subject of that case were subsequent to the repeal by Act No. 43 of 1930 of ss. 6 and 6A of the *Commonwealth Conciliation and Arbitration Act* 1904-1928. The log and cll. 77 and 78 of the award in effect repeated certain prohibitions and penalties that had been in the repealed provisions. *Latham* C.J. said (1): "The repeal of these sections, in my opinion, does not affect the power of the Arbitration Court in making awards. That power was not extended by these sections when they were in operation, and it is not diminished by their repeal." *Rich* J. said (2):—"Of course the repeal of these provisions does show a change of legislative policy. It does show that the Legislature decided to remove from the law the provisions making strikes and lock-outs and the like offences. But I cannot find in the repeal any indication of intention that the powers of the Arbitration Court in settling an industrial dispute should in any way be restricted. If a dispute existed on such matters as job control the Arbitration Court might well be expected to prohibit them by an award. I see nothing in the change of policy to show that the Court's powers in this respect were to be limited. The deleted portions were general legislative prohibitions separated from the sections which delimit the jurisdiction of the Court. Such provisions are unaffected by any express enactment and I can find nothing in the statute as it stands supporting a restriction. If the repeal of the old prohibition of strikes and lock-outs evidences a legislative policy against the imposition of any similar prohibition by the award of the Court in the course of settling a dispute all I can say is that the Legislature has stopped short of expressing its policy in any legislative form". *Starke* J. said (3) that "Their repeal (ss. 6 and 6A) did not affect whatever jurisdiction the Arbitration Court possessed under the Act". The present Chief Justice said (4):—"These amendments clearly indicate an abandonment by the Legislature of the policy of forbidding under penalty strikes and lock-outs and similar acts. They may be said to indicate too that the Legislature considered that the only acts of that character which should be statutory offences under Federal law operating of its own force should be those described in sec. 58BA. But, conceding so much, I am unable to see why this implies any intention to limit the jurisdiction which, as the result of an industrial dispute, the Court of Conciliation and Arbitration might possess to forbid by award acts of a like nature by the disputants or by members of the disputant organizations. The suppression by

(1) (1936) 54 C.L.R., at p. 637.
(2) (1936) 54 C.L.R., at pp. 641, 642.
(3) (1936) 54 C.L.R., at p. 643.
(4) (1936) 54 C.L.R., at pp. 645, 646.

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direct legislative enactment of strikes and analogous acts is an altogether different thing from an attempt to restrain them by the terms of an arbitral award. The first was done by creating offences which might be committed independently of any exercise of authority by the Court. In one case, that of the old sec. 6, the offence depended on the existence of an industrial dispute; in another, that of the old sec. 6A, upon the existence of an award. Given these facts, whether the Court of Conciliation and Arbitration did or did not consider that the parties should be restrained by penalty from refusing to give or accept work, the law operated to create the offence. But a restraint by award can arise only from an exercise of the arbitrator's authority to determine a dispute which from its nature makes appropriate such an award. It extends no further than the parties and those they represent. The arbitrator can do no more than make it a term of the award. It is not the arbitrator but the Act that makes it an offence to contravene a term of an award ".

These dicta explain how the award making power under the Act stands in relation to a penal provision like s. 78. It follows from the dicta that the mere omission of organizations from s. 78 cannot provide satisfactory ground for an argument that cl. 19 (ba) is contrary to the intention of that section. If it was not a good objection to the award which the Court considered in the *Seamen's Union Case* (1) that it revived penal provisions of the kind which Parliament abolished by the repealing sections, it is hardly possible to sustain the argument that cl. 19 (ba) is bad merely because the Parliament did not include an organization within the scope of s. 78.

The remaining objection to cl. 19 (ba) is that it has not the requisite relation to an industrial dispute to make it valid. Clause 28 of the present log is similar in character and purpose to cl. 26 of the log in the *Seamen's Union Case* (1). The decision in that case shows that cl. 26 of the log there in question was a demand with respect to " industrial matters " and its rejection caused an " industrial dispute " as to those matters. It follows from the decision that cl. 28 of the present log relates to " industrial matters " and the rejection of the log resulted in an " industrial dispute " as to such matters. Clause 28 is a demand that direct or industrial action within the area of the employment should be abandoned. Upon the rejection of the log there was, according to the theory of the law derived from the *Conciliation and Arbitration Act*, a dispute about the exertion of that kind of force or pressure to obtain

(1) (1936) 54 C.L.R. 626.

alterations in the terms and conditions of employment. A comparison between cl. 28 of the log and cl. 19 (ba) of the award shows that the prohibition against direct or industrial action provided in the award is not as wide as cl. 28. The comparison shows that what cl. 19 (ba) prohibits is included in cl. 28. It follows from the decision in the *Seamen's Union Case* (1) that what was awarded upon the employers' claim with respect to direct action was within their claim, that cl. 19 (ba) of the present award must be within cl. 28 of the present log and consequently within the ambit of the industrial dispute settled by the present award.

Clause 19 (ba) is not limited to overtime as was the prohibition against " bans, limitations and restrictions " which was in question in the case of *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2) and was there held to be valid. Clause 19 (ba) applies generally to all the terms and conditions of the award governing the performance of the work falling within the scope of the award. Having regard to the scope and content of the award, I think that cl. 19 (ba) is within the award-making powers of the conciliation commissioner because the clause is incidental or ancillary to the settlement of the industrial dispute by the award. Upon these principles the prohibition against " bans, limitations and restrictions " which was in question in the case of *R.* v. *Metal Trades Employers' Association* (3) was held to be valid.

Order nisi for prohibition in respect of the order of variation made on 21st June 1951 discharged with costs. Application for order absolute in the first instance for prohibition in respect of the corresponding provision of the award made on 16th January 1952 refused with costs.

Solicitors for the prosecutor, *Macpherson & Kelly*, by *Sullivan Bros.*

Solicitors for the respondent, *Moule, Hamilton & Derham.*

R. D. B.

(1) (1936) 54 C.L.R. 626.
(2) (1951) 82 C.L.R. 208.
(3) (1951) 82 C.L.R., at pp. 245, 246, 257, 258.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

McLENNAN;

EX PARTE CARR.

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SYDNEY, *March* 26, 27; *July* 31.

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

Customs—Regulations—Validity—Prohibited exports—Exportation harmful to Commonwealth—Opinion of Governor-General—Scrap non-ferrous metal—Exportation conditioned upon approval of department—Delegation of power—Consent—Nominees—Disconformity—Materiality—Customs Act 1901-1950 (*No.* 6 *of* 1901—*No.* 80 *of* 1950), *s.* 112—*Customs Act* 1951 (*No.* 56 *of* 1951), *ss.* 5, 7.—*Customs* (*Prohibited Exports*) *Regulations* (*S.R.* 1935 *No.* 2—*S.R.* 1951 *No.* 122).

Section 112 of the *Customs Act* 1901-1950, so far as material provides: (1) the Governor-General may, by regulation, prohibit the exportation of any goods (*b*) the exportation of which would, in his opinion, be harmful to the Commonwealth, (2) the power contained in sub-s. (1) shall extend to authorize the prohibition of the exportation of goods generally, or to any specified place, and either absolutely or so as to allow of the exportation of the goods subject to any condition or restriction, and (3) all goods the exportation of which is prohibited shall be prohibited exports to the extent to which the prohibition extends.

An Order-in-Council, by which item 65 was inserted in the Third Schedule of the *Customs* (*Prohibited Exports*) *Regulations*, recited that the Governor-General was of opinion that the exportation of goods specified in the regulations, except with the consent of the Minister of Trade and Customs, would be harmful to the Commonwealth. The effect of the regulations and of the item so inserted was to prohibit the exportation of non-ferrous scrap metal unless the intending exporter obtained the approval of the Department of Supply and Development.

Held, by *Dixon* C.J., *Williams*, *Fullagar* and *Kitto* JJ., (1) that the expression of the Governor-General's opinion in that form is not a delegation of the duty which the Act imposed upon him; it was consistent with an opinion that uncontrolled exportation would be harmful but that harmful tendencies

would be sufficiently reduced by the exercise of administrative discretion, and (2) (*Webb* J. dissenting), that the regulations so far as they concern item 65 are within the power conferred by s. 112 as that section existed prior to and after the commencement of the *Customs Act* 1951.

Radio Corporation Pty. Ltd. v. *The Commonwealth* (1938) 59 C.L.R. 170 and *Poole* v. *Wah Min Chan* (1947) 75 C.L.R. 218 applied.

The fact that the Order-in-Council referred to the consent of the Minister of Trade and Customs whereas the provision opposite item 65 specified the approval of the Department of Supply and Shipping was only an immaterial variation in the choice of the Minister responsible for the exercise of the discretion and did not affect validity.

APPEAL and ORDER NISI for a Writ of Prohibition.

Upon an information laid by John Henry McLennan, an officer employed in the service of the Customs, Tony Carr, of 345 Wattle Street, Ultimo, New South Wales, was, under s. 233 (1) (*c*) of the *Customs Act* 1901-1949, charged before a stipendiary magistrate that he did on or about 19th August 1949, at Sydney, export by *S.S. Tomar* prohibited exports to wit 142 tons 18 cwts. and 23 lbs. of non-ferrous scrap metal whereby he had, under the Act, incurred a penalty in excess of £500. The excess was abandoned.

The informant averred, *inter alia*, that a covering approval had not been issued by the Department of Supply and Development in respect of the exportation of the said non-ferrous scrap metal.

Regulation 6 of the *Customs* (*Prohibited Exports*) *Regulations*, made under s. 270 of the *Customs Act* 1901, as amended, provides that the exportation of goods specified in the Third Schedule of the regulations shall be prohibited, unless the conditions and restrictions respectively specified in that schedule opposite to the name or description of those goods were complied with. Item 65 on that third schedule gave the name or description of " Metals, non-ferrous, scrap " and opposite specified a condition or restriction which, at the date of the offence, was as follows : " The intending exporter shall produce to the Collector of Customs a covering approval issued by the Department of Supply and Development ".

At the time when the regulations were made s. 112 provided, so far as material, that (1) the Governor-General may, by regulation, prohibit the exportation of any goods (*b*) the exportation of which would, in his opinion, be harmful to the Commonwealth, (2) the power contained in sub-s. (1) shall extend to authorize the prohibition of the exportation of goods generally, or to any specified place, and either absolutely or so as to allow of the exportation of the goods subject to any condition or restriction, and (3) all goods

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the exportation of which is prohibited shall be prohibited exports to the extent to which the prohibition extends.

Carr was, on 22nd June 1951, convicted and was adjudged to forfeit and pay by way of penalty the sum of £500.

From that conviction and penalty Carr appealed to the High Court pursuant to s. 39 (2) (*b*) of the *Judiciary Act* 1903-1950 and s. IV. of the *Appeal Rules*, and upon motion was granted an order nisi for a writ of prohibition directed to McLennan and the magistrate to restrain further proceedings on the ground, *inter alia*, that the *Customs* (*Prohibited Exports*) *Regulations* were invalid as the Act required that the opinion as to the harmful effect to the Commonwealth of the exportation of the goods must be formed by the Governor-General and no other person.

After the date of the conviction, and on 11th December 1951, by Act No. 56 of 1951, the *Customs Act* was amended. Sections 5 and 7 of the amending Act are as follows :—" 5. Section one hundred and twelve of the Principal Act is repealed and the following section inserted in its stead :—' 112.—(1.) The Governor-General may, by regulation, prohibit the exportation of goods from Australia. (2.) The power conferred by the last preceeding sub-section may be exercises—(*a*) by prohibiting the exportation of goods absolutely ; (*b*) by prohibiting the exportation of goods to a specified place ; or (*c*) by prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with. (3.) Goods the exportation of which is prohibited under this section are hibited exports '.

7. All regulations made under the *Customs Act* 1901-1934, or under that Act as amended, prohibiting the exportation of goods, whether absolutely or subject to conditions or restrictions, shall be deemed to have been at all times, and to be, as valid and effectual as if made under the Principal Act as amended by this act."

Further relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

G. E. Barwick Q.C. (with him *H. H. Glass*), for the prosecutor. Section 112 of the *Customs Act* 1901-1951, as inserted by Act No. 56 of 1951, is quite immaterial in this proceeding, which is an appeal and not a re-hearing, and being an appeal the Court deals with the material which was before the magistrate and in the state of the law as it then existed (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1)). That case has been followed on different occasions and it is to be

(1) (1931) 46 C.L.R. 73, at pp. 85, 87, 106, 110, 112, 113.

contrasted with *Hume* v. *Higgins* (1) where the Court, as it were, derivatively had a power of re-hearing. If the law be taken as it existed at the date of the conviction, s. 7 of the amending Act could not be taken into consideration because it did not then exist. Section 7 is an attempt to make something a prohibited export long after it was exported and there is not anything on which the law can operate at this point of time. Statutory prohibition in New South Wales is strictly an appeal (*Ex parte Lovell*; *Re Buckley* (2)). The regulation in relation to non-ferrous scrap metal was not authorized by s. 112 of the *Customs Act*. It does not finally determine itself the class of goods the exportation of which is prohibited. The regulation shows that the Governor-General has not himself to determine the goods the exportation of which is prohibited. The Third Schedule in relation to " metals, non-ferrous, scrap " does not contain a condition or restriction within the meaning of s. 112 (2). In the light of the scheme for the implementation of which the regulation is being used the Governor-General could not have formed the opinion that the exportation was harmful to the Commonwealth. There is a fundamental difference between s. 52 and s. 112 both in their purpose and in their structure, respectively. The construction of s. 52 (*g*) is that there is a statutory prohibition on importation of goods in a list of goods, or discretion and power are given to the Governor-General by s. 52 (*g*) to add to that list or, as was held in *Poole* v. *Wah Min Chan* (3), to substitute the list, but to do so by describing in his regulation the goods. " All goods " is a description of goods. It is a list of classes by description. The reasoning by which the Court in *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (4) arrived at the view that the requirement of the Minister's consent was a condition stemmed out from this point: that there was an absolute power of prohibition. The former s. 112 did not give the Governor-General power to substitute or add to the list of goods. That is quite different from the new s. 112 which gives him an absolute power to prohibit the exportation of goods. Parliament itself, under s. 112, has nominated the classes of goods which are to be subject to the Governor-General's authority and power. Of the five classes of goods (*a*) and (*d*) are classes by mere description. The words " in his opinion " in (*a*) probably perform three functions: (i) they enable the description to be widened as

(1) (1949) 78 C.L.R. 116, at pp. 121, 128.
(2) (1938) 38 S.R. (N.S.W.) 153, at p. 171; 55 W.N. 63.
(3) (1947) 75 C.L.R. 218.
(4) (1938) 59 C.L.R. 170.

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it were because of the peculiar knowledge of the Executive so as to cover goods which would not fall within the precise description "arms, explosives, military and naval stores"; (ii) they confine the decision to the Executive; and (iii) they remove from the area of controversy in a court the question of whether or not goods covered by a prohibition are, in fact, capable of being used in the manufacture of arms. In (*d*) the goods are described as goods which have not been prepared or manufactured under prescribed conditions. Classes (*b*), (*c*) and (*e*) are in sharp contrast to (*a*) and (*d*) and are three classes of goods which are nominated, not by description strictly, but by the relationship which the goods bear to some public interest. The words "in his opinion" seek in all classes to utilize the peculiar knowledge of the Executive as to the relationship between the goods and the public interest. They are intended to confine the matter to the Executive, so that the area the class will cover is to be determined by the Executive and by it alone: but they do not enable an addition to the terms in which the section has nominated the class. The only function of "in his opinion" is for those three reasons: to enable the Governor-General to enlarge the area which the fixed and determined description or the fixed and determined nomination by relationship covered. But that is the peculiar function of the Executive. Under s. 112 the Governor-General merely, by virtue of the words "in his opinion", is enabled to bring to bear on the nominated relationship the Executive's knowledge as to whether particular goods bear the relationship, and he is enabled, by once expressing his opinion, to remove from the area of dispute a question of fact as to whether the goods do in fact bear that relationship. That is quite a different section from s. 52. Section 112 ought therefore to be said merely to authorize the Governor-General, by regulation, to prohibit all or any of those goods which fall within the descriptions of (*a*) and (*d*), or such goods as in his opinion bear the necessary relationship to the public interest under (*b*), (*c*) and (*e*). The Governor-General can prohibit the exportation of those goods, such goods as he has decided bear the necessary relationship, either absolutely or unless some condition or restriction is observed, but he cannot alter the class or the spread of goods by the condition. It is quite different from the *Radio Corporation Case* (1). Under that case there was the power to add to the list under s. 52 and the power to apply an absolute prohibition or a conditional prohibition to that list or any part of it. The structure of s. 52 is that there is a list of goods and a power to substitute

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

them, to change them, or do what one will, on the Court's decision, but under s. 112 there is not any power to add to the classes, they are there, fixed from the beginning as classes, two by description and three because of a specified relationship to the public interest. The function of the Governor-General under s. 112, unlike s. 52, is not to pick which class, or all or any of it; his function is to point to some specific goods or class of goods that answers the description, or bears the necessary relationship, and he must do that, he cannot delegate it to anyone. There is a radical distinction between s. 112 and s. 52 under consideration in the *Radio Corporation Case* (1). The line of reasoning by *Latham* C.J. in that case (2) could not be applied to s. 112 (1) (*b*) bearing in mind that the only function is to nominate goods within the specified relationship, the goods being chosen on the Executive's own discretion as being the goods to which the prohibition is to apply. Nor could further reasoning by his Honour (3) be applied to the instant provision because the insertion of the words "in his opinion" denies the possibility of it being left to a departmental officer. The reasoning of the minority judgment in that case (4) would not permit of the view that there being a power to include all or any part of the goods on the list, the Minister's consent might be regarded as part of the description of the goods added to the list. In this case the prosecutor is concerned with *Poole* v. *Wah Min Chan* (5) only to point out that in s. 52 there are two steps, first of all there being a power to add to the list, the addition of such goods as the Minister will not give a licence for is a sufficient exercise of the power. Section 112A suggests that a very general power was contemplated. It must be found that the exportation of the particular goods bears the necessary relationship to the public interest and would be harmful to the Commonwealth in the opinion of the Governor-General. Having ascertained the goods, the power is to prohibit the exportation of those goods subject to a condition or absolutely. The vice of the regulation is that the finding of the parcel of goods is left to someone else, the Governor-General never knows what parcel of goods it is going to be and can never apply his mind to whether the exportation of those goods is harmful or not. The goods must be described objectively. Any condition imposed must be a condition of the prohibition of the exportation of the goods about which the Governor-General has formed his opinion. The condition must be consistent with the formation by the Governor-General

(1) (1938) 59 C.L.R. 170.
(2) (1938) 59 C.L.R., at pp. 178-183.
(3) (1938) 59 C.L.R., at p. 184.
(4) (1938) 59 C.L.R., at pp. 186-193.
(5) (1947) 75 C.L.R. 218.

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of the necessary opinion, and cannot extend the class or change the identity of the prohibited goods. It is quite unlike s. 52. All the Governor-General has to do is to identify the goods that fall within the description or the nominated relationship. He must do that and the condition cannot alter what he has done. A way of reading this regulation is that it is a prohibition of so much of the non-ferrous scrap metal the exportation of which the department will not approve. Any condition must of necessity relate to the harmful quality of the exportation of the goods; it must be related to the removal, *pro tanto*, of the harmful quality of the exportation. The condition must be objective in relation to this section; it must be possible objectively to comply with a condition stated objectively. In the present instance, the condition would infringe any one of these submissions. One must distinguish between the identification of the goods on the one hand and a condition of the prohibition on the exportation of the identified goods when they have been identified. In this instance this so-called condition is part of the identification of what is to go out. That is different from a condition of the prohibition on exportation of the goods after they have been identified. The Governor-General has no power over goods, as in s. 52. The change to "by regulation" effected in 1934 did not warrant any change in the general significance of the section. That was done in order to bring the matter more closely under parliamentary supervision, and have the *Acts Interpretation Act* 1901-1932, and similar provisions, work with respect to it. The ground which *Dixon* and *Evatt* JJ. took in the *Radio Corporation Case* (1) is ground upon which we may not stand with relation to s. 52. In this instance in relation to s. 112, whatever may be now said about s. 52 because of the form and nature of it with relation to s. 112, it can be said that it would be wrong to consider this section and the word "condition" in it as enabling the export trade of the country to be submitted to some piecemeal arbitrary control by what is in substance a licensing system (*Radio Corporation Case* (1)). Once it is conceded that the so-called condition is wide enough to authorize in terms the scheme that is not afoot, then the submission is made good that the opinion that the goods are harmful to the Commonwealth—and therefore fall within s. 112—cannot really be formed. The form of the recital in the amendment in 1946 is inapt to cover the schedule.

A. R. Taylor Q.C. (with him *J. W. Smyth* Q.C. and *R. F. Loveday*), for the respondents. The correspondence shows that in the letters

(1) (1938) 59 C.L.R., at p. 187.

and orders the subject goods were deliberately misdescribed. Licences were taken out for goods under a completely incorrect description in order that they might be got away. Evidence given by McLennan as to departmental practice was purely hearsay and was clearly inadmissible. It is not conceded that the practice was that an approval would be given as a matter of course or as a matter of practice when it is shown that a levy is being paid to the association. The main argument adduced on behalf of the prosecutor is based on the proposition that if the Governor-General forms the opinion that the exportation of, say, lead from the Commonwealth will be harmful and, having formed that opinion, prohibits the exportation of lead but by the regulations lifts, in effect, the prohibition if the consent of an appropriate Minister is given, if those things happen the Governor-General has delegated to the Minister the function of forming the opinion as to the harmfulness of the exportation. That is not so because the Governor-General, if he forms the opinion that the exportation of the goods from the Commonwealth would be harmful, may permit the exportation of those goods by regulation if an appropriate Minister gives his approval. The regulations simply prescribe as a condition of export the Minister's approval which, if given, will authorize the exportation even though the exportation of the particular goods may still be harmful to the Commonwealth. This case is governed completely by the decisions in the *Radio Corporation Case* (1) and *Poole's Case* (2). Those two cases are clear authority for the proposition that the consent of the Minister is a permissible condition or restriction in relation—in those cases to s. 56—in this case to s. 112. The question of whether the consent of the Minister was a condition or a restriction in relation to s. 56 was approached in the *Radio Corporation Case* (1) in a general fashion: it did not depend on differences in form between s. 56 and s. 112: see the report (3). Those considerations which persuaded their Honours to take the view that the requirement of the consent of the Minister could not be a condition or restriction in relation to s. 52 arose out of consideration of the special terms of s. 56 itself. That is shown by the word "specified" and the important consideration that s. 56 itself nominated as prohibited exports a number of specified articles and then only gave to the Govern-General a power to add to a list. There is not any list in s. 112. The decision that the requirement that the consent of the Minister should be obtained was held to be a permissible condition in the *Radio Corporation Case* (1), and the

(1) (1938) 59 C.L.R. 170.
(2) (1947) 75 C.L.R. 218.
(3) (1938) 59 C.L.R., at pp. 181, 183, 184, 188, 192.

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authority of that proposition was not shaken in *Poole's Case* (1). There is not any reason why, if the requirement that the consent of the Minister shall be obtained is a permissible condition in relation to s. 56 that it should not be a permissible condition in relation to s. 112. There cannot be any limit upon the classes of goods which the Governor-General may declare to be prohibited exports under, for instance, sub-s. (1) (*b*) of s. 112, because the power under that sub-section extends to the exportation of any goods the exportation of which in the opinion of the Governor-General would be harmful. If the condition imposed be that the consent of the Minister be obtained—notwithstanding compliance with the condition the exportation of the goods would still be harmful to the Commonwealth, and indeed it may never be a matter considered by the Minister. It is not a matter for the Minister to consider as to whether the exportation would be harmful to the Commonwealth. There may be other matters for his consideration, and the exportation would still be lawful even though the exportation were harmful, if the condition were satisfied. Having declared that the exportation of the non-ferrous scrap metal would be harmful the Governor-General is free to attach to the prohibition any form of condition he desires. The words "except with the consent of the Minister for Trade and Customs" could only become of importance if they could operate to restrict the class of goods being declared by the Governor-General, but those words in s. 112 are not looking to goods but to exportation. Once it is conceded that the preamble is concerned with the exportation of the goods specified in the schedule the said words do not add anything, because the Governor-General says, in effect, that the exportation of any of those goods would be harmful. The provisions of sub-s. (2) of s. 112 read into sub-s. (1) (*b*) provide, in effect, that the Governor-General may form an opinion that the unconditional exportation would be harmful, and therefore he may allow it subject to a condition. A recital by the Governor-General that he had formed the opinion that the exportation of specified goods without his consent would be harmful, and that therefore he prohibited the exportation of those goods without the consent of the Minister for Trade and Customs, would be a perfectly legitimate exercise of the power and quite a permissible condition. Under s. 112 there is a power to prohibit absolutely, or to authorize exportation on any condition which the Governor-General thinks fit. *Victorian Stevedoring and General Contracting Co. Pty. Ltd.*

(1) (1947) 75 C.L.R., at pp. 229, 234, 239.

and Meakes v. *Dignan* (1) has no relation whatever to amendments made by the *Customs Act* 1951. Under s. 7 of that Act the regulations are deemed to have been valid for all material purposes when the magistrate decided the matter. The "deeming" provisions of s. 7 can only be met by a formula that the regulations were in force as from the time when they were made (*Millner* v. *Raith* (2)). In *Dignan's Case* (3) the position was that a regulation had ceased to be in operation. This is a full appeal, and is not a statutory prohibition. The respondents are entitled to succeed under s. 112 as it stood before the amendment, or, failing that, having regard to s. 7 of the *Customs Act* 1951. It does not follow by any means that it is any function of the person whose approval may be the condition subject to which there may be an exportation, that he has any function whatever to determine whether any particular exportation is harmful or not, but the only effect of the regulation is that the Governor-General prohibits the exportation of certain goods because it may be harmful but may export those goods if the appropriate Minister consents thereto. The arguments (a) that the Third Schedule does not contain a restriction within the meaning of the Act, and (b) that the condition must be related to the harmful quality of the export, are met entirely by the *Radio Corporation Case* (4) and *Poole's Case* (5). It was decided in *Millner* v. *Raith* (2) that if this was the law at all material times then the authority to prosecute covered the law as it now is and was then.

G. E. Barwick Q.C., in reply. Section 112 is not a section that enables the Governor-General to consider the conditional or unconditional exportation of goods. He has to apply his mind to some particular goods the exportation of which would be harmful to the Commonwealth : s. 112 (1) (*b*). There must be the exportation of some specific goods, not merely exportation. The emphasis is on the exportation of some identifiable goods, and the Governor-General's function is to identify those goods, express his view and prohibit the exportation of them. The prohibition must be limited to those goods about which the Governor-General can form an affirmative opinion that the exportation of those goods would be harmful. He is not given the function of determining to what extent the exportation would be harmful. The Court is asked, in performing its appellate function, to assume for the administration of the law something that did not exist at the time in relation to

(1) (1931) 46 C.L.R., at pp. 85, 87, 106, 110, 112, 113.
(2) (1942) 66 C.L.R. 1.
(3) (1931) 46 C.L.R. 73.
(4) (1938) 59 C.L.R. 170.
(5) (1947) 75 C.L.R. 218.

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a closed transaction: *Cooley* on *Constitutional Law*, 8th ed. (1927), vol. 1, pp. 188-194. It is not suggested that a person cannot be "legislated" into an offence retrospectively. The Court is performing its own appellate function, the function it derives from its own place in the Constitution, using the power that comes to it from the Constitution. The Court would never permit itself to be placed in the situation of supposing, contrary to the fact and the law, that the law was different from what it actually was. The Court is asked to have regard to a false set of circumstances and to decide on that footing. The Court would not permit that to be done under any guise. This Court should follow its own decision and treat this matter as the magistrate had it in reality, regarding the amendments as not being in existence when the magistrate had the matter before him, and that this does not compel the Court to treat these regulations as being different from what they were at the time. The use of the word "deem" is discussed in *Cooley* on *Constitutional Law*, 8th ed. (1927), vol. 1, pp. 188-194.

[WILLIAMS J. In *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (1), Lord *Wright* said that since the Act was plainly retrospective they would have to decide the appeal on the retrospective law.]

In *Performing Rights Society Ltd.* v. *Bray Urban District Council* (2) the Privy Council said they would not tender advice to the Crown which would involve the restoration of the trial judge's order. The reason for the Privy Council taking that course was not so much influenced by the retrospective effect of the Act, as by what the prospective effect of restoring the trial judge's decision would be in relation to the legislation—if they restored that decision then the party would have his remedies. Section 7 of the 1951 Act does not validate the regulations which were thought to be in force in 1949, firstly, because the regulations or purported regulations as they existed in 1949 do not fall within s. 7, and, secondly, because the new s. 112 would not support them in any case.

Cur. adv. vult.

July 31.

The following written judgments were delivered:—

DIXON C.J., WILLIAMS, FULLAGAR AND KITTO JJ. This is an appeal pursuant to s. 39 (2) (*b*) of the *Judiciary Act* 1903-1950 and s. IV. of the *Appeal Rules* from a conviction by a Court of Petty Sessions exercising Federal jurisdiction. The conviction was for an offence under s. 233 (1) (*c*) of the *Customs Act* 1901-1949 which

(1) (1939) A.C. 1., at pp. 32, 33. (2) (1930) A.C. 377.

provides that no person shall export any prohibited exports. Section 111 also provides that no prohibited exports shall be exported. The defendant, who is the appellant, was convicted for that on or about 19th August 1949, he did export by the *S.S. Tomar* prohibited exports to wit certain specified quantities of scrap non-ferrous metal and he was adjudged to pay a penalty of £500; see ss. 240 and 245.

The *Customs* (*Prohibited Exports*) *Regulations* purport to bring scrap non-ferrous metal under the category of prohibited exports. The ground upon which the appeal of the defendants is supported is that in so far as they relate to scrap non-ferrous metal the regulations are invalid. Regulation 6 provides that the exportation of goods specified in the Third Schedule of the regulations shall be prohibited, unless the conditions and restrictions respectively specified in that schedule opposite to the name or description of those goods are complied with. The sixty-fifth item on the Third Schedule give the name or description of "metals, non-ferrous, scrap" and opposite specifies a condition or restriction which, at the date of the offence stood thus—"The intending exporter shall produce to the Collector of Customs a covering approval issued by the Department of Supply and Development", see S.R. 1946 No. 138 as amended by S.R. 1948 No. 105. The general power to make regulations under the *Customs Act* is contained in s. 270 but the authority for the regulations in question must be found in s. 112. Since the conviction, which took place on 22nd June 1951, a new s. 112 has been substituted by the *Customs Act* 1951 (No. 56 of 1951) which came into operation on 11th December 1951 before the hearing of this appeal. But at the time when the regulations were made so much of s. 112 as is relied upon to support it was as follows:—"112 (1) The Governor-General may, by regulation, prohibit the exportation of any goods—(*b*) the exportation of which would, in his opinion, be harmful to the Commonwealth . . . (2) The power contained in sub-s. (1) . . . shall extend to authorize the prohibition of the exportation of goods generally, or to any specified place, and either absolutely or so as to allow of the exportation of the goods subject to any condition or restriction. (3) All goods the exportation of which is prohibited shall be prohibited exports to the extent to which the prohibition extends."

For the appellant it is said that under these provisions the Governor-General in Council, in order to make a valid regulation, must form an opinion, with reference to goods of some definite kind or description, that to export them would be harmful to the Commonwealth and then he must prohibit the exportation of goods

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of that kind or description. What has been done, so it is contended, amounts to no more than an attempt to delegate the determination of the question whether a proposed exportation of non-ferrous scrap metal would be harmful, an attempt to delegate it to the Department of Supply and Development. That department must say in each case whether a parcel of non-ferrous scrap metal is to be exported. Put another way the argument is that under the regulations it is the department and not the Governor-General that is to identity describe or define the goods the exportation of which is to be prohibited. It is denied that, within sub-s. (2) of s. 112, the Third Schedule opposite item 65 expresses a restriction or condition subject to which the exportation is to be allowed. For the appellant it was suggested that the restriction on the export of non-ferrous scrap metal was the outcome of a plan to maintain the home consumption price of lead at a lower level than export parity and to take part of the price of exported scrap lead as a contribution towards the recoupment of the deficiency in the price of lead consumed domestically. This, it was said, showed that no opinion had been formed that the exportation of non-ferrous scrap metal would be harmful to the Commonwealth. The respondent, on the other hand, did not admit that the administrative practice under or purpose of the regulation was that alleged and of course contested the conclusion. This Court cannot act upon the suggestion which in any case relates not to the meaning and effect of the regulations but something done under them.

Many of the subsidiary arguments which might otherwise be employed in support of the appeal are precluded by the decision of this Court in *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1): see too *Poole* v. *Wah Min Chan* (2).

These cases were, however, decided upon ss. 52 (*g*) and 56, not on s. 112, and for the appellant it was claimed that independent considerations arose upon s. 112 and the form of the particular regulation which, without encountering either of these decisions, led to the conclusion that the regulation so far as concerned item 65 was invalid. The argument already briefly stated was accordingly advanced. The argument appears to assume that s. 112 (1) (*b*) cannot be used if the opinion of the Governor-General is that the uncontrolled exportation of the specified goods would be harmful although it might be permitted, for example, in limited quantities or for specific purposes or upon special occasions or when the exporter fulfilled conditions calculated to avoid or reduce the mischief.

(1) (1938) 59 C.L.R. 170. (2) (1947) 75 C.L.R. 218.

But what must be considered harmful is the exportation of the goods. The harm may result from a consequent shortage, from financial or economic consequences that would ensue, or possibly from the use that would be made of the goods abroad or perhaps in the case of some kinds of goods even from the risk of political objection on the part of the country of destination. The fact that the regulation prohibits exportation of the goods unless the department approves does not mean that the decision of the question whether exportation is harmful is delegated. Nor does it mean that the Governor-General must have been of opinion that to export the goods would be harmful subject to the department not thinking otherwise. It is quite consistent with an opinion that it would always be harmful but justice or wisdom required or made it desirable to permit exceptions pursuant to an administrative discretion. It is also consistent with the view that uncontrolled exportation would be harmful but that the harmful tendencies would be sufficiently reduced or mitigated by an administrative control by a system of permits. The Order in Council by which the regulation inserting item 65 was made (S.R. 1946 No. 138, 21st August 1946), recited that the Governor-General was of opinion that the exportation specified in the regulation, except with the consent of the Minister of Trade and Customs, would be harmful to the Commonwealth. An opinion in this form is within s. 112 (1) (*b*) (2) and (3). It is within these provisions because, construing them together they seem clearly enough to contemplate a prohibition which is not absolute but is conditional or is restrictive only, restrictive that is in the sense that it is less than a complete prohibition, and because the opinion need go no further than " the extent to which the prohibition extends ", to use the words of sub-s. (3). It is true that there seems to be some disconformity between the recited exception of the consent of the Minister of Trade and Customs and the actual provision opposite item 65 specifying the approval of the Department of Supply and Shipping (as did the first form of the condition or restriction). But this disconformity means only an immaterial variation in the choice of the Minister responsible for the exercise of the discretion, immaterial to validity. The truth is that the ground left uncovered by the two decisions of this Court to which reference has been made gives no sufficient support for an attack upon the validity of the regulations in relation to item 65.

As has been said already, s. 112 under which the regulations were made has since been replaced by a new s. 112 : see s. 5 of Act No. 56 of 1951. Section 7 of the last mentioned Act says that all regulations made under the *Customs Act* 1901-1934, or under

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that Act as amended, prohibiting the exportation of goods whether absolutely or subject to conditions or restrictions shall be deemed to have been at all times and to be as valid and effectual as if made under the Principal Act (*Customs Act* 1901-1950) as then amended, i.e. by the Act No. 56 of 1951.

The respondent contended that even if the regulations were not authorized by s. 112 as it stood, this provision validated them. For had the new provision been in force when the regulations were made, it would have sufficed to authorize them.

The provision in the new s. 112 upon which the respondent relied is s. 112 (1) and (2) (*c*) considered in combination. Sub-section (1) confers a power by regulation to prohibit the exportation of goods from Australia. Sub-section (2) provides that this power may be exercized by prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with. The reasons already given for the conclusion that the regulations so far as they concern item 65 are within the power conferred by the old s. 112 apply with equal force to these provisions. The question therefore does not arise whether if the terms of the new s. 112 had been insufficient to cover the regulations, they would have gone out of force owing to the repeal by s. 5 of Act No. 56 of 1951 of the provision under which they had been made and to the terms of s. 7 ; cf., *Craven* v. *City of Richmond* (1). In view of the conclusions already expressed still less does the question arise whether upon an appeal to this Court from an order made before the passing of a provision in the form of s. 7, that provision is to be taken into account. (See *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (2) ; *Performing Right Society Ltd.* v. *Bray Urban District Council* (3) ; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4), cf. *Millner* v. *Raith* (5)).

For the foregoing reasons the appeal should be dismissed and the order nisi discharged with costs.

WEBB J. This is an application to make absolute an order nisi for a prohibition restraining proceedings on a conviction of the prosecutor, Tony Carr, before a magistrate for a breach of a regulation purporting to be made under the *Customs Act* 1901-1949 in exporting (in August 1949) non-ferrous scrap metal without the covering approval of the Department of Supply and Shipping, and adjudging Carr to pay a fine of £500.

(1) (1930) V.L.R. 153.
(2) (1939) A.C. 7, at p. 33.
(3) (1930) A.C. 377.
(4) (1931) 46 C.L.R. 73.
(5) (1942) 66 C.L.R. 1.