or invalidity of s. 4 of the Act depends upon a judicial determination or ascertainment of the facts without any limitation by the recitals.

Question 1 (b). The plaintiffs are entitled to adduce evidence to establish that s. 4 is outside the legislative power of the Commonwealth.

Question 2. In the absence of evidence by the defendants in support of s. 4 the whole Act is invalid.

FULLAGAR J. The *Communist Party Dissolution Act* 1950 received the Royal Assent on 20th October 1950. Immediately after its enactment a number of actions were commenced in this Court by persons and bodies of persons affected by its provisions. The object of the actions is to obtain declarations that the Act is invalid and injunctions to prevent action being taken under it to the prejudice of the plaintiffs. Applications for interlocutory injunctions came on for hearing before *Dixon* J., who granted certain injunctions and refused others, and stated a case for the opinion of the Full Court on certain questions, the answers to which may or may not finally dispose of the actions. The Act contains a preamble consisting of nine " recitals ", as they have been called. The plaintiffs deny the truth or accuracy of what is stated in a number of these recitals. They submit that the Act is invalid irrespective of the truth or accuracy of any of the recitals, but they maintain, alternatively, that its validity can only be supported on the footing that statements of fact contained in the recitals are true, and on this basis they desire to call evidence with a view to establishing that those statements are untrue or inaccurate. The questions stated for the opinion of the Full Court are—

" 1 (a) Does the decision of the question of the validity or invalidity of the provisions of the *Communist Party Dissolution Act* 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth ?

2. If no to either part of question 1, are the provisions of the *Communist Party Dissolution Act* invalid either in whole or in some part affecting the plaintiffs ? "

Before considering any of these questions, or even the proper approach to them, it is necessary to obtain a clear view of the substance of the provisions of the Act. Those provisions fall into three groups.

The central section of the first group is s. 4, which deals directly with the Australian Communist Party. The Australian Communist Party is defined by s. 3 as meaning the organization having that name on the specified date, which is 10th May 1948, " being the last day of the National Congress of the Australian Communist Party by which the constitution of the Australian Communist Party was adopted ". Section 4 declares that the Australian Communist Party is an unlawful association and is by force of the Act itself dissolved. A receiver is to be appointed by the Governor-General and all the property of the Australian Communist Party is vested in the receiver so appointed. The powers and duties of the receiver are prescribed by s. 15, and a number of sections follow, which contain ancillary provisions dealing with his position. His primary duty is to take possession of the property of the Party, to realize that property, to discharge the liabilities of the Party, and to pay or transfer the surplus to the Commonwealth. Section 7 (1) prohibits, under penalty of imprisonment, the doing of a number of specified acts by way of adherence to, or in support of, the Australian Communist Party.

The central section of the second group of provisions is s. 5. The terms of this section are elaborate. It is enough to say that it does not apply to any industrial organization registered under Commonwealth or State law, but does apply to all other bodies of persons corporate or unincorporate which (to put it extremely shortly and without any pretence to accuracy) are dominated by communists or by communist doctrine. Sub-section (2) provides that where the Governor-General is satisfied that a body of persons is a body of persons to which s. 5 applies *and* that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth *or* to the execution or maintenance of the Constitution *or* of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association. The Executive Council is not to advise the Governor-General to make a declaration unless the material upon which the advice is founded has first been considered by a committee consisting of

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certain designated persons. There is provision for an application to a court to set aside the declaration on the ground that the body is not a body to which s. 5 applies, but not on the ground that the continued existence of the body would be prejudicial to the matters mentioned in sub-s. (2). There is provision for the suspension of the consequences of the declaration pending the determination of the application. Section 6 provides that the effect of the declaration is to dissolve the body. Section 8 provides that the instrument making the declaration is to appoint a receiver of the property of the body, in whom the property of the body is to vest. Thereupon s. 15 and the other sections relating to receivers (to which I have already referred in connection with the first group of provisions) come into operation. Section 7, to which I have also already referred, also comes into operation in relation to the declared and dissolved body.

The centre of the third group of sections is s. 9. This section deals with individual persons, whereas s. 5 deals with bodies of persons. Section 9 applies to any person who was, after 10th May 1948 and before the dissolution of the Party by the Act, a member or officer of the Australian Communist Party or who is or was at any time after the specified date a communist. Subsection (2) provides that where the Governor-General is satisfied that a person is a person to whom s. 9 applies *and* that that person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth *or* to the execution or maintenance of the Constitution *or* of the laws of the Commonwealth, the Governor-General may, by instrument published in the *Gazette*, make a declaration accordingly. The Executive Council is not to advise the Governor-General to make a declaration unless the material upon which the advice is founded has first been considered by a committee consisting of the same persons as are designated in s. 5. Again, there is provision for an application to a court to set aside the declaration on the ground that the applicant is not a person to whom s. 9 applies, but not on the ground that he is not a person engaged or likely to engage in activities prejudicial to defence or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. There is also again provision for the suspension of the consequences of the declaration pending the determination of the application. Sections 10 and 14 provide for the consequences of the declaration. Section 10 provides that a declared person shall be incapable of holding office under or of being employed by the Commonwealth or an authority of the Commonwealth or of holding office as a member

of an incorporated authority of the Commonwealth. He is also to be incapable of holding office in an industrial organization (whether registered under Commonwealth or State law or not) to which s. 10 applies. Section 10 applies to industrial organizations declared by the Governor-General to be industrial organizations to which the section applies, and the Governor-General may make such a declaration in any case where he is satisfied that a substantial number of members of the organization are engaged in one of a number of industries specified as vital industries or in any other industry which, in the opinion of the Governor-General, is vital to the security and defence of Australia. Sections 11 and 12 contain ancillary provisions in connection with the vacating of offices in cases to which s. 10 applies. Section 14 provides that no contract or agreement shall be made by the Commonwealth or by an authority of the Commonwealth with a person, in respect of whom a declaration under s. 9 is in force, under which a fee or other remuneration is payable in respect of the services of that person.

The provisions of s. 27 should be noted in conclusion. Section 27 provides that where the Governor-General is satisfied that the continuance in operation of the Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution *and* of the laws of the Commonwealth, the Governor-General shall make a proclamation accordingly and thereupon the Act shall be deemed to have been repealed. There is an obvious ambiguity about this provision, but I should think it reasonably clear that what it really means is that the proclamation is to be made if, but not unless, the Governor-General is satisfied that neither the security and defence of Australia nor the execution and maintenance of the Constitution and of the laws of the Commonwealth require the continuance in operation of the Act.

The above brief analysis of the operative part of the Act discloses that there is a difference (which may turn out to be radical or may turn out to be of no substantial importance) between the first group of provisions on the one hand and the second and third groups on the other hand. Section 5 (2) and s. 9 (2), which are the respective keystones of the second and third groups, seem to invoke in terms two undoubted powers of the Parliament. There is a direct reference to the power given by s. 51 (vi.) of the Constitution to make laws with respect to defence, and there is a less direct reference to the power given by s. 51 (xxxix.) to make laws with respect to matters incidental to the execution of the powers vested by the Constitution in the Government of the Common-

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wealth. With regard to s. 4, however, which is the keystone of the first group, it seems quite clear that, if it be regarded *in vacuo* and without reference to extrinsic facts, it cannot be supported as an exercise of any power conferred by the Constitution on the Parliament. It is not possible by means of anything that appears on its face to relate it to any subject matter which is not left by the Constitution exclusively within the legislative powers of the States. In the argument before us much more time and attention were devoted to the second and third groups than to the first group. But both the long title and the short title of the Act, the preamble and the place of s. 4 in the forefront, show that the whole Act is directed primarily at the Australian Communist Party and communists, and one's first impression of the Act is that the fate of s. 4 is likely to seal, for weal or woe, the fate of the second and third groups of provisions.

The obvious need of s. 4 of legs upon which to walk, and the possible similar need of s. 5 (2) and s. 9 (2), did not, of course, go unnoticed by those who framed the Act, and it is the obvious purpose of the preamble, to which I have referred in passing, to supply the legs. The preamble, as I have said, contains nine "recitals". These fall into three classes. The first three recitals constitute the first class. They refer to the legislative powers of the Parliament. They recite (1) the legislative power given to the Parliament by s. 51 (vi.), the "defence power", (2) the conferring of executive power in the terms of s. 61, and (3) the conferring of the "incidental" legislative power in the terms of s. 51 (xxxix.) so far as it relates to the execution of powers vested by the Constitution in the Parliament of the Commonwealth or in the Government of the Commonwealth. The next five assert certain doctrines, aims and activities as doctrines, aims and activities of the Australian Communist Party and communists. The ninth and last purports to relate the enactment to the powers invoked by virtue of what is asserted in the fourth, fifth, sixth, seventh and eighth recitals. The aims and activities asserted in those recitals include the overthrow of established government in Australia by means of force, violence, intimidation and fraudulent practices, espionage and sabotage, and deliberate dislocation, disruption and reduction and retardation of production in industries vital to the security and defence of Australia. That such activities could be the subject of valid Commonwealth laws could, one would think, not be doubted. Some of them are indeed dealt with in Part IIA of the *Crimes Act* 1914-1946. But the great difficulty of the present case lies in the fact that the Act in question does not set out to deal

with those activities as such. It has an actual direct operation upon a particular association of persons specified by name, and a potential direct operation upon other associations and individuals who become subject to it by virtue of an expression of opinion by the Governor-General.

I think that the questions in the case are best approached by a general consideration of the powers invoked. It will be convenient to take the defence power first, because it has been much explored in recent years, and it possesses, I think, certain features which differentiate it from all or most of the other legislative powers.

In the first place, the power given by s. 51 (vi.) of the Constitution is given by reference to the purpose or object of the law and not by reference to some concrete subject matter. Perhaps the best-known statement to this effect is to be found in the judgment of *Dixon* J. in *Stenhouse* v. *Coleman* (1), where his Honour said that the power given by s. 51 (vi.) " involves the notion of purpose or object ". He said that the connection of any law with defence " can scarcely be other than purposive, if it is within the power ". He added : " No doubt it is possible that the ' purpose ' here may be another example of what Lord *Sumner* described as ' one of those so-called intentions which the law imputes : it is the legal construction put on something done in fact ' (*Commissioners of Inland Revenue* v. *Blott* (2)). For apparently the purpose must be collected from the instrument in question, the facts to which it applies, and the circumstances which called it forth." Here the obvious purpose of the preamble is to put forward facts to which the power applies and circumstances which call it forth. Whether it can achieve this purpose remains to be seen.

In the second place, and perhaps partly because of its " purposive " character, the power given by s. 51 (vi.) has two aspects. The tendency of the decisions of this Court, given in the course of two great wars and during the aftermath of each, has been to hold up the two aspects in sharp contrast one to another, and the dividing line between them has hitherto been regarded as sharp and clear—perhaps as sharper and clearer than it will ultimately be found to be. In its first aspect, s. 51 (vi.) authorizes the making of laws which have, as their direct and immediate object, the naval and military defence of the Commonwealth and of the several States. This power is clearly not confined to time of war : see, e.g., *Farey* v. *Burvett* (3), per *Isaacs* J. ; *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (4), per *Latham*

(1) (1944) 69 C.L.R., at p. 471.
(2) (1921) 2 A.C. 171, at p. 218.
(3) (1916) 21 C.L.R., at p. 453.
(4) (1943) 67 C.L.R., at pp. 132, 133.

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C.J.; *Hume* v. *Higgins* (1), per *Dixon* J.; and cf. the reference by *Williams* J. in *Koon Wing Lau* v. *Calwell* (2) to matters "which could reasonably be considered to be a threat to the safety of Australia in the event of some future war." It is obvious that such matters as the enlistment (compulsory or voluntary) and training and equipment of men and women in navy, army and air force, the provision of ships and munitions, the manufacture of weapons and the erection of fortifications, fall within this primary aspect of the defence power. These things can be undertaken by the Commonwealth as well in peace as in war, because they are *ex facie* connected with "naval and military defence". From any legitimate point of view of a court their only possible purpose or object is naval and military defence. An interesting (and perhaps border-line) example of this primary aspect of the defence power is to be found in *Attorney-General* (*Vict.*) v. *The Commonwealth* (3). But (with or without the aid of s. 51 (xxxix.)) the defence power in its primary aspect includes much more than the things I have mentioned. It could not, I think, be doubted that it includes a power to make laws for the prevention or prohibition and punishment of activities obstructive of the preparation by such means as I have mentioned of the nation for war—and this whether war appears to be imminent or the international sky to be completely serene. Here again, from any legitimate point of view of a court, the only possible purpose or object of such a law is naval and military defence. The possibility of some extrinsic purpose or ulterior motive cannot be investigated by a court (*Stenhouse* v. *Coleman* (4)). The law is a law with respect to defence.

What I have called the secondary aspect of the defence power has so far only been invoked and expounded in connection with an actual state of war in which Australia has been involved. It has hitherto, I think, been treated in the cases as coming into existence upon the commencement or immediate apprehension of war and continuing during war and the period necessary for post-war readjustment. In a world of uncertain and rapidly changing international situations it may well be held to arise in some degree upon circumstances which fall short of an immediate apprehension of war. In its secondary aspect the power extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence. Examples now familiar are the prices of goods and the rationing of goods, rents and the eviction of tenants, the transfer of interests

(1) (1949) 78 C.L.R., at pp. 133, 134.
(2) (1949) 80 C.L.R., at p. 585.
(3) (1935) 52 C.L.R. 533.
(4) (1944) 69 C.L.R., at p. 471.

in land, and the conditions of employment in industry generally. It may be that, on its true analysis, this secondary aspect of the defence power depends wholly on s. 51 (xxxix.) of the Constitution. On this view, the effect of a national emergency is that the matters which I have mentioned, and very many others, become " matters incidental to the execution " of the power of the Executive to deal with the emergency. Having in mind this secondary or extended aspect of the power, *Dixon* J., in *Andrews* v. *Howell* (1), said of the power given by s. 51 (vi.) :—" Though its meaning does not change, yet, unlike some other powers, its application depends upon facts, and, as those facts change, so may its actual operation as a power enabling the legislature to make a particular law. . . . The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power." Other passages to a similar effect could be cited. In such passages the " facts " referred to are the basic facts which give rise to the extension of the power. Such facts have always hitherto been matters of public general knowledge, and matters, therefore, of which a court can and will take judicial notice. But, given the basic fact of (say) war, the question will still arise, whenever the validity of a particular law is in question, whether that law can be related to the extended power, or whether it is a law with respect to a matter incidental to the power of the Executive to wage war. The matter is, in effect, taken in two stages. At the first stage, the existence of war or national emergency is recognized as bringing into play the secondary or extended aspect of the defence power. This is done simply as a matter of judicial notice, and it provides the justification for a presumption of validity which might not otherwise exist in the case of an enactment which on its face bore no relation to any constitutional power. At the second stage the enactment in question is examined with regard to its character as a step to assist in dealing with the emergency, and " the presumption is, so to speak, reinforced by the respect which the court pays to the opinion or judgment of the other organs of government, with whom the responsibility for carrying on the war rests. When, for example, it appears that a challenged regulation is a means adopted to secure some end relating to the prosecution of the war, the court does not substitute for that of the Executive its own opinion of the appropriateness or sufficiency of the means to promote the desired end " (per *Dixon* J. in *Stenhouse* v. *Coleman* (2)). The question which arises at this second stage may itself turn on

(1) (1941) 65 C.L.R., at p. 278. (2) (1944) 69 C.L.R., at p. 470.

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particular facts as distinct from the overriding general fact of war or national emergency. Such facts may relate to the operation of the law in question or to a state of affairs which calls for its enactment. Whether any and what evidence of such facts is admissible must depend on the circumstances of each particular case. In *Jenkins* v. *The Commonwealth* (1), and in *Sloan* v. *Pollard* (2), evidence was admitted. On the other hand, affidavits were rejected in the *Uniform Tax Case* (3) and in *R.* v. *Foster*; *Ex parte Rural Bank of New South Wales* (4), the Court in each case confining itself to matters of which judicial notice could be taken. The Court will normally, I think, so confine itself. In *Stenhouse* v. *Coleman* (5) *Dixon* J. said :—" Ordinarily the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge." The reasons why this must generally be so are stated in his Honour's judgment. The taking of evidence might often involve disclosures which would be prejudicial to the steps being taken by the Executive to deal with the emergency. The Court, in any case, is bound by the legal rules of evidence, and there are thus limitations upon the material which it can receive or take into account. It may perhaps be added that the " facts " will in many cases be of such a general character as to be difficult or impossible to prove or disprove by legally admissible evidence, while quite capable of being judicially noticed. It is indeed a characteristic of a large class of matters which are judicially noticed that they are of this general character. In *Holland* v. *Jones* (6), *Isaacs* J. said :—" Wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court ' notices ' it, either *simpliciter* if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt. The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not ' general ' but ' particular ' facts. . . . But, if the fact is of such ' general ' character as to give rise to the presumption mentioned, then a Judge is justified in ' noticing ' it."

Closely connected with the foregoing and with each other are two other features of the defence power in its wider aspect. It is well

(1) (1947) 74 C.L.R. 400.
(2) (1947) 75 C.L.R. 445.
(3) (1942) 65 C.L.R., at pp. 384, 385, 409.
(4) (1949) 79 C.L.R., at pp. 51, 52.
(5) (1944) 69 C.L.R., at p. 469.
(6) (1917) 23 C.L.R., at p. 153.

established that the so-called separation of powers under the Constitution does not preclude the Parliament from authorizing in the widest and most general terms subordinate legislation under any of the heads of its legislative power (*Victorian Stevedoring and General Contracting Co. Ltd. and Meakes* v. *Dignan* (1)). But the scope of permissible "delegation" of legislative power to the Executive is almost certainly wider in the case of the defence power than in the case of any of the other powers. Thus an Act giving a power "to make regulations with respect to bankruptcy", not given in aid of specific legislation by the Parliament, might well be held not to be a law with respect to bankruptcy. But an Act giving to the Governor-General a power "to make regulations for securing the public safety and the defence of the Commonwealth" is a valid law with respect to the defence of the Commonwealth in time of war (*Wishart* v. *Fraser* (2)). In that case *Dixon* J. said: "The defence of a country is particularly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent, that width and generality are a characteristic of the powers which it must exercise" (3). Further—and more important for present purposes—power may validly be given by an Act, or by a regulation under an Act, to a designated person or authority to make orders, declarations and proclamations which are not themselves of a legislative character but which carry legal consequences by virtue of the Act or regulation under which they are made. And such orders, declarations or proclamations may be authorized to be made on no more specific basis than the opinion of the donee of the power that they are necessary or desirable for securing the public safety and the defence of the Commonwealth. There could be no more striking illustration of the exceptional status of the defence power. For "when the operation of a law is made conditional upon the opinion, as to certain matters, of some person named or described, or on proof of certain matters to his satisfaction, the question whether his opinion is justified, or whether he should have been satisfied on the materials before him, is not examinable by the Courts. The only question which can be examined is whether, acting bona fide, he formed the opinion or was satisfied with the proof" (*Ex parte Walsh and Johnson* (4), (per *Knox* C.J.)). If the opinion is to be that of the Governor-General, it cannot, in my opinion, be examined at all, for it is not open to impute mala fides with respect to an act of the King by

(1) (1931) 46 C.L.R. 73.
(2) (1941) 64 C.L.R. 470.
(3) (1941) 64 C.L.R., at pp. 484, 485.
(4) (1925) 37 C.L.R., at p. 67.

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himself or his representative (*Duncan* v. *Theodore* (1) (per *Isaacs* and *Powers* JJ.)).

That under the defence power a law may, at least in time of war, be made to operate upon the opinion of a designated person, and that that opinion may supply the only link between the defence power and the legal effect of the opinion is well established. It is sufficient to refer to *Lloyd* v. *Wallach* (2) (cf. *Liversidge* v. *Anderson* (3); *Ex parte Walsh* (4); *Little* v. *The Commonwealth* (5); and *Reid* v. *Sinderberry* (6)). It may be thought that herein lies an exception to an elementary rule of constitutional law which has been expressed metaphorically by saying that a stream cannot rise higher than its source. It was stated in *Shrimpton* v. *The Commonwealth* (7) in these terms:—"Finality, in the sense of complete freedom from legal control, is a quality which cannot be given under our Constitution to a discretion, if . . . it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force." Cf. *Dawson* v. *The Commonwealth* (8). The "discretion" may, of course, be the discretion of the legislature itself, exercised by the very fact of the enactment of a law. Or it may be the discretion of the Governor-General or a Minister, intended to be legally effective by the operation of an enacted law upon it. The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse. A power to make a proclamation carrying legal consequences with respect to a lighthouse is one thing: a power to make a similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing. Whether the rule exemplified by *Lloyd* v. *Wallach* (9) constitutes a real or only an apparent exception to the general rule is a matter which need not be considered here. It is enough to say that, on the one hand, it is established beyond all doubt, while, on the other hand,

(1) (1917) 23 C.L.R., at p. 544.
(2) (1915) 20 C.L.R. 299.
(3) (1942) A.C. 206.
(4) (1942) A.L.R. 359.
(5) (1947) 75 C.L.R. 94.
(6) (1944) 68 C.L.R. 504.
(7) (1945) 69 C.L.R., per *Dixon* J., at pp. 629, 630.
(8) (1946) 73 C.L.R., per *Dixon* J., at pp. 181, 182.
(9) (1915) 20 C.L.R. 299.

it has never yet been invoked except in connection with that secondary aspect of the defence power which has so far been regarded as depending upon a basic fact of emergency and ceasing when conditions created by the emergency have passed (*R.* v. *Foster*; *Ex parte Rural Bank of New South Wales*; *Wagner* v. *Gall*; *Collins* v. *Hunter* (1)).

The " defence " to which s. 51 (vi.) refers is the defence of Australia against external enemies: it is concerned with war and the possibility of war with an extra-Australian nation or organism. But it cannot, in my opinion, be doubted that there exists also a legislative power in the Parliament, which it is not easy to define in precise terms, to make laws for the protection of itself and the Constitution against domestic attack. In *R.* v. *Kidman* (2) *Isaacs* J. said that the legislative power " may say that any attempted invasion by force on the field of Commonwealth executive powers may not only be resisted and prevented, but also punished." In the same case his Honour said (3) that the Commonwealth has " an inherent right of self-protection " and (4) that it " carries with it—except where expressly prohibited—all necessary powers to protect itself and punish those who endeavour to obstruct it." In *Ex parte Walsh and Johnson* (5) the same learned Justice, speaking of " deportation as a means of self-protection in relation to constitutional functions ", said :—" This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party, who associate themselves voluntarily for mutual benefit, to eliminate from their communal society any element considered inimical to its existence or welfare ". In *R.* v. *Hush*; *Ex parte Devanny* (6) *Rich* J. said :—" . . . it is impossible to doubt the legislative power to prohibit associations which by their constitutions or propaganda advocate or encourage the overthrow of the Constitution of the Commonwealth by revolution or of the established government of the Commonwealth by force or violence. Section 51 (xxxix.) of the Constitution includes matters incidental to the execution of powers vested by the Constitution in the organs of government. The survival of the Constitution appears to me to be a matter most incidental to the execution of power under it. But, apart from this, s. 61 of the Constitution expressly enacts that the executive power shall extend to the execution and maintenance of the Constitution. To prevent persons associating together for the

(1) (1949) 79 C.L.R. 43.
(2) (1915) 20 C.L.R., at p. 441.
(3) (1915) 20 C.L.R., at p. 440.
(4) (1915) 20 C.L.R., at pp. 444, 445.
(5) (1925) 37 C.L.R., at p. 94.
(6) (1932) 48 C.L.R., at p. 506.

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purpose of destroying the Constitution is a matter incidental to maintaining it." In that case *Rich* J. took a different view of the facts from that taken by the other justices, who did not find it necessary to consider the question of constitutional power, though *Evatt* J. expressed doubt as to the existence of the power. But in *Burns* v. *Ransley* (1) its existence was, I think, placed beyond doubt. The relevant passages are of great importance, but they are already recorded, and I will quote only two brief extracts. *Latham* C.J. said :—" Protection against fifth-column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers and operations of governmental agencies and the existence of government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organized societies " (2). *Dixon* J. (3) said :—" I do not suppose that it would be denied that the legislative power of the Commonwealth extends to measures for the suppression of incitements to the actual use of violence for the purpose of resisting the authority of the Commonwealth or effecting a revolutionary change in the form of government. In the same way I think that the legislative power authorizes measures against incitements to the use of violence for the purpose of effecting a change in our constitutional position under the Crown or in relation to the United Kingdom or in the Constitution or form of government in the United Kingdom. Our institutions may be changed by laws adopted peaceably by the appropriate legislative authority. It follows almost necessarily from their existence that to preserve them from violent subversion is a matter within the legislative power." Not less important are the statements to be found in *R.* v. *Sharkey* (4). The source of part of the power which I have been discussing may be found in s. 51 (xxxix.), read with s. 61 of the Constitution, and it is here that the framers of the second and third recitals in the preamble to the *Communist Party Dissolution Act* have found it. But I think that, if it ever becomes necessary to examine it closely, it may well be found to depend really on an essential and inescapable implication which must be involved in the legal constitution of any polity. The validity of the Act, however, if it could be supported by the power, would not be affected by the fact that its framers had taken too narrow a view of the source of the power.

(1) (1949) 79 C.L.R. 101.
(2) (1949) 79 C.L.R., at p. 110.
(3) (1949) 79 C.L.R., at p. 116.
(4) (1949) 79 C.L.R., at p. 148 per *Dixon* J.; at pp. 157, 158, per *McTiernan* J., and at p. 163, per *Webb* J.

There has never yet been occasion to examine closely the scope of this power. It may be that it is elastic in the same sense in which the defence power is elastic. But I do not think that the principle of *Lloyd* v. *Wallach* (1) and *Ex parte Walsh* (2) can be applied to it. That is to say, while it may be found to expand very considerably in time of domestic emergency, I think that it is so far of a different nature from the defence power that a law cannot be made under it imposing legal consequences on a legislative or executive opinion which itself supplies the only link between the power and the legal consequences of the opinion.

I come now to the Act itself. The most conspicuous feature of the Act is s. 4, and the most conspicuous feature of s. 4 is that it does not purport to impose duties or confer rights or prohibit acts or omissions, but purports simply to declare a particular unincorporated voluntary association unlawful and to dissolve it. It is, one supposes, to be classed as a public enactment as distinct from a private enactment, but it is, or at least is extremely like, what the Romans would have called a *privilegium*. Such a law (for I would not deny to it the character of a law) may well be within the competence of the Commonwealth legislative power, which is, within its constitutional limits, plenary (cf. *Abitibi Power & Paper Co. Ltd.* v. *Montreal Trust Co.* (3)). It would be impossible, I should think, to challenge s. 4 if the Parliament had power to make laws with respect to voluntary associations or with respect to communists. It would be a law " with respect to " each of those " matters ". So an Act of the Parliament dissolving the marriage of A with B would be a law with respect to divorce. It would be a *privilegium*, but what the Act actually did would be a thing which fell within a class of subject matter on which the Parliament was authorized to legislate. The Parliament has power to make laws with respect to divorce, and the Act is a law which effects a divorce. It is a *privilegium*, but it is a good law. But, if the Parliament enacts a *privilegium* which on its face bears no relation to any head of legislative power, it is likely to be extremely difficult to justify it under any head of power. In such a case (and s. 4 is an example of such a case) there can, in my opinion, be no presumption of validity, and the Act, if it is to be upheld at all, can only be upheld on the basis of special and particular facts relating to the person or class who or which is the subject of the *privilegium*. Suppose, for example, an Act of the Parliament providing that all the property of AB should be

(1) (1915) 20 C.L.R. 299.
(2) (1942) A.L.R. 359.
(3) (1943) A.C., at p. 548.

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delivered to a receiver X and realized and that the proceeds should be distributed among the creditors of AB. Such an Act might (I do not say it would) be a good law with respect to bankruptcy if the liabilities of AB at the commencement of the Act exceeded his assets, but it could not possibly otherwise be a law with respect to bankruptcy. It seems to me that there could not in such a case be any presumption of validity, for the simple reason that there could not be any presumption that the liabilities of AB exceeded his assets. I am only, of course, using the case for purposes of illustration, and it does not matter for this purpose whether excess of liabilities over assets would really be the correct test to apply. What seems clear is that the supposed Act could not be held valid except on the basis of facts, proved or judicially noticed, to connect it with power. The present case is not exactly parallel to the case which I have supposed, because in the present case a real question of judicial notice arises, which would not arise in the example I have taken. But it is desirable, in a case of such importance, to proceed step by step, and we begin, I think, with this, that there can be no presumption of the validity of s. 4, for the simple reason that there can be no presumption that the Australian Communist Party has done or is likely to do anything which would bring it within the defence power or the constitution-preservation power (to give it a short name at some sacrifice of accuracy).

It should be observed at this stage that nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is clear, its merits and demerits are alike beside the point. It is the law, and that is all. Such a law as the *Communist Party Dissolution Act* could clearly be passed by the Parliament of the United Kingdom or of any of the Australian States. It is only because the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority that it arises in the case of the Commonwealth Parliament. If the great case of *Marbury* v. *Madison* (1) had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; and there are those, even to-day, who disapprove of the doctrine of *Marbury* v. *Madison* (1), and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury* v. *Madison* (1) is accepted as axiomatic, modified in varying degree in various cases (but

(1) (1803) 1 Cr. 137 [2 Law. Ed. 118].

never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.

I have said that there can, in my opinion, be no presumption of the validity of s. 4. But I have been considering the matter so far without reference to the preamble. How, if at all, is the position affected by the recitals contained in the preamble? In the case of a legislature of limited powers, can such recitals be used to bring within power a *privilegium* which cannot be related by anything that appears on its face to any power of that legislature? One thing seems very clear to me, and that is that no declaration containing allegations in favour of, or against, the object of the *privilegium* could be conclusive for or against that object. To go back to my bankruptcy example, if the Court were to hold that AB was not entitled to adduce evidence in denial of a recital in the Act that his liabilities exceeded his assets, the Court would be not merely paying respect to the opinion of the legislature but simply abdicating its function. And the position is prima facie similar in the present case. Parliament cannot recite itself into a field the gates of which are locked against it by superior law. The example which I am at the moment considering is *a fortiori* to that which *Latham* C.J. was considering in *South Australia* v. *The Commonwealth* (1), and the learned Chief Justice there said: "Such a declaration cannot be regarded as conclusive. A Parliament of limited powers cannot arrogate a power to itself by attaching a label to a statute."

I am of opinion, indeed, that, in such a case as the present, such recitals cannot be regarded as affording even prima-facie evidence of the truth of what is recited. I do not think that there is any rule of the common law which compels us so to regard them, though the English Courts generally regard recitals of facts in a statute as equivalent to prima-facie evidence of the truth of those facts. But the matter is primarily one of the construction of the statute in each particular case, and the position may be affected by circumstances. The reasoning of Lord *Ellenborough* and *Bayley* J. in *R.* v. *Sutton* (2) would indeed seem to lead to the conclusion that such recitals must amount to conclusive evidence, since those learned judges appear to treat the recitals as standing on the same level as the operative part of the statute and as being in effect part of the law enacted. But, as is pointed out in *Craies* on *Statute Law*, 4th ed. (1936), p. 41, recitals as such are not part of the law enacted on the subject, and the most that can be said

(1) (1942) 65 C.L.R., at p. 432.

(2) (1816) 4 M. & S. 532 [105 E.R. 931].

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is, I think, that such statements are generally to be regarded by a court as prima-facie true. In *Earl of Leicester* v. *Heydon* (1) the argument of counsel (2) that " the recital in our case, which is false, and founded upon a false information, shall not conclude the plaintiff to say the truth " appears to have been accepted by the Court of King's Bench. In *R.* v. *Greene* (3) Lord *Denman* C.J. agreed that mention in a statute of a certain body of persons as a corporation " made a prima-facie case " that the body was incorporated, but held the prima-facie case displaced by other evidence which was admitted. *Patteson* J. and *Coleridge* J. concurred. No doubt, in the case of a legislature of unlimited powers, a statement of fact or law *could* be made conclusive. So, in *R.* v. *Inhabitants of Haughton* (4), Lord *Campbell* C.J. said that a recital in a statute that a certain road was in Denton might be considered evidence that the road was in Denton but could not prevail against an estoppel, and he added: " Had there been anything amounting to an enactment that the road should be considered in Denton, this would have prevailed over the estoppel: but a mere recital in an Act of Parliament, either of fact or of law, is not conclusive: and we are at liberty to consider the fact or the law to be different from the statement in the recital." (The latter part of this passage was quoted with approval by Lord *Chelmsford* in *Mersey Docks and Harbour Board Trustees* v. *Cameron* (5).) The whole position seems to be summed up by *Knight Bruce* L.J. when, in *Norton* v. *Spooner* (6), speaking for the Privy Council, he says that " a recital in an act of legislation, . . . may, according to circumstances, be of more or less weight, and be often not conclusive ".

But, whatever may be the general position, it seems to me that it would be contrary to principle to allow even prima-facie probative force to recitals of facts upon which the power to make the law in question depends. It is, as I have said, clearly impossible to allow them conclusive force, because to do so would be to say that Parliament could recite itself into a field which was closed to it. But to allow *any* probative force to such recitals would, it seems to me, be to say the same thing—and not less because the entry into the field might be only provisional. This view is not, in my opinion, inconsistent with the many statements to be found in cases arising on the defence power to the effect that the Court

(1) (1561) 1 Plowd. 384 [75 E.R. 582].
(2) (1561) 1 Plowd., at p. 398 [75 E.R., at p. 603].
(3) (1837) 6 Ad. & E. 548 [112 E.R. 210].
(4) (1853) 1 El. & Bl. 501, at pp. 515, 516 [118 E.R., 523, at p. 528].
(5) (1864) 11 H.L.C. 443, at p. 518 [11 E.R. 1405, at p. 1434].
(6) (1854) 9 Moo. P.C. 103, at p. 129 [14 E.R. 237, at p. 246].

will pay great respect to statements of Parliament in an Act or of the Governor-General in a regulation. This has been put strongly on occasions—nowhere, perhaps, more strongly than by *Higgins* J. in *Pankhurst* v. *Kiernan* (1), where his Honour said that, if Parliament treated the fixing of prices as conducing to the defence of the Commonwealth, " we are bound to accept the statement of Parliament that it does so conduce unless we can see that the statement is obviously untrue or absurd." A somewhat similar approach is indicated when Lord *Atkin*, in *Abitibi Power & Paper Co. Ltd.* v. *Montreal Trust Co.* (2) says :—" Their Lordships see no reason to reject the statement of the Ontario legislature, contained in the preamble." But neither *Higgins* J. nor Lord *Atkin* was thinking of a case in which the " statement " of Parliament was a statement of particular facts relating to a particular individual or body of individuals, although the Ontario statute in the latter case was a special Act relating to the appellant company. And, in so far as effect has been given to such statements of Parliament as bearing on the connection between enactment and legislative power, the cases have all been cases in which the basic fact of war has been judicially noticed at the outset. That basic fact brings into existence the secondary aspect of the defence power, to which, as I have pointed out, exceptional considerations apply.

I have thought it right to consider with some care whether any and what probative force could be attributed to the fourth, fifth, sixth, seventh and eighth recitals in the preamble to the Act, regarded as statements of fact, because a good deal of the argument for the Australian Communist Party was devoted to this question, and it is a question of general interest and importance. But the truth is that I do not think that those recitals can be properly regarded at all as statements of fact having a potential probative force by virtue of their presence in an Act of Parliament. It is more or less involved in what I have said that I am disposed to regard such a view as a begging of the question. It is as if one should say : " The Act is valid because the statements contained in it are true, and the statements are true because they are contained in a valid Act." The true view is, I think, that the recitals in the preamble are to be regarded as statements of opinion or belief as to facts, inserted to explain the occasion of what is enacted and to provide justification for it. I do not think that any further or other effect can be given to the preamble in this case. It does not necessarily follow that the recitals are of no importance, because, if one condition, to which I will refer in a moment, were

(1) (1917) 24 C.L.R., at p. 134. (2) (1943) A.C., at p. 548.

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fulfilled, they would be very important indeed and probably decisive.

Nor does it necessarily follow from what I have just been saying that both questions 1 (a) and 1 (b) in the case stated by *Dixon* J. should be answered in the negative, because the Commonwealth might still maintain that the validity of the Act depends on facts asserted in the preamble and capable of judicial ascertainment, and might seek to tender evidence to establish the facts which it regarded as essential. And, if the Commonwealth were to be permitted to tender such evidence, the plaintiffs would, as a matter of course, be entitled to adduce evidence in rebuttal. But the Commonwealth has not sought to adduce evidence, and it has, in my opinion, been right in not seeking to do so, because I do not think that the validity of this Act depends on evidence.

This Act can, in my opinion, only be supported, if it can be supported at all, as an exercise of the defence power in what I have called its extended or secondary aspect. I do not think it can be supported under the other power invoked, whether that power be regarded as based on the joint operation of s. 61 and s. 51 (xxxix.) of the Constitution or on an implication from the existence and nature of the Constitution as the foundation of a body politic. The reason for this is that the provisions of the Act operate on opinions, and those opinions include an opinion as to matters on which the validity of those provisions depends. There is, as I have pointed out, a notable difference between the first group of provisions (headed by s. 4) on the one hand and the second and third groups of provisions (headed by ss. 5 and 9) on the other hand. But, in the last analysis, they stand on the same footing, and their validity depends on the same considerations. Section 4 is a directly enacted *privilegium* based on announced opinions of the Parliament, which involve an opinion as to matters on which power depends. Sections 5 and 9 operate on opinions of the Governor-General, which involve an opinion as to matters on which power depends. The decisions of this Court establish that such enactments may (not that they always will) be valid in cases where the secondary aspect of the defence power comes into existence by virtue of a judicially noticed emergency. No decision establishes that such enactments may be valid as exercises of the other power invoked by the Parliament in this case, and I have already expressed my opinion that there is no secondary aspect of this other power corresponding to the secondary aspect of the defence power.

The question whether the Act can be supported as an exercise of the defence power in its secondary aspect must, in my opinion, depend entirely on judicial notice. The coming into existence of this secondary aspect has never been treated as depending on anything else. Nor could it, in my opinion, be treated as depending on anything else. It is only when the existence of the secondary aspect has been established by judicial notice of an emergency that evidence has ever been admitted to connect the enactment in question with power. This I have already pointed out. I think that it is only in exceptional cases, where a simple fact is readily susceptible of proof or disproof, that evidence can, even then, be admitted. I have cited what *Dixon* J. said in *Stenhouse* v. *Coleman* (1). "Ordinarily the Court does not go beyond matters of which it may take judicial notice." The present case seems to me to be pre-eminently a case in which the Court would have to confine itself, even if it were satisfied that the Act was capable of being supported under the defence power in its secondary aspect, to matters of which it could take judicial notice. Apart from the considerations mentioned in *Stenhouse* v. *Coleman* (2), one has only to glance at the relevant recitals in the *Communist Party Dissolution Act* to see that they could hardly be made the subject of proof or disproof by evidence in the ordinary way in which facts are proved and disproved. They relate to a particular association, but no specific act or fact is asserted, and what *is* asserted is of that "general" character on which *Isaacs* J. laid so much stress in *Holland* v. *Jones* (3). Such matters in a constitutional case are matters for judicial notice or they are nothing.

The elimination of the second power on which it is sought to support the Act is, I think, important, because matters of which judicial notice could, as I think, be taken would come nearer to justifying the Act as an exercise of this power than as an exercise of the defence power. It must, however, in my opinion, be eliminated, and we are thus brought to what I regard as the ultimate problem in this difficult case. That ultimate problem lies, I think, in the question whether judicial notice can be taken of matters sufficient to bring into operation that extended aspect of the defence power which was the basis of the decisions in *Lloyd* v. *Wallach* (4); *Ex parte Walsh* (5), and *Little* v. *The Commonwealth* (6). On the whole I do not think that it can.

(1) (1944) 69 C.L.R., at pp. 469, 470.
(2) (1944) 69 C.L.R., at p. 469.
(3) (1917) 23 C.L.R., at p. 153.
(4) (1915) 20 C.L.R. 299.
(5) (1942) A.L.R. 359.
(6) (1947) 75 C.L.R. 94.

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Four things are to be remembered throughout. The first, which may or may not by itself be of vital importance, is that the date as at which the matter must be considered is 20th October 1950. The second is that the Parliament had, and has, undoubted powers to deal with such a situation as is envisaged by the preamble. The only question is whether it has power to deal with it by the particular means adopted. The third is that the particular means adopted is a means which has hitherto been recognized as valid only in time of, and by virtue of, a clear and great national danger. It is a means, moreover, which may—from a practical, though not perhaps from a technical and analytical, point of view—be thought to involve a degree of relaxation of a fundamental constitutional rule. Finally, it must not be forgotten that the defence power is, as I have said, a power concerned with protection against external enemies. If, therefore, a situation is to be found which will justify the Act in question as an exercise of an extended defence power, it must be an international situation. It is necessary to be on guard against letting in considerations appropriate only to the other power on which reliance is placed and which I have felt must be rejected.

On the one hand, I am not prepared to hold that nothing short of war or an immediate threat of war can bring into play a fully extended defence power. Each situation which arises must be examined as and when it arises. On the other hand, I think that the Court would be justified in taking judicial notice of a good many of the matters suggested by Mr. *Barwick* as proper matters for judicial notice. But I have come to the conclusion that, if one keeps steadily in mind the important factors which I have enumerated, one cannot judicially notice in this case a state of affairs which would justify holding a measure having the peculiar features of the *Communist Party Dissolution Act* valid as an exericse of an extended defence power.

It was argued that the Parliament had, by enacting s. 4, assumed itself to exercise judicial power in contravention of the Constitution, which by s. 71 entrusts the judicial power of the Commonwealth to organs other than the Parliament. I am quite unable to accept such a view. In enacting s. 4 the Parliament was making a law, or making what would be a law if it were " with respect to " some subject matter of legislative power. It neither did nor purported to do anything other than to make a law. And making laws is not a judicial function. The power to make Rules of Court, as incidental to the exercise of the judicial function, is, of course, beside the point here. Making laws as such is not a judicial function,

and, when Parliament makes a law—any kind of law—it is not exercising judicial power. The "law" may be valid or invalid, but, if it is invalid, it will not be because Parliament has attempted to invade the judicial sphere.

The conclusion which I have set out above is sufficient, in my opinion, to dispose of all three groups of provisions contained in the Act. It seems clear that it establishes the invalidity of the first two groups, which hinge respectively on s. 4 and s. 5 (2). A further question arises, however, with regard to the third group of provisions, those which hinge upon s. 9 (2). It is arguable that the consequences attached to a declaration under s. 9 (2) do not necessarily depend for their validity upon the power to make laws with respect to defence or the power to make laws with respect to matters incidental to the execution of the executive power. Those consequences are attached by ss. 10 and 14 and may be shortly stated as being that a person declared under s. 9 (2) shall be incapable of (*a*) holding office under or being employed by the Commonwealth or an authority of the Commonwealth, or (*b*) holding office as a member of a body corporate being an authority of the Commonwealth, or (*c*) holding office in certain industrial organizations, and that no contract for remuneration shall be made with a declared person. The Commonwealth has clearly power to make laws disqualifying any person or class of persons from being employed by the Commonwealth or an authority of the Commonwealth or from being a member of a corporate authority of the Commonwealth or from contracting with the Commonwealth. A law imposing such a disqualification may select any criterion whatever as the basis of the disqualification, even an irrational or absurd criterion, because the law will be a law with respect to a matter within the legislative power, and indeed within the exclusive legislative power, of the Commonwealth. And the view suggested by *Higgins* J. in several cases that there was an analogy between legislative powers and powers of appointment, and that it must appear on the face of a statute that the legislature intended to exercise a power invoked to support it, has never, I think, been accepted as sound. *Starke* J. said, in *Ex parte Walsh and Johnson* (1):—"A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source derived."

A similar view might be put with regard to s. 10 (1) (*c*), which disqualifies declared persons from holding office in certain industrial organizations. Clearly, of course, s. 10 (1) (*c*) cannot be so

(1) (1925) 37 C.L.R., at p. 135.

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supported in its entirety on this basis, because industrial organizations with respect to which the Commonwealth has no legislative power are included. It might, however, be suggested that it was valid in a limited application to organizations registered under the *Commonwealth Conciliation and Arbitration Act*. I should certainly suppose that the Commonwealth Parliament could validly make it a condition of registration that any particular person or class of persons should be disqualified from holding office in any such organization; or could provide that the rules of any organization registered under the Act must contain provisions that no person of any specified class shall be eligible for office in the organization; or could provide that the holding of an office in an organization by a person of any specified class should be a ground for deregistration of the organization. The power to do these things rests on s. 51 (xxxv.) and (xxxix.) of the Constitution: see *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (1).

I am of opinion, however, that s. 10 (1) and s. 14 cannot be supported on this basis. This basis necessarily assumes either that s. 9 (2) is in itself a valid enactment or that it has no operative effect but serves merely to describe a class. I have already said that I do not think that s. 9 (2) is a valid enactment, and it cannot, in my opinion, be regarded as merely serving to describe a class. It is an enabling law, and the declaration could be made of any person irrespective of whether he were in the Commonwealth public service or a member of an industrial organization or a candidate for membership of the Commonwealth public service or for office in an industrial organization.

Apart from legal consequences, such a declaration could have a most damaging effect, and, in my opinion, s. 9 (2) must be regarded as a law and an invalid law. On this view the basis of the arguments under consideration disappears.

In the case of s. 10 (1) (*c*) there is, I think, another reason for rejecting the argument in its favour, and this is that it is impossible to " sever " or " read down " s. 10 (1) (*c*) so as to make it apply only to industrial organizations registered under the Arbitration Act and then treat it as a law valid to that extent under the power to make laws with respect to a matter incidental to the execution of the power to make laws with respect to conciliation and arbitration under s. 51 (xxxv.). Intention to exercise a power is not, I think, important in connection with s. 10 (1) (*a*) or (*b*) or s. 14, because no question of " reading down " arises. But such a question does arise in connection with s. 10 (1) (*c*), and intention may be important in

(1) (1908) 6 C.L.R. 309.

such a case. The characteristic regarded by Parliament as the essential characteristic of the industrial organizations with which it is dealing is clearly indicated in s. 10 (3). To select arbitrarily some other and unrelated characteristic such as being registered under the Arbitration Act or being engaged on Commonwealth public works or defence projects is really to assume the function of legislation, and this is not authorized either by any common-law rule or by s. 13A of the *Acts Interpretation Act*. Cf. *Victorian Chamber of Manufactures* v. *The Commonwealth* (1), per *Latham* C.J. and (2) per *McTiernan* J.

For the above reasons I am of opinion that the questions asked by the case stated must be answered as follows :—

1 (a) No. (b) No.

2. The Act is wholly invalid.

KITTO J. The questions raised by the case stated require a decision to be given as to the validity or invalidity of the *Communist Party Dissolution Act* 1950 unless the Court considers that such a decision must depend upon a judicial ascertainment upon evidence of the truth or untruth of certain statements contained in the preamble to the Act.

The statements made in the preamble are the pronouncement of a legislature to which power is given by the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the Government of the Commonwealth. The executive power of the Government extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth : Constitution, s. 61.

The recitals in the preamble reveal that the Parliament, which is entrusted with these legislative powers and which must bear the corresponding responsibility, has formed a judgment as to the existence and nature of a menace to the safety of Australia. In a unitary system of government no challenge could be successfully offered to any legislation passed in consequence of such a judgment ; but under a Federal system the central legislature is equipped with limited powers only, and the duty is cast upon the courts to determine whether laws which that legislature thinks necessary for the security of the country are within the scope of its powers.

(1) (1943) 67 C.L.R., at pp. 418, 419. (2) (1943) 67 C.L.R., at p. 424.

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It should not be held, in my opinion, that a judgment of the Parliament of the Commonwealth as to the existence of a danger to the safety of the nation can enlarge the scope of any of its powers. So far as the defence power is concerned, such a proposition could not be supported except upon the view that the conception of "the naval and military defence of the Commonwealth and of the several States" is such that its limits must be taken to have been left by the Constitution for final determination by the authorities which are in the best position to determine them, namely the Parliament and the Executive which it controls, and that therefore the courts must accept as conclusive of power a Parliamentary decision that particular legislation is in the circumstances within the ambit of the power to make laws with respect to defence.

This Court has always recognized that the Parliament and the Executive are equipped, as judges cannot be, to decide whether a measure will in practical result contribute to the defence of the country, and that such a question must of necessity be left to those organs of government to decide. But the necessity arises, not simply because of the peculiar position in relation to defence which those organs occupy; it arises from the consideration that the limits which the Constitution sets to the defence power are not limits which have to do with the results which legislation may be believed likely to produce. They are limits defined by reference to the nature and character of legislation; it must be "with respect to" defence; and that means that its operation by way of altering the law must be seen to give it such a relevance to the subject of defence that its true character is that of legislation with respect to the subject. If a measure, having regard to what it does "in the way of changing or creating or destroying duties or rights or powers" (as *Latham* C.J. expressed it in *South Australia* v. *The Commonwealth* (1)), can be seen to be really and substantially capable in the existing circumstances of contributing specifically to defence, it possesses the necessary kind and degree of relevance to the subject. But, while it is certain that the necessity or desirability of the measure, if it be within power, is a matter with which the courts have no concern, it is equally certain that the question whether the legal operation of the measure has such a capability of aiding defence as gives it that character which alone will sustain it as an exercise of the defence power is a matter which no judgment of the Parliament can conclusively decide. It is inherent in the system of government which the Constitution

(1) (1942) 65 C.L.R., at p. 424.

establishes that the Court must make its own decision on that point.

This conclusion is entirely consistent with a full acceptance of the doctrines, made familiar in judgments delivered during the second world war, that the defence power is purposive, and that, while it possesses a constant meaning, its application is of greater or less width according to circumstances. As to the first of these doctrines, it was pointed out by *Dixon* J. in *Stenhouse* v. *Coleman* (1) that " the naval and military defence of the Commonwealth and of the several States " is a subject which differs in one important respect from most of the others mentioned in s. 51, namely, that it is not a class of transaction or activity, or a class of public service, undertaking or operation, or a recognized category of legislation, but is a purpose. The word " purpose " in this connection has nothing to do with the motives or the policy lying behind legislation (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (2)). It refers to an end or object which legislation may serve ; and the consequence which follows from a recognition of defence as a " purpose " in this sense of the word is that the relevance to defence which stamps a measure with the character of a law with respect to defence is to be found in a capacity to assist that purpose. But that capacity must be discernible by the Court, since it is the Court which must decide whether the measure possesses the requisite character. As to the second doctrine, the important point for present purposes is that the circumstances to which it refers are the circumstances of a public nature existing at any given time. Thus, in time of peace, when there is no special reason to apprehend a war, the class of laws which can be seen to possess a defence character is much more limited than it is when a danger of hostilities arises ; it becomes wider still when war breaks out ; it reaches its maximum amplitude when a war is raging which is of so serious a character as to call for the devotion to its prosecution of the entire resources and activities of the nation ; it fluctuates according to " the nature and dimensions of the conflict . . . the actual and apprehended dangers, exigencies and course of the war, and . . . matters that are incident thereto " (*Andrews* v. *Howell* (3)) ; it contracts again when hostilities cease, but even then remains sufficient to include laws to wind up after the war and to restore conditions of peace (*Dawson* v. *The Commonwealth* (4) ; *Miller* v. *The Commonwealth* (5) ;

(1) (1944) 69 C.L.R., at p. 471.
(2) (1945) 71 C.L.R., at p. 178.
(3) (1941) 65 C.L.R., at p. 278.
(4) (1946) 73 C.L.R., at p. 176.
(5) (1946) 73 C.L.R. 187.

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Real Estate Institute of New South Wales v. *Blair* (1); *Hume* v. *Higgins* (2); *R.* v. *Foster* (3)). All these stages in the waxing and waning of the defence power have been witnessed in recent years. In all of them the meaning of the power has been recognized to be unchanging; but "its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law" (*Andrews* v. *Howell* (4)). The "very nature" of the power "means that its strength is commensurate with the exigency or danger which calls for its exercise" (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (5)). But "the exigency" and "the danger" by reference to which the reach of the power is to be determined are objective facts, which the tribunal which has the constitutional duty of comparing challenged legislation with the power must be able to perceive. To allow that their existence may be conclusively affirmed by the Parliament according to its own judgment would be to treat the exigency and the danger as matters of subjective opinion and, in effect, to alter the Constitution by substituting for the power to make laws with respect to defence, a power to make laws which would be with respect to defence if the situation were such as the Parliament adjudges it to be. Such an alteration would involve a fundamental departure from the principle of the Constitution that the legislative power of the Commonwealth is subject to legal limitations, and not merely to limitations arising from political or practical considerations or the limitations, depending upon the character of legislators, which *Dicey* called internal. It is no doubt true that legislative or executive actions may themselves create situations in which the scope of the defence power is wider than it would have been if these actions had not been taken. A declaration of war is an obvious example. This is so because the determinant of the ambit of the defence power at a given point of time is the situation, however it may have been brought about, in which Australia finds itself at that time. But the responsibility of ascertaining the ambit of the power rests upon the Court, and therefore the Court must of necessity decide for itself what features relevant to the power the existing situation presents.

If the defence power does not enable a measure to be upheld by reason of an opinion formed by the Parliament that the safety of the Commonwealth calls for or justifies that measure, it is even clearer, I think, that the scope of the other powers of legislation

(1) (1946) 73 C.L.R. 213.
(2) (1949) 78 C.L.R. 116.
(3) (1949) 79 C.L.R. 43.
(4) (1941) 65 C.L.R., at p. 278.
(5) (1945) 71 C.L.R., at p. 178.

relied upon by the Commonwealth in the argument in this case must be unaffected by any opinion of the Parliament as to the need for legislative action. The incidental power conferred by s. 51 (xxxix.) in association with s. 61 is, like the defence power, a power to make laws of a specified character, determined by the relevance of their operation to a particular matter. The reasons of the legislature for enacting a law, though they be reasons based upon its belief as to the existence of a state of facts connected with the execution and maintenance of the Constitution and of the laws of the Commonwealth, do not enter into the character of the law itself, and therefore do not bear upon the question of its validity. As for the implied power to legislate for the protection of the Commonwealth against subversive activities, which was referred to by *Dixon* J. in *Burns* v. *Ransley* (1), and in *R.* v. *Sharkey* (2), all I need say is that to treat that power as extending to any activities to which the Parliament sees fit to ascribe a subversive character, would be to transform the power into one far wider than can be justified by the reasoning upon which the implication of the power depends.

The problem which the Court must face, in my view, is whether the *Communist Party Dissolution Act* 1950 can be seen to fall within any of the legislative powers which are relied upon in support of it, irrespectively of the disclosed opinion of the Parliament. In preceding judgments the provisions of the Act have been analysed and their operation described. I need not repeat the process. Three major questions emerge: (1) whether s. 4, which dissolves the Australian Communist Party, is valid; (2) whether the provisions which commence with s. 5, and relate to bodies of persons to which that section applies, are valid; and (3) whether the provisions which commence with s. 9, and relate to persons to whom that section applies, are valid.

The defence power is relied upon as supporting each of these portions of the Act, either wholly or in part. Whether that power suffices for the purpose must depend upon the range of its application at the date when assent was given to the Act, which was 20th October 1950. This in turn must depend upon such facts, existing at that date and relevant to the defence of the Commonwealth, as are or may be brought within the knowledge of the Court; for the Court must necessarily deny the validity under the defence power of any measure passed by the Parliament of the Commonwealth, unless it is able to see with reasonable clearness how the

(1) (1949) 79 C.L.R., at p. 116. (2) (1949) 79 C.L.R., at p. 148.

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measure is incidental to that power (*R.* v. *Foster* (1)). Facts which, to use the language of *Stephen's Commentaries,* 16th ed. (1914), vol. 3, p. 568, are " matters of common and certain knowledge ", may be judicially noticed without proof; but the Court has in some cases taken into account, in considering the validity of legislation under the defence power, facts outside the range of judicial notice. In *Jenkins* v. *The Commonwealth* (2), and in *Sloan* v. *Pollard* (3), for example, legislation was found to be within power upon consideration of facts established by evidence. It does not follow, however, that there is no limit to the kind of facts which evidence may be adduced to prove in support of, or in answer to, a challenge to legislation which is rested on the defence power.

Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce. The question is whether the legislation forms part of the law of the Commonwealth. Since it is impossible to affirm the validity of a measure upon a particular basis of fact unless that basis of fact can be seen to be common to all persons, it cannot be material, for the purpose of considering validity, to decide an issue of fact which is of such a nature as to admit of different findings in different cases.

Moreover, in connection with the defence power, three classes of facts may be distinguished, namely, those which bear upon the degree of national danger by reference to which the extent of the power at the relevant time must be determined; those which relate to the existence of a particular purpose, within the wider purpose of defence, which the measure in question is capable of aiding; and those which are relevant only to the question whether the measure is likely to produce results of advantage to the defence of the country. Evidence may be needed to establish facts of the first two classes, but such facts are not likely to be disputable. Facts of the third class may often be open to controversy; but even if capable of conclusive proof, the Court is not concerned with them. They have nothing to do with any question of power; they relate to a question which is essentially one for the consideration of the Parliament on the assumption that the measure is within power as having an operation in law which is capable of serving an end within the purpose of defence.

(1) (1949) 79 C.L.R., at p. 84.
(2) (1947) 74 C.L.R. 400.
(3) (1947) 75 C.L.R. 445.

It is true also with respect to the incidental power in association with s. 61, and the limited power of making laws for the protection of the Commonwealth against subversion, that, in considering whether these powers are wide enough to support a given measure, it is necessary to recognize as irrelevant such facts as have significance in relation only to the practical effect likely to be achieved by the measure. These facts are proper to be considered by the Parliament in determining legislative policy. The courts have nothing to do with policy, and they cannot be assisted in performing their function by any facts save those which, being ascertained with certainty, affect the scope of legislative power.

A recognition of the distinction between the classes of facts I have mentioned goes far towards providing the solution of the problems involved in the present case. Indeed it appears to me to lead inevitably to the answer to the question whether the provisions of the Act relating to the Australian Communist Party are valid. These provisions purport to dissolve the Party and to forfeit what remains of its property after its liabilities are provided for. There is no general power in the Parliament to deal with associations in such a manner; and the powers I have mentioned, which alone are relied upon as sufficient for the purpose, plainly cannot suffice unless facts existing at the passing of the Act gave them a wide enough range. The Court can take judicial notice of the fact that in October 1950 international tension had reached a point of real danger to Australia. The possibility of a war breaking out in the near future was by no means to be overlooked. In that situation the defence power, at least, had a wider application than it has at times when no danger of war appears; but, even so, it was not possible to see, in the light only of that situation, a relation between any of the powers referred to and a law dissolving a specified association and confiscating its property. The question therefore is whether additional facts, relating to the Australian Communist Party, may be taken into account as relevant to the ambit of power.

Some facts relating to the Australian Communist Party are alleged in the recitals in the preamble to the Act, and others may be said to be implied by the word "Communist" in the name of the Party. Such facts are in their nature controversial, and evidence which might be adduced with respect to them in the present litigation could not enable findings to be made which would necessarily be proper in other litigation challenging the validity of the Act. But facts of this kind, even if they could be conclusively established, do not go to the question of power, but go only to the

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question whether this legislation would, in practical result, conduce to an end within power. There is an essential difference between, on the one hand, a law providing for the dissolution of associations as to which specified facts exist and, on the other hand, a law providing specially for the dissolution of a particular association. The first law may be supportable, under the defence power for example, for the reason that a relevance to the subject of the power, sufficient to give the law the character which attracts validity, is to be seen by considering the nature of the specified facts which the law makes the condition of its operation. The other law cannot be upheld, because the operation of the law is independent of any facts peculiar to the association, and a consideration of its legal effect does not disclose any relevance to the subject of the power. The point of fundamental importance is that, before a measure can be pronounced valid, a capacity to assist defence, or a sufficient relevance to another subject of power, must be perceivable in what the law itself does, not in what will follow when it does it. Turn to facts concerning the character, objects, activities or propensities of an association which is made the specific subject of a law, and you turn away from the relevant inquiry; you are looking no longer at the legal operation of the law but at the practical results likely to follow in the train of its operation; you are concerning yourself, not with power, but with matters which provide a reason for a purported exercise of power.

It follows that, in my opinion, the Court cannot be assisted in this case by taking into its consideration, either with or without evidence, facts of the kinds alleged in the recitals or any facts as to the nature of communist doctrines or the tendencies which espousal of them may induce. It must take the powers of the Parliament as they stood in October 1950, having regard, so far as the defence power is concerned at least, to the danger of war as it could then be seen to exist, and it must compare with those powers the character of the Act as disclosed by nothing else than its operation in law. If this be done, the provisions applying to the Australian Communist Party must be held, in my opinion, to be invalid, whatever may be the truth as to matters with which that Party is or may be charged.

I turn now to the provisions of the Act as to bodies of persons to which s. 5 applies. Their operation is to dissolve any such body of persons and forfeit its property if the Governor-General declares the body an unlawful association. He is authorized to do so if satisfied that the body answers one or more of the descriptions contained in s. 5 (1) and that the continued existence of the body

would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

The descriptions provided in s. 5 (1) all involve some form or degree of connection with the Australian Communist Party or with communism, but they contain nothing else which could be suggested to have any relevance to any head of legislative power. Considerations similar to those which lead me to the conclusions I have stated in relation to the provisions concerning the Australian Communist Party lead me to the conclusion that none of the powers relied upon to support the Act is attracted by the descriptions which s. 5 contains of the bodies of persons to whom that section applies. Since the Commonwealth Parliament has no power under the Constitution to legislate upon the general topic of the dissolution of voluntary associations, it follows from the conclusion stated that if the provisions in question are to be upheld it must be upon the ground that they are brought within power by the stipulation for the Governor-General's satisfaction that the continued existence of the body would be prejudicial to the matters referred to in s. 5 (2).

Section 5 provides for what is in effect a right of appeal from the Governor-General's satisfaction that the body is one which answers any of the descriptions in s. 5 (1), but it does not provide for any form of challenge to his satisfaction as to the prejudicial character of the continued existence of the body. In the absence of any such provision, a declaration of this satisfaction is, in my opinion, immune from challenge or examination in any court upon any ground. It was strongly urged on behalf of the defendants that if it were shown that the Governor-General, upon the materials before him in relation to a body which he declares an unlawful association under the section, could not have the necessary satisfaction without misconceiving the legal significance of the expression "activities prejudicial to the security and defence of the Commonwealth" &c., it would be competent for the Court to hold his declaration to be unauthorized and of no effect. I find it impossible to accede to this argument. The section on its face will bear no other meaning than that the Governor-General is to form an unchallengeable judgment as to whether the continued existence of the body will have the necessary tendency. In sharp contradistinction to the provision for judicial review of his opinion as to whether a body is one to which the section applies, is the very limited provision that the Executive Council shall not advise the Governor-General to make a declaration unless the material upon

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which the advice is founded has first been considered by a statutory committee. It is not required that the advice tendered to the Governor-General shall be consistent with the opinion formed by the committee. In the face of this contrast, the inference is irresistible that it is left to the Executive Council to give such advice as it thinks proper, being assisted but not controlled by the views of the committee. To hold that nevertheless a court may review the legal conceptions which underlie the advice would be to ignore the plain meaning of the legislation. Moreover, it is in the nature of things practically, if not totally, impossible for a court to know in a given case either what those legal conceptions were or to what facts they were applied; and I find it impossible to attribute to the legislation any other intention than that the Governor-General may exercise his power with complete immunity from judicial interference. Finally, it must be remembered that the satisfaction with which alone the section is concerned is the satisfaction of the Governor-General acting with the advice of the Executive Council. So acting he has not to consider for himself either questions of fact or questions of law, but will be satisfied as he may be advised.

The effect of s. 5 (2), therefore, is that if the Governor-General is satisfied that a body of persons is one to which the section applies and the appropriate court does not decide that it is not such a body, the Governor-General is empowered to declare that body an unlawful association subject only to his being satisfied upon the advice of the Executive Council (as to the correctness of which in law or in fact no sort of challenge can be made) that the continued existence of the body would be prejudicial to certain matters as to which the Parliament has legislative power; and after the lapse of a specified period from the publication of that declaration the statute operates by its own force to dissolve the body and expropriate its property. I have stated the effect of the legislation in this way in order to draw attention to what I consider a crucial distinction between this enactment and certain other kinds of legislation by which powers are made exercisable conditionally upon the formation of an opinion as to the scope of a subject upon which the Constitution enables the Parliament to make laws. Such measures frequently have this in common with the provisions I am considering, that the opinion formed is unexaminable for error of fact or of law; yet though, for this reason, they enable the authority who forms the opinion to act upon his own conception of the scope of a parliamentary power, they may themselves be valid exercises of that power. That is so in two classes of cases, namely, those in which

the authority conferred is a power of subordinate legislation, and those in which the authority conferred is expressly or impliedly limited by reference to the purpose with which it may be exercised.

It has been held repeatedly that the Governor-General may be validly authorized to make such regulations as appear to him to be necessary or expedient for the defence of the Commonwealth, and yet that the Court may declare any regulations he makes to be invalid if they exceed the scope of the defence power. The reasoning which produces this result appears to me to involve the following steps: (i) a law conferring a power to promulgate subordinate legislation within the limits of legislative powers possessed by the Parliament is valid as being itself within those limits (*Roche* v. *Kronheimer* (1); *Huddart Parker Ltd.* v. *The Commonwealth* (2)) but it cannot be within those limits if it purports to authorize subordinate legislation transcending them; (ii) therefore a law which confers power on the Governor-General to make regulations if he is of a specified opinion, must be construed as authorizing only legislation as to which two conditions are satisfied, namely that the Governor-General holds the required opinion and that the legislation is such as would be valid if enacted by the Parliament itself; (iii) therefore a regulation as to which the Governor-General holds the specified opinion is nevertheless open to be tested for validity by considering what it says and does, and applying to it the same test as would be applied to a statute in similar terms. The point to be observed is that the law conferring the regulation-making power is not construed as making it a condition of the validity of regulations that the Governor-General shall have observed the proper limits of the defence power in forming his opinion. Consequently the Court has to consider, not the soundness, reasonableness or factual basis of the Governor-General's opinion, but only whether the regulations fall outside the ambit of the constitutional power itself (*Stenhouse* v. *Coleman* (3)).

Again, it is true that laws conferring administrative or executive powers upon designated persons have been upheld in certain cases, notwithstanding that the powers have been made exercisable in consequence of the formation of an opinion as to what is necessary or expedient for the defence of the Commonwealth. This has been held, I think, only in cases where the relevant legislation could not be properly construed as authorizing acts of a nature or for a purpose unrelated to the defence power. The Court cannot

(1) (1921) 29 C.L.R. 329.
(2) (1931) 44 C.L.R., at p. 512.
(3) (1944) 69 C.L.R., at p. 470.

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examine acts done under such legislation for the purpose of considering whether the person entrusted with authority correctly understood and observed the limits of the defence power in forming his opinion, for no condition that he shall do so is read into the legislation; but there is nothing to preclude the Court from considering whether the designated person in truth held the requisite opinion, or whether his acts were of the nature, and were done for the purpose, which alone the legislation can be held to authorize consistently with the limits of the defence power.

This seems to me to be the principle underlying the cases of *Lloyd* v. *Wallach* (1), *In re Walsh* (2) and *Little* v. *The Commonwealth* (3). The legislation considered in each of those cases came into operation in time of war, when much more might be validly authorized under the defence power than at other times. The consequence of this was that the kinds of acts which might be authorized under that power, and the purposes for which under that power they might be authorized to be done, covered a large field. In none of the cases cited was it attempted to be shown that the purpose for which the executive acts in question were done was foreign to the purpose of defence as it existed at the relevant time; but none of them suggests that their purpose was unexaminable for relevance to the defence power. The basis of those cases appears to me to have been that the defence power was wide enough at the time to support legislation authorizing the acts in question to be done for a defence purpose. If the acts had been of such a nature, or such consequences had been attached to them by legislation, that even the existence of a defence purpose would not give them or their consequences a sufficient relevance to defence, the reasoning of those members of the Court who held invalid regs. 3 to 6B in the *Jehovah's Witnesses Case* (4), would have applied to invalidate the legislation authorizing them or the legislation attaching consequences to them. And if the acts authorized, though of such a nature as to be capable of assisting defence, if done for a defence purpose, had been authorized to be done for purposes extraneous to the power of defence, the legislation authorizing them must have been held invalid, as is shown by *Shrimpton* v. *The Commonwealth* (5).

The case is very different where that which a measure purports to do is not within any power of the Parliament unless a sufficient connection with power is supplied by making the operation of the

(1) (1915) 20 C.L.R. 299.
(2) (1942) A.L.R. 359.
(3) (1947) 75 C.L.R. 94.
(4) (1943) 67 C.L.R. 116.
(5) (1945) 69 C.L.R. 613.

measure conditional upon an executive judgment which is unexaminable and involves the formation of an opinion as to the scope of a legislative power. In such a case the condition cannot bring the statute within power, for *ex hypothesi* the condition may be satisfied, and the statute according to its terms may operate, in consequence of a wrong opinion as to the scope of the selected power. Thus, under the Act now in question, notwithstanding that the Parliament has no general power to dissolve associations and forfeit their property, a body of persons to whom s. 5 applies might become dissolved and its property forfeited in consequence of an executive judgment based upon an unexaminable opinion as to what is capable of being considered prejudicial to a matter within the scope of the defence power or the incidental power, even though the opinion may be completely erroneous. I find it impossible to refer to any head of power legislation of which that can be said.

The provisions of the Act relating to individuals resemble in some respects those which apply to bodies of persons. Section 9 applies to a person who answers any of several descriptions which s. 9 (1) contains. A person to whom the Governor-General is satisfied that s. 9 applies, and as to whom an appropriate Court does not make any contrary finding, is subjected by the Act to a variety of consequences if the Governor-General, being satisfied that that person is engaged or is likely to be engaged in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, makes a declaration accordingly under s. 9 (2). For reasons similar to those I have stated in connection with s. 5 (2), I am of opinion that s. 9 (2) is not a valid exercise of the defence power, the incidental power, or the implied power to legislate against subversive activities. It cannot be upheld unless as incidental to a power which will support some one or more of the provisions by which consequences are attached to the making of a declaration by the Governor-General.

One of those consequences, created by s. 10 (1) (*c*), is incapacity to hold an office in an industrial organization to which the section applies or in a branch of such an organization. The organizations to which the section applies are such as the Governor-General declares. He is authorized to make a declaration in respect of any industrial organization if he is satisfied that a substantial number of its members are engaged in a vital industry; and the industries referred to as vital are certain named industries and any others which in the opinion of the Governor-General are vital to the security and defence of Australia: s. 10 (3). It is not

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within Commonwealth legislative competence to make laws upon the subject of capacity to hold office in industrial organizations generally, and the definition of " industrial organizations " in s. 3 make it clear that that expression in s. 10 (1) (*c*) is not limited to organizations registered under the *Commonwealth Conciliation and Arbitration Act*. Nor is it possible, I think, consistently with the scheme of the legislation, to apply the presumption of severability created by s. 15A of the *Acts Interpretation Act* 1901-1948 so as to import such a limitation. Section 10 (1) (*c*) therefore cannot be supported under par. (xxxv.) of s. 51 of the Constitution. Nor can it be supported under the defence power by reason of the fact that it operates only with respect to industrial organizations as to which the Governor-General has the satisfaction prescribed by s. 10 (3). The considerations I have stated in relation to s. 5 (2) apply in this connection also. There is therefore no power of the Parliament which will support s. 10 (1) (*c*).

The other disabilities which are made statutory consequences of a declaration under s. 9 (2) relate to matters which are clearly within Commonwealth legislative power. These disabilities are imposed by s. 10 (1) (*a*) and (*b*) and s. 14. It may be accepted as a general proposition that if the Parliament has power to impose a disability in relation to a particular matter, e.g. ineligibility for employment in the Commonwealth public service, it may do so upon any condition it may see fit to select. But it does not follow that, if the condition selected depends upon the doing of some act, such as the making of a declaration, which requires statutory authorization, the power which supports the imposition of disabilities will also support a provision authorizing the act to be done. I should think it clear that the Governor-General's declaration provided for by s. 9 (2) requires statutory authorization in order to be privileged under the law of defamation, having regard to the grave imputations it must contain ; and in my opinion the statement of the Governor-General's satisfaction which s. 9 (2) authorizes to be made in the declaration lacks such a specific connection with any of the powers under which disabilities of the kind in question might be imposed to be capable of authorization in exercise of those powers.

I am therefore of opinion that s. 9 (2) is invalid ; and if it is, ss. 10 (1) and 14, the operation of which is conditional upon a declaration being in force under s. 9 (2), must fall with it.

The remaining sections of the Act cannot stand by themselves and are therefore invalid.

The result is that in my opinion Question 1 should be answered : (a) No, and (b) No ; and Question 2 should be answered : The whole Act is invalid.

Questions in case answered as follows :—

1. (*a*) *No.*
1. (*b*) *No.*
2. *Yes—wholly invalid.*

Defendants to pay costs of plaintiffs Gibson and Campbell in action No. 11 *of* 1950 *and of plaintiffs in the other actions in which this case has been stated. Case remitted to Dixon* J.

Solicitor for the plaintiffs (Action No. 11 of 1950) The Australian Communist Party, Gibson and Campbell ; (Action No. 11 of 1950) Bulmer and Others (for the Building Workers' Industrial Union) and Purse ; (Action No. 18 of 1950) the Australian Coal and Shale Employees' Federation, Williams, *Harold Rich.*

Solicitors for the plaintiffs (Action No. 12 of 1950) the Waterside Workers' Federation of Australia and Healy ; (Action No. 17 of 1950) the Federated Ironworkers' Association of Australia and McPhillips, *C. Jollie-Smith & Co.*

Solicitors for the plaintiffs (Action No. 13 of 1950) the Australian Railways Union and Brown, *Slater & Gordon*, Melbourne.

Solicitors for the plaintiffs (Action No. 15 of 1950) the Amalgamated Engineering Union (Australian Section) and Rowe ; (Action No. 16 of 1950) the Seamen's Union of Australia and Elliott, *Sullivan Bros.*

Solicitor for the defendants, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

Solicitors for the intervenants (Action No. 39 of 1950) the Federated Ship Painters and Dockers Union ; (Action No. 40 of 1950) the Sheet Metal Workers' Union ; and (Action No. 41 of 1950) the Federated Clerks' Union of Australia (New South Wales Branch) and Maurice John Rodwell Hughes, *C. Jollie-Smith & Co.*

J. B.