[HIGH COURT OF AUSTRALIA.]

QUEENSLAND NEWSPAPERS PTY. LTD. . APPELLANT; INFORMANT,

AND

McTAVISH . . . . . RESPONDENT. DEFENDANT,

H. C. OF A. 1951.

BRISBANE, *June* 21, 22.

MELBOURNE, *Oct.* 3.

Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

*Constitutional Law (Cth.)—Defence—National security—Landlord and tenant—Restriction on eviction of protected persons—Alternative accommodation—Cessation of hostilities—War time legislation and regulations thereunder—Operation—Transitional period—Continuance—Validity of legislation and regulations—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*), (*xxxix.*)—*Defence* (*Transitional Provisions*) *Act* 1946-1949 (*No.* 77 *of* 1946—*No.* 70 *of* 1949), *s.* 6 (1)—*National Security Act* 1939-1946 (*No.* 15 *of* 1939—*No.* 15 *of* 1946), *s.* 19—*National Security* (*War Service Moratorium*) *Regulations* (*S.R.* 1942 *No.* 437—1948 *No.* 109), *regs.* 28A, 30*.

Regulations 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations* impose restrictions upon the ejectment of a class of persons which includes members and discharged members of the armed forces; women and parents depending or recently depending upon such members or receiving pensions payable in consequence of their death or incapacity.

*Held* that on their true construction the purpose of the regulations was not to confer on members or former members of the armed forces some recompense or reward for war service but was to deal with conditions arising out of and in the course of the war and existing in the transition from war to peace. Accordingly the *Defence* (*Transitional Provisions*) *Act* 1946-1949, to the extent to which it purported to continue the regulations in force until 31st December 1950, is not authorized by the defence power and is invalid.

*Collins* v. *Hunter*, (1949) 79 C.L.R. 43, applied.

ORDER TO REVIEW.

Queensland Newspapers Pty. Ltd. as landlord gave notice to Archibald Gordon McTavish, to quit and deliver up possession of certain premises being part of Victory Chambers, Adelaide Street,

* The operation of regs. 28A and 30 has been terminated in New South Wales, Victoria, South Australia and Western Australia, where their place has been taken by State legislation. This has not been done in Queensland.

Brisbane, and of which he was the tenant. This notice was given under s. 41 (1) (5) (8) (ii) of *The Landlord and Tenant Act of* 1948 (Q.). As the tenant failed to comply with the notice to quit an information was exhibited by the landlord, so that proceedings might be instituted for ejectment. After hearing evidence the stipendiary magistrate would have made an order for possession but held that in view of regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations* he was unable to do so. The magistrate found that the tenant was a protected person within the meaning of these regulations and that reasonably suitable alternative accommodation was not available. Accordingly he dismissed the information.

From this order an appeal was brought to the High Court, *Fullagar* J. granting an order nisi to review.

*M. B. Hoare* (with him *W. B. Campbell*), for the appellant. The *Defence* (*Transitional Provisions*) *Act* 1941-1949, in so far as it attempts to continue the operation of regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations*, until the end of 1950 cannot be supported as a valid exercise of the powers of the Commonwealth either under s. 51 (vi.) or s. 51 (xxxix.) of the Constitution. It appears from the history of the regulations that they were intended to be of a temporary character only and that they were intended to operate only during the actual course of the war and during the transitional or interim period. When the regulations were first introduced the time limit within which the period of protection from ejectment applied was six months. That was an indication that even during the actual war emergency and the housing shortage which then existed, which would be almost wholly at that time caused by the war, there was a period of six months between the time when the serviceman was discharged and his ejectment, when he was able, as it were, to readjust himself and fully return to private life. The broad object of the regulations was to ensure that members of the forces and their dependants were not ejected from houses or business premises while the bread winner was engaged on war service and during a transitional period afterwards, whatever that period may be considered to be. Originally six months was the time limit, and that has been extended from time to time until it became eventually four years. It is obvious that reg. 30 does not come within the *direct* legislative scope of s. 51 (vi.) of the Constitution, but comes only within the indirect effect or the secondary aspect of legislation for defence.

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[He referred to *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1).] It has been made clear in several cases that the transitional period covers a gradual transition back to more or less peace conditions. There is no sudden restriction on the powers and the question is essentially one of degree. The provisions of regs. 28A and 30 are of an extreme and drastic nature. [He referred to *Collins* v. *Hunter* (2).] The relevant time when this matter has to be considered is the date of the *Defence Transitional Act* 1949. The provisions of reg. 30 are just as drastic if not more drastic than those of reg. 38 dealt with in *Collins* v. *Hunter* (3). They have become more onerous with the passage of time. In respect of new buildings and renovated premises the inevitable result has been that rents have risen, so that the prospect of a landlord ever being able to provide alternative accommodation at the same rental is so remote as to be almost impossible of fulfilment. The regulations can only be justified under s. 51 (vi.) or s. 51 (xxxix.) by reason of an indirect relationship to the defence forces. Their real effect is to affect greatly the law of landlord and tenant, although indirectly they benefit certain returned servicemen. Under the definition a pensioner from the war of 1914 to 1918 is a protected person, which would show that the regulations have nothing to do with demobilisation at all. The respondent has been discharged over four years. A person who served in the forces during 1940 and was then discharged and is in receipt of a pension also comes within the definition. The regulations are designed to deal with the actual war emergency and, the demobilisation period immediately following, and cannot be extended for an indefinite period. The fact that they purport to apply to a person who may have been discharged for nine to ten years is tantamount to an indefinite period. The legislation must relate to the naval or military forces of the Commonwealth and if it does not relate directly to the raising and operation of these forces, it must be such legislation as can be considered to fall reasonably within that scope. Even though it may be of benefit to returned servicemen and may indirectly lead to the benefit of the forces by encouraging enlistments in the future, that does not make it a law relating to the naval and military forces. *A fortiori* in the case of a discharged member of the forces, if legislation is for his benefit, it does not necessarily mean that it is legislation within the defence power. There must be some real connection with defence. [He referred to *R.* v. *Foster* (4); *Victorian Chamber of Manufactures* v. *The*

(1) (1945) 71 C.L.R. 161, at p. 170.
(2) (1949) 79 C.L.R. 43, at pp. 96, 97.
(3) (1949) 79 C.L.R., at p. 67.
(4) (1949) 79 C.L.R., at p. 81.

*Commonwealth* (1); *South Australia* v. *The Commonwealth* (2).] There must be a definite limited period during which servicemen could remain in possession of premises under the defence power: *Real Estate Institute of New South Wales* v. *Blair* (3). It is a power which is exercisable only during the actual war emergency and the transitional period, and only with respect to members and ex-members of the forces during the actual demobilisation period. All the Commonwealth can legislate on so far as the defence power is concerned, is to make provision for demobilisation. These particular regulations are "blanket regulations" which purport to extend the rehabilitation period beyond the four years which was considered too long in *Collins* v. *Hunter* (4) in respect of any person who was in receipt of a pension. [On the question whether a person who fought in the war of 1914 to 1918 is included in the definition, he referred to *Fenton* v. *Batten* (5); *Ex parte Morrall*; *Re King* (6).] While the Commonwealth has full power to provide homes for discharged members of the forces, it can only acquire homes by the acquisition of the property on just terms: *Real Estate Institute of New South Wales* v. *Blair* (7). While in this case there is not a direct acquisition of property, the regulations confer valuable proprietary rights on tenants, who are protected from ejectment, and take away rights from a landlord who but for the regulations could eject the tenant and give vacant possession if he wanted to sell. It is impossible to distinguish these regulations from those declared invalid in *Collins* v. *Hunter* (4). In each case the regulations deal with rehabilitation, which is only valid during a restricted period. The only reference to a court in reg. 30 is "the Court making the order". It does not refer to any particular court of a State and there is no attempt to confer federal jurisdiction on any court in Queensland sitting under *The Landlord and Tenant Acts* 1948 *to* 1949. [He referred to *Le Mesurier* v. *Connor* (8).] Section 39 of the *Judiciary Act* 1903-1950 has been impliedly excluded, because under s. 6 (3) (c) of the *Defence (Transitional Provisions) Act* 1946 there is express power in the regulations to include provision for vesting any court of a State with federal jurisdiction with respect to any matter arising under the regulations.

*P. D. Phillips* K.C. (with him *L. L. Draney*), for the Commonwealth, intervening by leave. The submission that the regula-

(1) (1943) 67 C.L.R. 413.
(2) (1942) 65 C.L.R. 373, at p. 424.
(3) (1946) 73 C.L.R. 213, at p. 236.
(4) (1949) 79 C.L.R., at p. 67.
(5) (1948) V.L.R. 422.
(6) (1945) 46 S.R. (N.S.W.) 29; 63 W.N. 37.
(7) (1946) 73 C.L.R. 213, at p. 235.
(8) (1929) 42 C.L.R. 481, at p. 500.

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tions are valid is based on no temporary aspect of the defence power at all. It is not put broadly as a transitional or demobilisation provision at all and it is necessary to look carefully at the way this law operates in relation to the State law of which it is a qualification. When that is done this is seen to be for the most part an exercise of the defence power and is something which would fall within the power to make laws about naval and military defence. There are three aspects, firstly, the persons privileged, secondly the privileges which they gain and thirdly the land in respect of which privileges are given. The persons dealt with by the regulations are in four classes, viz. discharged soldiers without any disability; men in the services; disabled veterans; and dependants. The aspect of the defence power, which is exercised, differs in relation to the classes. As to the men serving with the forces, that would be put purely on the ground that it is either within or outside the powers to make provisions guaranteeing security of tenure within the limits and with no qualification. It is simply part of the power to make laws about naval and military defence in its very narrowest sense. As to the discharged soldiers under no disability, the aspect of the defence power called in aid there is the transitional or demobilisation power. As to the disabled veterans, it is necessary to go back to the first power. A careful examination of the nature of the provisions of this law shows that that is a power which can be exercised if there is power to raise and maintain armies. It comes within the power if it deals with a particular war, to raise armies, maintain them and deal with them, including those disabled in the service of their country. The question is—Is this a legitimate exercise of that aspect of the defence power for those involved, giving consideration to the privileges granted? As to the discharged soldier, a normal capable returned soldier, who is unincapacitated, it is a genuine demobilisation provision. He is only protected for four years after his discharge. If the position is taken as at November 1949, an unincapacitated person discharged before November 1945 is outside the protection of the regulations, the great bulk of servicemen had their demobilisation completed by November 1945. But if there were unincapacitated persons who came out of the services after November 1945, they are given protection only to the end of 1951. As to those of full capacity the provision is clearly transitional. The regulations automatically operate so that during the period from the discharge the privileges fall away. It is a genuine demobilisation statute as to men of full capacity. With regard to those who have suffered some disability in the service of their country the period of protec-

tion grows, so that the discharged serviceman may get a permanent privilege if he is incapacitated on military service. In this way the Commonwealth as the army-raising authority has the power to deal with incapacitated veterans in the way of giving them some civil concessions. No one has challenged the power of the Commonwealth to require persons to give preference in employment to returned soldiers. That is a law directed to civilians affecting the exercise of normal rights in the interests of returned soldiers, who must be reinstated as employees and be given preference over other applicants for employment. That is a good example of a federal law directly affecting or interfering with property and civil rights in the State. The normal right of choice of an employer in the conduct of his own business is *pro tanto* qualified by the privilege created for returned soldiers. The power of modifying civil rights must be limited and this becomes a question of degree : *Collins* v. *Hunter* (1). The degree depends upon the persons in respect of whom a privilege is granted and the nature of the privilege given. Nobody could dispute the power with respect to the man actually serving. The object is to provide some security for his home or business premises. It may be a home in which he is living because he has been transplanted or may be leased premises for the purpose of his service, or he may be a tenant who lives with his wife and dependants there. Then protection is given to her and the dependants in respect of the premises of which the serviceman is the lessor. That is the normal legitimate explanation of the power to raise and maintain armies. As to the nature of the privilege it goes to security of tenure and not to conduct or misconduct on the part of the tenant. It is impossible to consider these regulations as an exercise of the power except on the whole process. The Commonwealth repealed the *National Security* (*Landlord and Tenant*) *Regulations* upon being satisfied that there was a satisfactory system to satisfy other tenants and the moratorium provisions are to be viewed as a completion of a satisfactory system relating to landlords and tenants. It would therefore be artificial to examine the War Service Moratorium Regulations except in the whole context in which they became law, that is, the direction to the executive to discontinue the Landlord and Tenant Regulations, the amendment of the War Service Moratorium Regulations so as to make them applicable to and superimpose them upon State law, if it should be a State law of a satisfactory character, together with a further provision to remove the War Service Moratorium Regulations when satisfied that there is a

(1) (1949) 79 C.L.R., at p. 97.

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State law of a satisfactory character. This is a law giving certain privileges to veterans. The granting of privileges to veterans, if of a certain character is within the power. But if the privilege is in eviction from premises, it is important to see in respect of what legal situation as prescribed by other laws these privileges do arise. They do not exist *in vacuo*, but exist in relation to a legal situation. They are qualifications for it. Nor is it proper to assume some legal situation prescribed at common law. There is nothing sovereign about common law rights and privileges in this connection. The standard is what are the privileges as against the practices of the community, the rules regulating rights and privileges for incapacitated veterans and so on. What is the benefit the veteran is getting as against the rest of the community? Under s. 49 (1) (c) of *The Landlord and Tenant Acts* the court is directed to consider the question of reasonably suitable alternative accommodation. That is a matter which enters into the court's discretion. The chief point about the War Service Moratorium Regulations is that they take away that discretion in the case of a protected person. Under the statute affecting the community in the State law the court must take into consideration reasonably suitable alternative accommodation. Under the regulations the veteran gets the benefit of this, because the court cannot make an order unless there is reasonably suitable alternative accommodation. Now the significance is this—Here is a clog on eviction *pro tanto*, a guarantee of security of tenure, namely, security for tenants who pay their rent and do not cause annoyance to their neighbours. The protection of security of tenure, in the absence of reasonably suitable alternative accommodation is only in a legal way the guaranteeing of security of tenure if accommodation is scarce. At the stage when scarcity ceases the protection becomes less and less. The more other accommodation exists the easier it is to find a reasonably suitable alternative accommodation and the less the security of tenure to the tenant. Broadly it is a flexible standard giving security of tenure to certain classes of tenants, war veterans and only to those who pay rent and behave themselves. These regulations do nothing more than give the tenant who is protected, security during the period of shortage and in the areas where there is a shortage and for ascertaining that there is a shortage. Under reg. 30 (2) war veterans are given security of tenancy with regard to farming and agricultural properties in Queensland. By s. 7 of *The Landlord and Tenant Act* the definition of prescribed premises excludes grazing areas and farms. Here is a substantial additional privilege, which has to be validated or treated as severable. The

test is what does the Commonwealth law do in substance in terms of human rights and human activities and not merely what modification of the legal institutions of *The Landlord and Tenant Act* result. The validity of the Commonwealth law cannot be tested by seeing in what way it modifies the legal rights or what the nature of the modification is and if the privilege is sufficiently related to the powers. It is necessary to ascertain what is the substance of the privilege in terms of those enjoyed by other members of the community. It is hardly a matter of analysing the qualification of legal rights. The problem is whether a law which says in respect of a veteran dealing with the house in which he lives or the business premises in which he is making a living, provided he behaves himself and pays his rent and dependent upon the security or availability of houses, that the veteran is to have a greater security of tenure than the rest of the community, is so remote a privilege as to be outside the power to deal with incapacitated war veterans? It is submitted that the authority which raises and maintains armies, and which presumably must in consequence have a responsibility for those incapacitated in its service, and as part of its power of raising and maintaining armies, can confer privileges in civil life. This limited privilege is not beyond the power. There were suggestions in argument and it was indicated in the judgments in *Collins* v. *Hunter* (1) that the question whether the privilege is too excessive or within the power is to be gauged by looking at the legal nature of the privilege. That privilege has to be measured and its excess has to be determined by comparing it with the actual enjoyments of ordinary members of the community. The taking of houses as in *Collins* v. *Hunter* (1) was an extraordinary privilege. It was a marked departure from the enjoyments, rights, powers and immunities of ordinary citizens. But guaranteeing security of tenure, co-related to security of accommodation is not, either as a matter of law or as a matter of practice, an unusual proceeding at all. The United States of America, Great Britain and Australia have admitted not only the relation of landlord and tenant but a statutory modification, creating a substantial security of tenure in excess of what would have been that existing under merely contractual bases. Therefore it is necessary to look at this particular privilege as a departure broadly from that kind of pattern and ascertain what degree of modification is being sought. [He briefly compared the United States Congressional Defence Powers.] The validity of the War Service Moratorium Regulations depend, *inter alia*, on the surrounding circumstances in which it operates,

(1) (1949) 79 C.L.R. 43.

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and amongst the surrounding circumstances is the existing law in the States. That constitutes facts in relation to which the law must be measured and to some extent upon which its validity depends. It is within the defence power to give incapacitated veterans, who are earning their living by farming, some security of tenure in the absence of alternative accommodation. The giving to agricultural tenants security of tenure has a much longer history than merely the *Rent Restriction Act of* 1920. In some aspects the giving of tenant rights by law other than by agreement has even its common law basis. No real difficulty is presented by the fact that the federal law has imported a very important class of tenancies into this sphere of restriction, though that class of tenancies is outside the sphere of protection of the State law. In the United States there are provisions made under the defence power restricting evictions under federal law. [He referred to the United States Code, No. 46 Supplement Vol. 2, 80th Congress (3rd January 1947—2nd January 1949) Title 50 : War and National Defence, Appendix, p. 1391.] It is difficult to see on what constitutional or logical basis it can be held that making compulsive provisions modifying the rights or imposing duties upon the States and local authorities, could be within the power, and making the same kind of compulsive provisions modifying the rights or increasing the burdens of ordinary citizens would be outside the power. The test cannot be upon whom is the burden or the benefit imposed, but rather the nature and extent of the benefit in the community in which it is found. It is an improper analysis of this law to say that the finding of suitable alternative accommodation is a hardship on the landlord, which would turn the scale on the question of degree. If it be right that there is a great scarcity of alternative accommodation, then that is the point of the protection given. If there is no alternative accommodation available then the position of the disabled veteran is parlous, since if he is evicted there is nowhere for him to go, and in this way the case for saying that this is a substantial exercise of the defence power is made stronger. As the shortage of houses disappears in any place or region, then the protection drops automatically with the disappearance of the shortage. This law made in November 1949 has been continued, because of the reality and seriousness of the problem and whilst it is true that it adds to the burden of the landlord, it is that which makes it a genuine exercise of the power of the nature claimed.

*M. Hanger* K.C. (with him *J. D. McGill*), for the respondent, adopted for the most part the argument of *P. D. Phillips* K.C., on

behalf of the Commonwealth and submitted that the extent to which the respondent was required to go was to show that the regulations, so far as a pensioner was concerned, were valid. The provisions of the regulations with regard to a pensioner are severable. The respondent was a person entitled to a pension under s. 23 of the *Australian Soldiers Repatriation Acts*, the pension being granted on the ground of incapacity. So far as a pensioner is concerned, whether it were a case of actual hostilities being continued, whether it were a case of transfer to peace, or whether it were after the transitional period had expired, these regulations would be justified. They would also be justified as making some provision for a future war (*Hume* v. *Higgins* (1) ). It may well be regarded by the legislature as an important matter for its consideration in the treatment of the pensioner, with a proper and sympathetic consideration given to a person who is incapacitated as a result of hostilities. These matters provide a sufficient nexus with the defence power to justify the legislature making provision for incapacitated persons in this respect. The question of the extent of the power, the degree of the necessity and matters of policy with the legislature are not appropriate matters for the consideration of the judicial power (*Dawson* v. *The Commonwealth* (2) ; *Miller* v. *The Commonwealth* (3) ). In *Collins* v. *Hunter* (4) it is clear that the court held that the remedy was exceptional and required the exigencies of demobilisation and discharge to justify it, and as those exigencies no longer existed the justification for the regulation has ceased to exist. On that basis, the view taken that these regulations adopted an extreme course or an exceptional remedy or a remedy of a drastic nature was taken as being an element in determining the validity of the regulations. In deciding what is exceptional, drastic or extreme in the regulations the court should have regard to the laws of the State, six States of the Commonwealth have passed laws with slight differences, in substance the same as *The Landlord and Tenant Acts* (Q.). The regulations cannot be drastic because the character of the remedy must be measured by comparison with the law as it exists now. In *Real Estate Institute of New South Wales* v. *Blair* (5), a sufficient nexus was found in the legislation, which made provision for the reinstatement of service personnel in civilian life. After all reinstatement in houses is not as important as reinstatement in business. By the *Defence (Transitional Provisions) Act* these regulations have from time to time

(1) (1949) 78 C.L.R. 116, at pp. 133, 134.
(2) (1946) 73 C.L.R. 157, at p. 173.
(3) (1946) 73 C.L.R. 187, at p. 203.
(4) (1949) 79 C.L.R., at pp. 96, 97.
(5) (1946) 73 C.L.R. 213, at p. 223.

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received a considered judgment as to their necessity. The legislature must have satisfied itself of the necessity and the opinion of the legislature is a factor which the court should consider and if there were any doubt as to validity, that doubt should be resolved in favour of the validity of the regulations.

*M. B. Hoare*, in reply. It is not denied that there are certain permanent powers relating directly to defence, but in so far as the defence power relates to assistance for discharged servicemen, the whole subject is referable to the circumstances as they exist at the particular time. Such power must be considered in the light of the transitional or interim period, and the wide powers, which are attempted to be exercised here, were only valid during the period of the actual emergency and the demobilisation or interim period after the cessation of hostilities. The argument of the intervener was based on the continuance of a housing shortage. As regards the housing shortage and the shortage of accommodation generally, the war is but one cause. There are many other causes, but the argument presupposes that the shortage is a direct consequence of the war, which is not the case. No doubt, under the defence power the Commonwealth can provide pensions and medical treatment permanently for discharged servicemen. It is its duty so to do, but that is very different from placing a burden on a particular individual or class of individuals as these regulations seek to do, and while it may be justified in placing a burden on an individual or class of individuals during an interim period that is also different from attempting to impose the burden permanently. The provisions of the regulations are not severable. The various State laws have no bearing whatever on the validity of the regulations. If any regard is to be paid to State legislation it is merely for the extremely limited purpose of considering how far the regulations go. The fact that the legislature of Great Britain has passed the *Rent Restrictions Act* commencing in 1920 and continuing in force throughout the war indicates that so far as the housing shortage there was concerned it had no relation to the war at all. Very little regard can be paid to the social problems encountered by the legislatures of Great Britain and the United States. If some other legislature decides to introduce socialistic legislation, that has no bearing on Commonwealth powers and only the very slightest bearing on the extremity of the provisions here. The American regulations referred to in argument have a very limited effect and much more limited than these regulations, being confined to giving the ex-servicemen an opportunity of buying it,

before sold to anyone else. In *Real Estate Institute of New South Wales* v. *Blair* (1) *Williams* J. said that these regulations were in effect, if not in substance, an acquisition of property. Although it is not suggested here that this is an acquisition of property within the Constitution, the effects are most drastic. They take away the rights of an owner drastically and therefore in considering the powers of the Commonwealth and the reasonableness of the legislation, regard must be had to that circumstance (*Collins* v. *Hunter* (2) ). As to pensioners it should be remembered that there is a service pension as well as a war pension. The service pension has nothing to do with war disabilities. However the regulations are not severable and the service provisions cannot be severed from the provisions with regard to a pension. It cannot be said that the means are inappropriate to achieve the power, because the Commonwealth has no power to legislate in the matter (*Miller* v. *The Commonwealth* (3) ). In this case the opinion of the legislature is not a factor to consider. It has been considered on occasions, but is rather in the nature of the last grasp at a straw. The authorities cited by the respondent all relate to the transitional period. The Commonwealth has no power in regard to rehabilitation of ex-servicemen *per se*, but only has the power incidental to the exercise of the defence power. It cannot be said that because the Commonwealth has power to legislate with respect to demobilisation, discharge and rehabilitation and a man is suffering from a disability, it must extend that power. It is not within the power of the Commonwealth to say that because a man is in receipt of a pension of some kind, he is protected. It is not sufficient to say a man is receiving a pension and that is sufficient to continue the powers indefinitely. The whole of the provisions are extreme. They take away the rights of landlords and the legislation of the State in regard to landlord and tenant is legislation upon which the Commonwealth has no power to legislate. Further there is no sufficient nexus with the defence power to allow the regulations to operate so far as the present type of person is concerned.

*Cur. adv. vult.*

Oct. 3.

The following written judgments were delivered :—

DIXON, MCTIERNAN, WEBB, FULLAGAR AND KITTO JJ. This is an appeal under s. 39 (2) (*b*) of the *Judiciary Act* 1903-1950 and s. IV., rule 1 of the Appeal Rules from an order of the Court of Petty Sessions at Brisbane refusing an order putting the appellants

(1) (1946) 73 C.L.R. 213, at p. 225.
(2) (1949) 79 C.L.R., at pp. 95, 96.
(3) (1946) 73 C.L.R. 187.

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in possession of certain premises and dismissing the information by which the order was sought.

The premises consist of a part of Victory Chambers, Adelaide Street, Brisbane. They have been occupied by the respondent as a weekly tenant of the appellants but his tenancy was terminated by notice to quit expiring on 11th August 1950. The special magistrate was satisfied of the matters which under *The Landlord and Tenant Acts* 1948 *to* 1949 (Q.) would have enabled him to make an order for possession and he would have made such an order against the respondent, had it not been for regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations*. The operation of regs. 28A and 30 has been terminated in New South Wales, Victoria, South Australia and Western Australia where their place has been taken by State legislation. But this has not been done in Queensland.

The respondent falls within the definition of a "protected person" contained in reg. 28A and complies with the conditions imposed by reg. 30 (1) (*b*). The special magistrate was not satisfied that reasonably suitable accommodation was available for the occupation of the respondent and on that ground only refused the order for possession.

The appellants base their appeal from the special magistrate's decision upon the contention that regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations* are not now and were not at the material time in force in Queensland. They say that it is beyond the constitutional power of the Commonwealth to maintain them in force up to the relevant period of time. The relevant period of time is August 1950 and the legislation which purported to keep them alive in and throughout the year 1950 is the *Defence* (*Transitional Provisions*) *Act* 1946-1949. In *Collins* v. *Hunter* (1) this Court decided that regs. 30A to 30AF of the *National Security* (*War Service Moratorium*) *Regulations*, which dealt with the right of protected persons to take possession of dwelling houses which were unoccupied or about to become unoccupied, could not be validly maintained in operation in the year ending 31st December 1949. The Court held that in so far as the *Defence* (*Transitional Provisions*) *Act* 1946-1948 purported to give force and effect to regs. 30A to 30AF in that year, it was beyond the legislative powers of the Commonwealth. Regulations 28A and 30 however were not involved in the matter then before the Court. Subsequently, by the *Defence* (*Transitional Provisions*) *Act* 1949, s. 6 and 3rd Schedule, regs. 30A to 30AF were expressly abrogated. Regulation 30 in its earliest form was promulgated on 21st March 1941,

(1) (1949) 79 C.L.R. 43.

eighteen months before the regulations which the Court has already held bad, but like the latter regulations, the purpose of reg. 30 as amended from time to time has been to deal with the difficulties arising during the war and immediately thereafter concerning the accommodation of servicemen, discharged servicemen and certain of their relatives and dependants. Regulation 30 is contained in Part V. of the Regulations and that Part was recast by Statutory Rules 1942 No. 437 on 14th October 1942, since when the substance of reg. 28A and reg. 30 has undergone no important change. But reg. 30 depended upon the operation of the *National Security* (*Landlord and Tenant*) *Regulations* and when on 16th August 1948 by orders made under reg. 7AA inserted in those regulations by Statutory Rules 1948 No. 108 their operation was brought to an end, it became necessary to redraw reg. 30 of the *National Security* (*War Service Moratorium*) *Regulations* in order to avoid its automatic termination as an accessory of the *Landlord and Tenant Regulations*. Regulation 30 in the old form was therefore replaced with a reg. 30 in a new form by Statutory Rules 1948 No. 109 (13th August 1948). This was done in purported pursuance of the power to make regulations conferred by s. 6 (2) of the *Defence* (*Transitional Provisions*) *Act* 1946-1947. There was no change however in the substantial character of reg. 30.

The effect of reg. 30 is to maintain in the occupation of premises a very wide class of persons, covering servicemen, ex-servicemen and certain of their connections, called protected persons. The premises in the occupation of which they are protected may be of almost any kind. The expression goes far beyond dwelling houses and business premises and, reading the definition literally, it appears to include bare land of any description. Exceptions are made of licensed premises and permanent residences temporarily let for holiday purposes.

The occupation of premises by a protected person is maintained whether the protected person is a lessee himself or is a person claiming under a lessee whose tenancy has been determined. In the case of a protected person who is a lessee no order may be made by a court for the recovery of possession of the premises from him or for his ejectment unless either he has failed in compliance with certain conditions that are laid down or else a heavy burden is discharged of showing that reasonably suitable alternative accommodation is available to the protected person in occupation and that the premises in question are reasonably required for specified purposes.

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It is convenient to take the second alternative first. It is of a double character. The claimant must first show that the premises are reasonably required for one or other of certain enumerated purposes. The most commonplace is that the claimant requires the premises, if a dwelling house, for his own occupation or for some person residing with him and dependent upon him. If the premises are not a dwelling house the condition he must satisfy is that he reasonably requires them for his own occupation or for occupation by a person associated or connected with him in his trade, profession, calling or occupation. Other enumerated purposes relate to premises used or required for a parsonage or the like or a hospital or by a trustee for the personal occupation of a beneficiary or of a person residing with and dependent upon the beneficiary. The claimant, having established the existence of one of these reasonable necessities, must next show, as already stated, that reasonably suitable alternative accommodation exists available for the accommodation of the protected person in lieu of the premises which it is sought to recover. There is however a qualification to this; if the protected person has sublet the premises and has gone to reside elsewhere, that is enough. Before alternative accommodation can be considered reasonably suitable it must appear that the rent is not greater than that of the premises which the protected person occupies, that the floor area is not less, that the conditions appertaining to the new premises are not inferior to those of the old and in the case of a dwelling house that it is not less congenial.

But these necessities do not exist if the protected person can be brought within the first of the two alternatives mentioned, that is to say if it can be shown that he has broken one of the conditions imposed. It is enough if he has failed to pay the rent in respect of a period of eight weeks, if he has failed to perform a term or condition of the lease and there has been no waiver, if he has not taken reasonable care of the premises or of goods leased therewith, if he has committed waste, if he has been guilty of conduct amounting to a nuisance or annoyance to neighbouring occupiers or if he has been convicted during the currency of the lease of using the premises for an illegal purpose or if a court has found or declared that he has so used them. In certain very restricted conditions the fact that the occupier has assigned his lease or sublet without consent may be enough and, if the occupation is or has been by an employee whose place is to be taken by another employee, that may suffice.

It is not necessary to state fully the conditions governing the case of a protected person in occupation who is not himself a lessee

but who claims under a lessee whose tenancy has been determined. The conditions are analogous, the failure to comply with the conditions being that of the protected person in occupation, not of the lessee under whom he holds. In the same way of course the alternative accommodation must be suitable for the protected person.

It is of course possible that a lessor seeking to recover possession of premises from a protected person is himself within the definition of protected person. If so his case is excluded from the operation of the foregoing provisions. Moreover where a protected person seeks to recover premises from a person who is not a protected person, no provision of State law making it necessary that there should be alternative accommodation for the defendant is to stand in the way of his recovery of possession.

Considered apart from the description of persons who are protected persons, the provisions we have summarized would not appear to have any present connection with the power to make laws with respect to defence. That connection depends upon the relation to defence which the category of protected persons possesses.

An examination of the provisions creating the category shows, in our opinion, that regs. 28A and 30 concern the situation arising in the course of the war and at the termination of hostilities, that is to say, they relate to conditions incidental to the conduct of the war and a situation arising from the necessity of raising maintaining and subsequently demobilizing armed forces. They are not regulations directed to the general relations for an indefinite time of former members of the armed forces serving in the war to other members of the community with reference to housing. Before anyone can be a protected person he must either be, or bear a relation to, a member, or discharged member, of the forces whose war service required him for a specified time to live in premises which premises were not occupied by him as a home or occupied by a member of the household to which he belonged as a home. This somewhat vaguely expressed negative condition does not appear to mean that a serviceman must have had a home of his own or have formed a member of a household living in a home. All it seems to do is to exclude the case of a serviceman who was not required to leave such a home or live in a place which did not fall within that description.

The specified time covers two cases for a member of the Forces and three for a discharged member of the Forces. A member of the Forces must either be presently required by his war service so to live or must in the past have been so required for twelve months in all. A discharged member of the Forces must have been required

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by his war service so to live either (1) immediately prior to his discharge or (2) for a total period of twelve months during his war service, or (3) for three months continuously during the six months immediately prior to his discharge.

If the person is not a member of the Forces or a discharged member of the Forces he or she may nevertheless be a protected person if he or she bears to a member or discharged member a relation of either of two kinds. First a parent and secondly a female dependant of such a member or discharged member of the Forces are protected persons, but the expressions parent and female dependant are not used in their natural senses but according to definitions more or less artificial. In the case of a member of the Forces the parent and the female dependant must be dependent upon the member for their support. In the case of a discharged member the parent, like the female dependant, must have been dependent on the serviceman for support. But the dependancy may have been total or partial. The dependancy may be upon a pension payable in consequence of the incapacity or death of a person who has been a member of the Forces. Whether it was intended or not the result of the definitions is that a widow of a soldier of the 1914-1918 war receiving a pension falls under the head: *Fenton* v. *Batten* (1). Again, the dependancy may be upon a person who having been a member of the Defence Force during the war has been discharged, or has ceased to be engaged on war service, for a period not exceeding four years. This period of four years is a result of successive increases made by amendment of the regulations. In addition to actual dependancy a parent or female dependant comes within the class if he or she is the parent or wife of a person who having been a member of the Defence Force engaged on war service in the "present war" has been discharged or has ceased to be engaged on war service if he or she was immediately prior thereto dependent on him for support; but in such a case the person must be receiving from the Commonwealth medical treatment of such a nature as to prevent him wholly or partly from engaging in that occupation. A widow of a member of the Forces who died while engaged on war service is also a "female dependant of a member". To be a discharged member of the Forces for the foregoing purposes a person must have been a member of the Defence Force engaged on war service during the war and he must have been discharged for four years or have ceased for that period to be engaged on war service, or if that period has been exceeded he must be in receipt of a pension from the Common-

(1) (1948) V.L.R. 422.

wealth or of medical treatment of such a nature as to prevent him wholly or partly from engaging in his occupation. The four years is a result of successive amendments. The period began with six months, which was replaced with twelve months (Statutory Rules 1944 No. 176) then with two years (Statutory Rules 1946 No. 86) then three years (Statutory Rules 1947 No. 99) and finally four years (Statutory Rules 1948 No. 55). War service has a very wide application, and used without qualification is not necessarily confined to the war of 1939-1945. But it appears to us that the effect of the provisions contained in regs. 28A and 30 is to deal with the occupation of dwellings, business places and land generally by those serving in the war or lately serving in the war and women or parents presently or recently depending upon such persons or upon pensions arising from the death or incapacity of such persons. The conditions with which these regulations were designed to deal were those arising out of and in the course of the war and during the transition from conditions of armed conflict to those of outward peace a transition in the course of which demobilization took place.

In our opinion the case is like those of *Collins* v. *Hunter*, *Wagner* v. *Gall* and *R.* v. *Foster* (1), in which an attempt was made to prolong the operation of regulations framed for conditions more directly connected with the war into a period of changed conditions. We considered that the legislative power with respect to defence could not support the attempt to extend the operation of the regulations, framed as they were for such a different situation, for a time beyond any reasonable period of transition required for the winding up of the arrangements for war. We think that the considerations which proved decisive in those cases must govern the validity of the attempt to continue the operation of regs. 28A and 30. In support of the validity of that attempt somewhat extensive claims were made for the possible use of the power to make laws with respect to defence for the purpose of conferring upon former servicemen who have served in war special rights and privileges as against other members of the community. To our minds the present case is not one which concerns the power of the Commonwealth under s. 51 (vi.) of the Constitution to legislate with respect to special privileges which former members of the Navy, Army or Air Force who have served in war should have in the community generally. What we have to decide is the validity, not of a general law upon the subject of the privileges of ex-servicemen operating for an indefinite time in conditions of peace, but of an attempt to prolong the operation of a war emergency regulation. The regulations go far beyond the privileges of

(1) (1949) 79 C.L.R. 43.

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ex-servicemen and they do not deal with the matter on the basis of an incidental power in relation to the consequences of war service. The purpose of the regulations is not to confer some recompense or reward for war service or to provide some relief in respect of physical or other disabilities resulting from such service or to offer an incentive or encouragement for willing participation in the future defence of the Commonwealth. None of these matters forms the subjects of regs. 28A and 30 and none of them supplies or ever did supply grounds upon which the validity of the regulations might be sustained. As appears from the references to these two regulations in *Blair's Case* (1), the reason why they were conceived to be within the defence power before the life of the community, disrupted by the exigencies of war, could be restored to conditions of peace was that they constituted a measure incidental to the active conduct of the war. But before the commencement of the year 1950 the purposes to which the defence power might validly apply had so contracted that statutory provisions dealing with the occupation of land generally by persons comprised in categories far wider than the class of ex-servicemen could no longer find such a constitutional justification. What provided the constitutional justification for the regulation at the beginning was the expansion of the practical application of the defence power resulting from conditions of war. To prolong a regulation made in and framed for such conditions arising from the war is an attempt to exercise a power incidental to defence after the conditions to which the regulation was incident have passed.

In our opinion the attempt to extend the operation of reg. 28A and reg. 30 by the *Defence (Transitional Provisions) Act* 1946-1949 is within the reasoning of *Collins* v. *Hunter* (2), and is void. We think that the appeal should be allowed with costs and the order of the Court of Petty Sessions set aside. We think it is desirable to remit the cause to the special magistrate so that he may make the final order for possession fixing a time for the execution of the order.

WILLIAMS J. This is an appeal in proceedings brought by the appellant in a Court of Petty Sessions at Brisbane under the provisions of *The Landlord and Tenant Acts* 1948 *to* 1949 (Q.) claiming possession of certain business premises in that city. The respondent was a weekly tenant of the premises. The appellant purported to determine this tenancy by a notice to quit expiring on 11th August 1950. The ground of the notice to quit was that

(1) (1946) 73 C.L.R. 213, at pp. 222, 223, 231.

(2) (1949) 79 C.L.R. 43.

the premises, not being a dwelling house, were reasonably required for occupation by the lessor, the particulars being that the premises were required for the purpose of the newspaper business carried on by it at Brisbane. The magistrate was satisfied that this ground was established. He was also satisfied that the greater hardship would be on the appellant if an order for possession was refused than on the respondent if an order was granted. The magistrate would have made an order for possession if *The Landlord and Tenant Acts* 1948 *to* 1949 (Q.) had been the only legislation he had to consider. But he found, and his finding is not challenged, that the respondent was a protected person within the meaning of reg. 30 of the *National Security* (*War Service Moratorium*) *Regulations*. Regulation 30 (7) of those regulations provides that an order shall not be made against a protected person unless the court, in addition to being satisfied upon any other ground upon which the court is required to be satisfied, is further satisfied that reasonably suitable alternative accommodation is or has been since the date upon which the notice to quit is given, available for the occupation of the protected person in lieu of the premises in respect of which the order is sought. The magistrate held that no reasonably suitable accommodation had been available to the respondent since the date upon which the notice to quit was given. He therefore declined to make the order and dismissed the information.

The substantial ground on which we are asked to review the order of the magistrate is that the *National Security* (*War Service Moratorium*) *Regulations* were not at any material time in force in the Commonwealth by virtue of the *Defence* (*Transitional Provisions*) *Act* 1949 or otherwise. The material regulations are regs. 28A and 30. The *Defence* (*Transitional Provisions*) *Act* 1949, which was assented to on 28th October 1949, continued the War Service Moratorium Regulations in force from midnight on 31st December 1949 to midnight on 31st December 1950.

Prior to 13th August 1948 regs. 28A and 30 of the War Service Moratorium Regulations had operated as an amendment to the *National Security* (*Landlord and Tenant*) *Regulations*. At or about that date the Landlord and Tenant Regulations were in the process of being repealed in the States by orders made under reg. 7AA of those regulations. They were discontinued altogether by the *Defence* (*Transitional Provisions*) *Act* 1949. On 13th August 1948 Statutory Rules 1948 No. 109 entitled "Amendments to the National Security (War Service Moratorium) Regulations" made under the *Defence* (*Transitional Provisions*) *Act* 1947 came into

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force. Regulation 2 of these regulations provided that reg. 30 of the *National Security* (*War Service Moratorium*) *Regulations* should be repealed and a new reg. 30 inserted in its stead. This new regulation was the regulation which the *Defence* (*Transitional Provisions*) *Acts* 1948 and 1949 purported to continue in force during 1949 and 1950.

The legislative power of the Commonwealth relied upon to support these Acts is the defence power, s. 51 (vi.) of the Constitution. The relevant Act in the present case is the *Defence* (*Transitional Provisions*) *Act* 1949. The defence power, as this Court has so frequently pointed out, is a power of indefinite ambit. It expands in times of crisis, reaches its greatest magnitude during hostilities, and contracts upon their cessation. No legislation based upon the power can retain its validity after the power has ceased to be wide enough to support it. The *Defence* (*Transitional Provisions*) *Act* 1949 was the fourth of a series of annual Acts passed to continue in force for periods of twelve months such regulations made under the *National Security Act* with appropriate amendments as the Commonwealth Parliament considered were required to bring about, in the words of the recitals, " the gradual and orderly return to conditions of peace ". The constitutional validity of several of these regulations has been discussed in this Court. It is sufficient to refer to three cases heard together, *R.* v. *Foster*, *Wagner* v. *Gall*, *Collins* v. *Hunter* (1). The Court said (2) that " During the actual course of war in the sense of prosecution and continuance of hostilities defence necessities may reasonably be considered to require extensive and detailed control of the community by the Commonwealth in relation not only to war service and war supplies, but also to industry in general, food, clothing and housing, and financial, economic and social conditions. Apart from the defence power, control of these matters is in most respects outside Commonwealth legislative power and within State legislative power. Such matters come within Federal power because legislation with respect to them is legislation upon ' incidents in the exercise of ' the power with respect to defence ".

During the prosecution and continuance of the recent hostilities control of housing was one of the subjects which came within the scope of the defence power. This was because one of the results of diverting the resources of the nation to the prosecution of the war was to restrict building operations and this contributed to create a shortage of homes and business premises. This shortage has continued to the present time. It appears likely to continue

(1) (1949) 79 C.L.R. 43.

(2) (1949) 79 C.L.R., at p. 81.

into the remote future. Such a continuance cannot be indefinitely attributed to the interruption of building by hostilities. When the *Defence* (*Transitional Provisions*) *Act* 1949 was enacted fighting had ceased more than four years ago. A period of four years should have been sufficient to overcome the shortage due to war conditions. The present shortage may well be largely, if not entirely, attributable to other causes such as industrial unrest, shorter working hours, and a vigorous immigration policy. In *Foster's Case* (1) it was said that " If it were held that the defence power would justify any legislation at any time which dealt with . . . any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject ".

It is clear that by the end of 1949 circumstances which gave the Commonwealth Parliament general control of the law of landlord and tenant had ceased to exist. Indeed the Commonwealth Parliament had tacitly admitted this when it caused the repeal of the Landlord and Tenant Regulations in the States in the second half of 1948 and did not seek to re-enact them by the *Defence* (*Transitional Provisions*) *Act* 1949.

Regulation 30 of the War Service Moratorium Regulations remained as a Federal excrescence upon a legislative subject which had otherwise reverted to the States. It benefits all protected persons who are or were for the period mentioned in the four paragraphs of sub-reg. 1 required, by reason of their war service, to live in premises other than premises occupied by them, or by a member of the household to which they belonged, as a home. It operates in favour of such persons not only in respect of homes but also in respect of business premises and even vacant land of which they are lessees. Protected persons and members of the Forces are defined by reg. 28A. A protected person means a member of the Forces, discharged member of the Forces, female dependant of a member, female dependant of a discharged member, parent of a member or parent of a discharged member. " Member of the Forces " has a wide meaning. It includes not only members of the defence Forces of the Commonwealth, but any person who is on active service with the Naval, Military or Air Forces of the United Kingdom or any part of the King's Dominions, or of any foreign power allied or associated with His Majesty in any war in which His Majesty is engaged, or maintained by any foreign

(1) (1949) 79 C.L.R., at p. 83.

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authority recognized by His Majesty as competent to maintain Naval, Military or Air Forces for service in association with His Majesty's Forces. Discharged members of the Forces fall into two broad categories (1) those who have been discharged from the Defence Force or have ceased to be engaged on war service for a period not exceeding four years and (2) those who have been discharged from the Defence Force or have ceased to be engaged on war service for a period exceeding four years who are receiving a pension from the Commonwealth or who are receiving from the Commonwealth medical treatment of such a nature as to prevent them either wholly or partly from engaging in their occupation. Protected persons therefore, as Mr. *Phillips* said, may be divided into four broad classes (1) present members of the Forces; (2) discharged members without any disability; (3) discharged members under disability; (4) dependants of these three classes. These classes may be severable: *Real Estate Institute of New South Wales* v. *Blair* (1). The validity of reg. 30 in relation to existing and discharged members of the Forces may well rest on firmer ground than it does in relation to the dependants of such persons. We are here concerned with a discharged member of the Defence Force of the Commonwealth, who is partially disabled and in receipt of a pension from the Commonwealth. If the regulations could be valid in relation to any class they should be valid in relation to the class to which the respondent belongs.

One factor in favour of the validity of the re-enactment of the regulations by the *Defence* (*Transitional Provisions*) *Act* 1949 is the fact that the regulations are kept in force by annual Acts so that the necessity for their continuance is reviewed annually by the Commonwealth Parliament. In the case of an elastic power, like the defence power, the Commonwealth Parliament must be allowed a wide latitude of legislative discretion. But to quote again from *R.* v. *Foster* (2) "The Court must see with reasonable clearness how it is incidental to the defence power to prolong the operation of a war measure dealing with a subject otherwise falling within the exclusive province of the States and unless it can do so it is the duty of the Court to pronounce the enactment beyond the legislative power". A broad and generous view must be taken of the legislative content of the defence power with respect to the re-establishment and rehabilitation of discharged members of the Forces. But the responsibility of discharging this obligation rests on the Commonwealth itself and not on particular citizens who happen to possess property which is required for such

(1) (1946) 73 C.L.R. 213, at pp. 226, 230, 234.

(2) (1949) 79 C.L.R., at p. 84.

re-establishment and rehabilitation. There is no real distinction in principle between giving discharged members of the Forces particular privileges with respect to property rented from private persons at the expense of such persons and giving them special privileges with respect to any other property owned by private persons at the expense of those persons. As a purported exercise of the defence power there is little to choose in the degree of interference with the rights of property owners between the privileges conferred upon protected persons by reg. 30 and those conferred upon them by regs. 30A to 30AF of the War Service Moratorium Regulations which were held in *Collins* v. *Hunter* (1) to have been invalidly continued by the *Defence* (*Transitional Provisions*) *Act* 1948. It was said (2) of the latter regulations that " To treat the provision as one constitutionally capable of indefinite continuance is to mistake the difficulties which servicemen share with other members of the community in a prolonged housing shortage for the more immediate and urgent necessities which are set up by demobilization and discharge at the end of hostilities ". Those regulations gave protected persons a right to apply to a magistrate for possession of dwelling houses which were unoccupied or about to become unoccupied. They were confined to dwelling houses and they at least enabled the owner to resist the claim of a protected person on the ground of hardship to himself or some other person. Regulation 30 applies not only to homes but also to offices and vacant land. In respect of offices and vacant land, a protected person is given special rights not because the requirements of war service compelled him to vacate an office or vacant land but simply because war service required him to live in premises other than premises occupied by him or a member of the household to which he belonged as a home. It does not give him special rights over the home he then occupied, supposing he had to vacate it, but over any premises including premises subsequently let to him as a member of the public.

The regulation leaves altogether out of account the hardship the owner might suffer because he was unable to recover possession of his property. True, the protected person must not allow his rent to fall into arrears for more than fifty-six days, and must observe the terms and conditions of his tenancy and take reasonable care of the premises but it matters not that the premises being a dwelling house are reasonably required by the lessor for his own occupation or not being a dwelling house are reasonably required for occupation by the lessor in his trade, profession, calling or occupation. Regulation 30 prohibits an order for the recovery of

(1) (1949) 79 C.L.R. 43.

(2) (1949) 79 C.L.R., at p. 97.

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the possession of the premises unless the Court is satisfied that reasonably suitable alternative accommodation is available for the occupation of the protected person. The regulation provides that accommodation shall not be deemed to be reasonably suitable unless (a) the rent of the alternative accommodation does not exceed the rent of the premises at present occupied; (b) the floor area of the alternative accommodation is not less than the floor area of the premises at present occupied; (c) in the case of a dwelling house—the alternative accommodation is not less congenial than the premises at present occupied; and (d) the conditions generally appertaining to the alternative accommodation are not inferior to the conditions appertaining to the premises at present occupied. It is not a consideration that the protected person may be in better financial circumstances than the owner of the premises and well able to pay a higher rent for other suitable accommodation. The magistrate has no discretion whatever. The owner of property who has a protected person for a tenant is placed in a peculiar and invidious position in comparison with the rest of the community. He is deprived of important proprietary rights of which he can only be deprived in peace time by State law. The Commonwealth Parliament is not powerless in the matter. It can acquire land and build houses or business premises for members and discharged members of the Forces or can acquire existing premises on just terms under s. 51 (xxxi.) of the Constitution. But it cannot reasonably be said to be an incident of the defence power four years and more after the conclusion of hostilities for the Commonwealth to prolong a war measure dealing with a subject otherwise within the exclusive province of the States.

For these reasons I would allow the appeal, set aside the order of the magistrate, and make an order for possession.

*Order that the appeal be allowed with costs including costs of the order nisi and that the order of the Court of Petty Sessions at Brisbane be set aside and that the cause be remitted to the special magistrate so that he may make a final order for possession and fix a time for the execution of such order.*

Solicitors for the appellant, *Thynne & Macartney.*

Solicitor for the Commonwealth, intervenant, *G. A. Watson,* Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *J. H. Scott & Crawford.*

B. J. J.