

[HIGH COURT OF AUSTRALIA.]

MARCUS CLARK & CO. LIMITED

PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS

DEFENDANTS.

R. B. DAVIES INDUSTRIES LIMITED

PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS

DEFENDANTS.

Constitutional Law (Cth.)—Defence power—Defence preparations—Capital issues—Control—Restriction on issue of capital by companies—Restriction on issue of securities—Consent of Treasurer—Consent not to be refused except for purposes of or in relation to defence preparations—Treasurer’s statement—The Constitution (63 & 64 Vict. c. 12) s. 51 (vi.)—Defence Preparations Act 1951 (No. 20 of 1951), s. 4—Defence Preparations (Capital Issues) Regulations (S.R. 1951 No. 84)†, regs. 6, 10, 17.*

Section 4 of the *Defence Preparations Act 1951*, to the extent to which it purports to authorize the *Defence Preparations (Capital Issues) Regulations*, and the regulations are laws with respect to defence within s. 51 (vi.) of the Constitution.

H. C. OF A.
1952.
MELBOURNE,
May 13-16,
19.
SYDNEY,
Sept. 12.
Dixon C.J.,
McTiernan,
Williams,
Webb,
Fullagar and
Kitto JJ.

* The *Defence Preparations Act 1951* contained the following preamble :
“ Whereas Australia, in common with the United Kingdom, the United States of America and other nations associated with Australia in the British Commonwealth of Nations and in the United Nations, is pledged to support collective action for resisting international aggression :
And whereas, in the opinion of the Parliament and of the Government of the Commonwealth, there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent, and with a degree of urgency, not hitherto necessary except in time of war :
And whereas the defence preparations of Australia will include in the first place, the raising, equipping and provisioning of the armed forces of Australia in increasing numbers and the equipping and provisioning of armed forces of other members of the British Commonwealth of Nations and of the United Nations :
And whereas the defence preparations of Australia will include also

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

In considering the application or operation of the defence power the distinction between a period of actual hostilities and a period of apprehended danger short of war can never be disregarded. But the restrictions upon raising money by the issue of share capital or debentures or other securities are auxiliary to and consequential upon the diversion of tangible and intangible resources to warlike purposes and such a diversion a country may feel constrained to make under a threat of war as much as when actually engaged in hostilities.

So held by *Dixon C.J., McTiernan, Webb and Fullagar JJ.* (*Williams and Kitto JJ.* dissenting).

Australian Communist Party v. The Commonwealth, (1951) 83 C.L.R. 1, distinguished.

DEMURRERS.

Marcus Clark & Co. Ltd. v. The Commonwealth and Others.

The plaintiff Marcus Clark & Co. Ltd. brought an action against the Commonwealth of Australia, the Right Honourable Sir Arthur William Fadden and the Attorney-General for the Commonwealth of Australia in which the statement of claim was substantially as follows :

2. The nominal capital of the plaintiff is £1,298,924. Its issued capital is £1,002,786 divided into 300,000 six per cent cumulative first preference shares of £1 each, 297,848 six and a half per cent cumulative second preference shares of £1 each and 809,876 ordinary shares of 10/- each. The whole of the said issued capital has been fully paid.

measures to secure the maintenance and sustenance of the people of Australia in the event of war and to contribute towards the maintenance and sustenance of the people of countries associated with Australia in defence preparations :

And whereas the defence preparations of Australia will include also the expansion of the capacity of Australia to produce and manufacture goods, and to provide services, for the purposes of the defence preparations mentioned in the last two preceding paragraphs and generally for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war :

And whereas in present circumstances the defence preparations mentioned in the preceding paragraphs cannot be carried out without the diversion of certain of the resources of Australia (including money,

materials and facilities) for use in, or in connexion with, defence preparations :

And whereas the defence preparations mentioned in the preceding paragraphs cannot be carried out to the necessary extent, and, in particular, the resources of Australia cannot be diverted to the extent necessary to fulfil the requirements of defence, unless at the same time measures are undertaken for adjusting the economy of Australia to meet the threat of war and for avoiding or reducing economic dislocations or instability caused by, or impeding, defence preparations :

And whereas, having regard to the foregoing, the military and economic strength necessary for the defence of Australia cannot, in the opinion of the Parliament and of the Government of the Commonwealth, be built up and maintained with sufficient expedi-

3. The plaintiff has for many years past carried on and is still carrying on at a number of places in the said State a large and extensive business of selling goods by retail.

4. The plaintiff has also during the said period carried on and is still carrying on in a number of places other than the said places referred to in the preceding paragraph hereof a large and extensive business of manufacturing goods for sale by retail.

5. In connection with and for the purposes of each of its said businesses referred to in pars. 2 and 3 hereof the plaintiff is possessed of real estate of large value. On the said real estate there are erected large and valuable buildings.

6. A large number of the said buildings are now in need of repair and remodelling and unless the plaintiff is enabled to repair and remodel its said buildings its said businesses will suffer serious loss and damage.

7. In consequence of the plaintiff having become liable under awards made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1903-1949 and the *Industrial Arbitration Act* 1940-1949 (N.S.W.) to pay increased rates of wages to persons employed in its said business, the plaintiff will be unable to conduct its business at a profit unless it is able to increase the volume of each of its said businesses.

8. The plaintiff is unable out of its own money to do the said repairs and remodelling or to do such acts and things and incur such expenses as are necessary for the purpose of increasing the volume of each of its said businesses.

tion and effectiveness unless the Government has authority to take such measures as are from time to time required in relation to any or all of the matters mentioned in the preceding paragraphs:—

Section 4 of the Act provided:—“(1.) The Governor-General may make regulations for or in relation to defence preparations.

(2.) The regulations which may be made under the last preceding subsection include, without limiting the generality of the power to make regulations conferred by that subsection, regulations for or in relation to—(a) the expansion of the capacity of Australia to produce or manufacture goods, or to provide services, for the purposes of defence preparations or for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war; (b) the diversion and control of re-

sources (including money, materials and facilities) for the purposes of defence preparations; (c) the adjustment of the economy of Australia to meet the threat of war or the avoidance or reduction of economic dislocation or instability caused by, or impeding, defence preparations; and (d) measures to secure the maintenance and sustenance of the people of Australia in the event of war or to contribute towards the maintenance and sustenance of the people of countries associated with Australia in defence preparations.

(3.) Nothing in this section authorizes the making of regulations—(a) imposing taxation; (b) with respect to the borrowing of money on the public credit of the Commonwealth; (c) for or in relation to the compulsory direction of labour; or (d) imposing any form of, or extending any existing obligation to render, compulsory naval, military or airforce service.”

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.

1952.

MARCUS
CLARK
& Co. LTD.

v.

THE
COMMON-
WEALTH.

—

9. For the attainment in part of the purposes aforesaid the plaintiff has arranged to borrow from the Mutual Life & Citizens Assurance Limited the sum of £100,000, the repayment of such sum to be secured upon certain of the said real estate owned by the plaintiff.

10. Further in order to achieve the said purposes the plaintiff proposes to increase its nominal capital and to issue from its then unissued capital 401,114 ordinary shares of 10/- each.

11. The defendant the Right Honourable Sir Arthur William Fadden is the Treasurer of the Commonwealth of Australia and is the Minister for the time being administering the *Defence Preparations (Capital Issues) Regulations*.

12. For the purposes aforesaid the plaintiff has applied to the defendant the Right Honourable Sir Arthur William Fadden to consent to the plaintiff borrowing the said sum of £100,000 and giving security therefor and to consent to the issue of the capital referred to in par. 10 hereof.

13. The defendant the Right Honourable Sir Arthur William Fadden has refused to consent to each of the applications referred to in the preceding paragraph hereof.

† The *Defence Preparations (Capital Issues) Regulations* were made on 1st August 1951, in pursuance of s. 4 of the *Defence Preparations Act 1951*. Part II. of the regulations, headed Companies, dealt with the raising by companies of money by issuing share capital or by borrowing on deposit without security, and contained reg. 6 which provided:—"A company, or a person acting for or on behalf of a company, shall not, without the consent in writing of the Treasurer, make an issue of authorized capital of the company if the amount of authorized capital issued by the company during the preceding two years (including the issue then made), together with—(a) the amount borrowed and not repaid under a security issued or given by the company during that period, not being a security referred to in sub-regulation (3.) of regulation 13 of these Regulations; and (b) the amount borrowed and not repaid under a deposit accepted or received by the company during that period, exceeds Ten thousand pounds." Part III., headed Securities, dealt with the borrowing by all persons, including companies, upon security, its plan being, subject to certain exceptions, to prohibit without the written consent of the Treasurer

the issue or giving of a security by anyone, company or not, if it involved the raising of money beyond a certain limit or the reservation of a rate of interest over four and a half per cent per annum upon a first mortgage of land or upon a further charge in favour of a first mortgage of land. Regulation 10, which was contained in this Part, provided:—" (1.) A person shall not, without the consent in writing of the Treasurer, issue or give a security.

(2.) Nothing in this regulation prevents or affects the issue or giving of a security by a local authority—(a) to the Government of the State in which the local authority is constituted; or (b) with the approval of the Treasurer of that State, or a Minister of State for that State acting on his behalf, to a person other than the Government of that State."

Part IV. headed Miscellaneous, includes regs. 16 and 17 which provided: "16 (1.) Where application is made for the consent of the Treasurer under these Regulations, the Treasurer may, subject to the next succeeding regulation, grant the consent, either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent. (2.) Where the consent of the Treasurer is granted

14. The said refusal of the defendant the Right Honourable Sir Arthur William Fadden was not for the purposes of or in relation to defence preparations.

H. C. OF A.
1952.

The plaintiff claims the following declarations and orders :—

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

1. A declaration that the *Defence Preparations Act* 1951, so far as it purports to authorise the *Defence Preparations (Capital Issues) Regulations* is invalid.

2. A declaration that the *Defence Preparations (Capital Issues) Regulations* are invalid.

3. A declaration that regs. 6, 7, 8, 10, 11, 14, 15-24 (both inclusive) of the said regulations or some of them are invalid.

Alternatively—

4. A declaration that the refusal dated 8th October 1951, of the defendant the Right Honourable Sir Arthur William Fadden to consent to each of two several applications dated 27th August 1951 and 29th August 1951 respectively made by the plaintiff under and pursuant to the *Defence Preparations (Capital Issues) Regulations* is contrary to the said regulations and particularly reg. 17 thereof.

5. An order that the defendant the Right Honourable Sir Arthur William Fadden do consider and determine each of the said applications according to law.

subject to conditions, the person to whom, or the company to which, the consent is granted shall comply with those conditions. (3.) Where the consent of the Treasurer is granted under these Regulations but no period is specified in the consent as the period of its operation, the consent shall cease to be in force at the expiration of the period of six months after the date on which the consent was granted.

17. (1.) The Treasurer shall not refuse to grant consent under the last preceding regulation except for purposes of or in relation to defence preparations. (2.) The Treasurer shall not grant consent under the last preceding regulation subject to a condition except for purposes of or in relation to defence preparations. (3.) A person taking proceedings in a court for relief, whether by way of a declaration or otherwise, upon the ground that an application for the consent of the Treasurer under these Regulations has been refused contrary to this regulation, or upon the ground that the consent of the Treasurer to an application under these Regulations has been granted subject to a condition contrary to this regulation, may apply

to the court for an order directing the Treasurer to state in writing the facts and matters by reason of which— (a) the refusal of consent; or (b) the condition subject to which the consent was granted, was for purposes of or in relation to defence preparations, as the case may be. (4.) Notice of an application under the last preceding sub-regulation shall be given to the Treasurer, who shall be entitled to appear upon the hearing of the application. (5.) The court may, if it thinks fit, make the order applied for. (6.) A statement in writing by the Treasurer made in compliance with an order under the last preceding sub-regulation shall be filed in the court and shall thereupon, subject to any objection as to the relevancy of any part of the statement, be *prima facie* evidence of the matters contained in the statement. (7.) The court may make an order with respect to the costs of and incidental to the application, and of and incidental to the preparation and filing of the statement, whether the proceedings in relation to which the statement is made are determined or not.”

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

6. An order that the defendant the Right Honourable Sir Arthur William Fadden do consent to each of the said applications.

On 8th November 1951, *McTiernan* J. made an order pursuant to reg. 17 of the *Defence Preparations (Capital Issues) Regulations* for the delivery of a statement by the Treasurer of the Commonwealth setting out the facts and matters by reason of which the refusal of consent to the proposed capital issue was for purposes of or in relation to defence preparations. The Treasurer's statement was as follows :

PART I.

" 1. The Government of which I am a member has formed the conclusion on all the material available to it that there is an unmistakable danger of the occurrence of a general war involving the Commonwealth of Australia and that the threat thereof is such that Australia must be prepared for possible mobilization for hostilities by the end of 1953.

2. Accordingly, defence preparations of the Commonwealth upon the scale stated later are, in the opinion of the Government, made necessary by reasonably anticipated possibilities of armed conflict ; by legal obligations arising out of Australia's membership of the United Nations and consequential duty to safeguard mutual security ; by Australia's need to co-operate with other members of the British Commonwealth of Nations ; and by the minimum required of Australia as an independent nation collaborating with the other nations of what is known as the ' Free ' or ' Western ' World.

3. The defence preparations planned by the Government involve recruiting for the armed forces and production of all necessary material on a scale which will make possible effective national mobilization, ready for full armed national participation, if necessary, by the end of the year 1953.

4. So far as they relate to the physical economic resources and industrial capacity of Australia, the defence preparations above-mentioned may be classified under three headings :—(i) the raising, training and equipping of armed forces ; (ii) the provision of mobilization requirements (including reserves) of arms, munitions, ships, aircraft, transport and general war stores and supplies ; (iii) the construction of various works, factories and other buildings important for defence.

5. Defence requirements in manpower before the call-up of armed forces upon mobilization are estimated (as at the end of 1953) as follows :—

(i) employees in Government ship-building yards, aircraft and munitions factories and annexes ..	78,900	H. C. OF A. 1952.
(ii) employees in private firms working on defence orders	102,600	MARCUS CLARK
(iii) employees on defence works and buildings ..	22,000	& Co. LTD. v. THE
with the addition upon mobilization of:		COMMON- WEALTH.
(iv) strength of the Navy, Army and Air Force ..	189,000	
	<hr/> 392,500	

6. The total of 392,500 is estimated to include 320,000 males and 72,500 females, representing respectively 11.1 per cent of the estimated total of occupied males in Australia and 8.9 per cent of the estimated total of occupied females in Australia as at end of 1953.

7. At present, the numbers of persons engaged on defence are as follows :—

(i) strength of the Navy, Army and Air Force (excluding reserves)	59,200
(ii) employees in Government shipbuilding yards, aircraft and munitions factories and annexes..	22,300
(iii) employees in private firms working on defence orders (estimate)	15,000
(iv) employees on defence works and buildings (estimate)	8,200
	<hr/> 104,700

8. Of these, 98,900 are males, equal to 3.6 per cent of the present total of occupied males in Australia and 5,800 are females, equal to 0.73 per cent of the total of occupied females in Australia.

9. In the financial year 1950-1951, expenditure by the Commonwealth Government on goods and services for purposes of defence amounted to £96 millions. This amount covers expenditure on pay and allowances of the forces, arms, munitions and equipment, ship and aircraft construction, works and buildings directly related to defence, and provision of general defence supplies. The amount of £96 millions represents 3.1 per cent of the estimated national income in 1950-1951 (set out in the White Paper (F4547) presented by myself for the information of Honourable Members of the Commonwealth Parliament in September, 1951). The proportion of the national income thus expended will vary closely with the proportion of the occupied population employed on defence. As set out in par. 6 above, at the stage of mobilization the number of persons engaged upon defence will constitute approximately 11

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

per cent of the total of occupied persons in Australia. In consequence I estimate that direct defence expenditure by the Commonwealth on goods and services for purposes of defence will constitute a portion of the then national income amounting approximately to 11 per cent.

10. The defence preparations of the Commonwealth therefore involve a progressive absorption of resources during a period of approximately two years from the present time until a stage is reached at which, when mobilization plans are complete, approximately 11 per cent of national income will be spent on defence activities. The proportionate absorption might of course be greater if at that time adverse economic factors had caused national income to rise less than might now be anticipated. It may be considered that national income in 1950-1951 was abnormally high, having increased by £800 millions, or 34 per cent above the previous year, because of exceptional wool prices, large increases in wage rates and various other exceptional factors.

11. Since national income has its counterpart in the nett production and supply of goods and services, to say that 11 per cent of national income will be spent on defence is equivalent to saying that 11 per cent of total national output of goods and services will be applied to defence. It may be noted that in the United States of America it is estimated that the proportion of national income going into defence will this year reach about 15 per cent. The corresponding figure for the United Kingdom is about 9 per cent.

12. Proposals to obtain further capital by the raising of loans or the issue of share capital, as exemplified by the applications of the applicant company, must be considered against the above-mentioned estimates of the diversion of economic resources upon the scale indicated in this Part of my statement. The proposals must also be considered in the light of the facts as to the present and probable future employment of manpower and resources and the absence of any manpower and resources not currently employed. These facts are indicated in Part III. of this statement.

PART II.

13. The applicant company has made two applications. The first was made under the *National Security (Capital Issues) Regulations* by letter dated 9th March 1951, and was renewed by letter of 27th August 1951, as an application under the *Defence Preparations (Capital Issues) Regulations*. I attach a copy of the letter of 9th March, 1951, marked 'Annexure No. 1' and an extract from the later letter of 27th August 1951, marked 'Annexure No. 2.' The second application was made by letter dated 29th August 1951.

I attach a copy of this letter marked ‘Annexure No. 3’, together with a copy of the formal application referred to therein.

14. With respect to the first of the applications abovementioned, referring to a proposed loan, secured by mortgage, of £100,000 by the Mutual Life and Citizens Assurance Co. Ltd. to the applicant company, the applicant company disclosed that the company intended to utilize the money when lent for the following purposes and in the following amounts:—

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

Purpose	Amount
(a) New bedding factory at Newtown	£37,000
(b) New showroom at Dubbo	12,000
(c) Alterations to applicant’s properties at Sydney, Newcastle, Lismore and Dubbo (details given)	44,350
(d) Other unspecified alterations	6,650
	£100,000

15. I set out in subsequent Parts of this statement facts and matters relevant to the relation between defence preparations and the activities proposed to be carried out by the applicant company as set out in par. 14 above. In addition, there are certain particular considerations in connection with these matters which must be taken into consideration.

(a) *Bedding Factory at Newtown :*

The applicant company stated that application had been made to the Department of Building Materials in New South Wales for a permit to carry out the work in connection with the bedding factory but that a permit had not been obtained. The applicant company asserted that the work was necessary because the Cumberland County Council had served notice on the company that its existing premises, now used as a bedding factory in Mountain Street, Sydney, would be resumed for the purpose of constructing new arterial roads. I am informed and believe it to be true that :
(i) there has been some correspondence on the matter between the applicant company and the Cumberland County Council ;
(ii) no notice of resumption has yet been given by the Cumberland County Council in respect of the applicant company’s property ; and
(iii) if it were decided to resume the applicant company’s property, the resumption is not likely for some years.

(b) *Showroom at Dubbo :*

The erection of the new showroom was commenced on 24th July, 1950, and it was estimated that the work would be completed in October, 1951.

H. C. OF A. (c) *Alteration to various properties :*

1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

In addition to alterations and improvements of an unspecified nature, the work on which scarce labour and materials was to be used included the following items : (i) installation of electrical and radio department ; (ii) construction of delicatessen department ; (iii) new awning and shopwindows ; (iv) replan of layout of advertising office.

In a further statement, the applicant company indicated that some of the repairs, alterations and improvements had already been commenced and that others would be commenced as soon as detailed plans were available.

16. Apart from a general statement that the condition of many of its properties had deteriorated during the war, the applicant company provided no evidence to show that the work was essential. The applicant company stated that it had already spent considerable sums in carrying out repairs, improvements and alterations. It would appear that the applicant company desired to remodel its buildings in order to make them more attractive for the display of goods and the inducement of expenditure by customers. In fact, the whole of the proposed expenditure of £44,350, referred to in pars. 14 and 15 (c), is, from the description thereof, shown to be alterations and improvements to the internal arrangements of retail sale facilities which, in each particular case, are not essential in character and are not shown by any statements by the applicant company to be of essential importance or urgent in character. Moreover, some of the alterations and improvements have already been commenced, and presumably have been paid for in part. The loan for which consent was sought would provide funds to reimburse whatever fund has been employed for the work and would in consequence become available for the general purposes of the business. To this extent, portion of the loan of £100,000 is to be considered as in the same class as the share capital proposed to be raised, as set out in the application dated 29th August 1951.

17. Further to the matters set out in pars. 14, 15 and 16 above, the proposed activities of the applicant company to be financed by the loan for which consent was sought would necessarily involve the use of building materials, certain other timbers, glass, metal and fittings, and skilled and semi-skilled craftsmen and tradesmen. The effect of the demand for utilization of such materials, and the demand for and employment of such manpower, upon defence preparations and upon the diversion of resources necessary to execute defence preparations is more particularly described in Part IV. of this statement.

18. The information accompanying the application of the applicant company dated 29th August 1951, for permission to raise £200,557 of capital by the issue of 401,114 shares of the nominal value of 10/- each, indicates that the capital sought to be raised, together with all or an unascertained portion of the £100,000 sought to be borrowed as abovementioned, would, if obtained by the applicant company, be used to increase the turnover of its business. This business is primarily concerned with the retail sale of household and residential furniture, furnishings and fittings, and also male and female clothing. Attached hereto and marked 'Annexure No. 4' is a copy of the mail order catalogue of the applicant company indicating the general range of goods supplied by it. The applicant company asserts, and I have reason to believe in accordance with the facts, that the costs of conducting its business have risen and will continue to rise, for some time at least. The prices of trading stock sold by the applicant company have risen over the immediate past. The minimum labour costs of conducting the business as fixed by law have increased over the same period, and it may reasonably be anticipated that some further increases will take place. I am, therefore, aware that the limitation of the capital resources (trading funds or circulating capital) of the applicant company must in existing circumstances have the effect of preventing the desired increase in the turnover of the business and, should costs and prices continue to rise, may cause a decrease in turnover. Further, amongst the circumstances which appear to me to be relevant is the publicly announced policy of the national banking system of curtailing, rather than extending, credit facilities for businesses of the kind carried on by the applicant company. In consequence, the refusal of the applications of the applicant company may well have the effect of limiting, and possibly may reduce, the turnover of the applicant company. The facts and matters showing the relation of these possible consequences to defence preparations are set out in Part IV. of this statement.

PART III.

19. The nature of the proposed activities of the applicant company, for which the loan moneys and share capital sought were to be used, has been indicated in Part II. of this statement. The relation of these activities to defence preparations depends upon the extent of the diversion of resources and manpower involved in the execution of defence preparations. This extent has been broadly indicated in Part I. of this statement as involving, at the stage of mobilization, 11 per cent of national production. The relation to defence preparations also depends upon the facts and matters which

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
1952.
MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.

condition and impede the actual process of this diversion. The most important of these facts and matters are set out below in this Part.

20. If, as in 1939, there had been available currently unused economic resources and manpower, substantial defence preparations would have been carried out before the necessity arose to withdraw resources and manpower from present employment. No such unused resources or manpower, however, are at present available. On the contrary, at the present time practically all resources of manpower, materials, plant, buildings and equipment are being fully used or employed. Indeed, many types of manpower and materials are extremely scarce by comparison with the current demand for them.

21. At 30th June 1951, the total number of persons receiving unemployment benefits in Australia was 449. This position may be contrasted with June, 1939, when there were 298,000 unemployed in Australia.

22. Serious shortages of labour exist in all the main branches of industry. In June 1951, unfilled vacancies registered with the Department of Labour and National Service were as follows :—

Unfilled Vacancies, June 1951.

<i>Industry Group</i>	<i>Male</i>	<i>Female</i>	<i>Total</i>	<i>% of Unfilled</i>
				<i>Vacancies to</i> <i>Total Em-</i> <i>ployees</i>
Primary Production	3,419	506	3,925	n.a.*
Mining and Quarrying	2,354	6	2,360	4.2
Manufacturing ..	47,779	16,332	64,111	6.6
Building & Construc- tion	23,548	77	23,625	11.0
Transport Operation	6,852	361	7,213	2.8
Communication, Finance & Commerce	4,818	3,098	7,916	1.3
Public Administration Health and Educa- tion	3,229	5,913	9,142	3.0
Other Services ..	1,350	5,212	6,562	n.a.*
	93,349	31,505	124,852	4.7

* Not available

Because many employers having vacancies for labour do not register them with the Department of Labour and National Service, the foregoing figures do not show the full extent of labour shortages.

23. During 1951-1952, additional manpower (of working age) will become available from natural increase to the extent of 16,000 and from immigration to the extent of 79,000, a total of 95,000. If immigration continues at present rates the same increase will occur in 1952-1953. During recent years, however, whilst the labour force has increased year by year, the shortage of labour has also increased progressively. This is indicated by the following comparison :—

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

Wage and Salary Earners
(*excl. Rural and Female*
Domestic Workers and
Defence Forces).

Commonwealth Employment
Service Unfilled Vacancies.

Increase over
previous year.

	<i>Total</i>		
June 1946 ..	2,102,500	186,800	52,630
„ 1947 ..	2,269,000	166,500	69,707
„ 1948 ..	2,374,500	105,500	99,679
„ 1949 ..	2,451,200	76,700	102,306 (a)
„ 1950 ..	2,546,900	95,700	108,110
„ 1951 ..	2,631,000	84,100	124,854

(a) May 1949 ; June figures affected by N.S.W. coal strike.

24. The absence of unused resources is also indicated by the estimates of shortages of supply of basic materials set out below. By reason of the nature of the production required for defence preparations, the demand for these basic materials will be even further accentuated. Diversion for defence preparations will involve an increase in activities already disproportionately weak in relation to the whole economy. This diversion, therefore, involves not merely a change in but a reversal of the present direction in which materials and manpower are tending to flow. The marked scarcity of basic materials of primary importance for defence preparations is demonstrated by the estimates prepared by the Commonwealth Ministry of National Development.

<i>Item</i>	<i>Estimated Demand</i> 1951-52	<i>Estimated Supply</i> 1951-52	<i>Deficiency</i> 1951-52
Coal (tons) ..	21,500,000	19,000,000	2,500,000
Coke (tons) ..	256,000	215,000	41,500
Steel (tons) ..	2,386,000	1,806,000	580,000
Pig Iron (tons)	360,000	228,000	132,000
Copper (tons) ..	79,000	45,000	34,000
Cement (tons)	1,869,000	1,540,000	329,000
Sawn Timber (1000 super feet) ..	1,800,000	1,550,000	250,000

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & Co. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —

25. Increased defence preparations involve, as is disclosed by the foregoing paragraphs of this Part, the reduction of other economic activities, since no unused resources are available, and also involve the diversion of manpower and material into uses different from those into which they are flowing under existing economic inducements. These diversions need to be carried out urgently, and might be achieved by one or other of the following three ways :—

(a) By full-scale legal compulsions throughout the economy, including acquisition of property and conscription of labour power. These methods could in present circumstances be highly disturbing, would involve extensive official activities and controls and, in the opinion of the Government, could in fact impair the effectiveness of defence preparations.

(b) By offering such high financial inducements in the form of prices and wages as will attract resources and labour away from the activities which otherwise would absorb them. That course of action would, in the opinion of the Government, accentuate the inflationary difficulties at present threatening the economy, and seriously prejudice the effectiveness of defence preparations.

(c) By limiting and reducing various economic activities of the nation, particularly those related to the provision and sale of civilian goods, so that manpower and resources will be released and, in particular, so that the existing materials and manpower may be more effectively and easily diverted to defence preparations.

26. The course of action referred to in par. 25 (c) above directly touches the activities of the applicant company proposed to be carried out with the capital to be obtained by the loan and the issue of shares previously mentioned. This impact upon the proposed activities of the applicant company is one of the matters which demonstrates that the refusal of consent to the applicant company's, application was for purposes of or in relation to defence preparations and is dealt with more fully in Part IV. of this statement.

PART IV.

27. In so far as the applicant company proposed alterations or expansions in the materials, equipment and buildings employed in its business, the attraction of manpower and resources would necessarily be in the opposite direction to that required for defence preparations. The labour required for the purposes of the applicant company is of a class in which the existing

shortage is acute. The requirements of defence preparations in the construction of houses, buildings, hutments and other structures will accentuate the present unsatisfied demand for this class of labour. The requirements of housing and shelter for increased armed forces will have the same effect. Diversion of labour and materials to defence preparations of the kinds mentioned would thus be impeded by the proposed activities of the applicant company.

28. The maintenance of, or an increase in, the turnover of the applicant company would also impede the diversion of materials and manpower towards defence preparations. A very large proportion of the goods customarily sold by the applicant company consists of durable consumer goods used in furnishing and equipping residential establishments of all kinds. If the consumption of new goods of this character is not curtailed, the diversion of economic resources to defence preparations cannot take place. Substantial quantities of foodstuffs cannot be curtailed without injury to the efficiency of the nation. The curtailment of luxury consumer goods will not release sufficient resources to permit the transfer of 11 per cent of the national production to defence preparations. The partial curtailment of consumer goods of the character supplied by the applicant company and of many other classes of consumer goods, not essential to the maintenance of physical and mental efficiency, is unavoidable and essential if the diversion of resources required for defence preparations to the extent indicated in Part I. of this statement is to be carried out.

29. By avoiding increased supplies and in fact reducing the existing supply of the consumer goods abovementioned, the demand upon the manufacturers of these goods will be reduced. In consequence, the competition of these manufacturers for labour and materials will be reduced. These manufacturers will to some extent become willing to undertake the execution of contracts for the production of goods required for defence preparations without a marked increase of current prices and costs. Further, the reduction of demand upon these manufacturers and suppliers will affect in turn the demands upon the suppliers of the raw materials used by the manufacturers, and the diversion of the suppliers to the production of materials for the fulfilment of defence contracts will be facilitated. More generally, however, the limitation of, and even reduction in, the supply of consumer goods and the reduction *pro tanto* in the volume of consumption existing at present in Australia will generally modify the intensity of the demand for

H. C. OF A.
1952.
MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & Co. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —

materials and labour and, by so doing, make possible and also facilitate the far-reaching transfer of materials and manpower necessary to increase the production of basic materials and munitions and other defence requirements. The curtailment in the supply of the goods provided and sold by the applicant company has, therefore, a real and substantial, even though, in one aspect, not direct, relation to defence preparations, and the refusal of consent was for purposes of or in relation to defence preparations.

30. Further, an important part of the business of the applicant company is carried on in the form of time payment or hire purchase sales. The provision of consumer credit by these means enables purchasers to anticipate the receipt of moneys for the purchase, particularly of durable consumer goods and, in consequence, to establish and fix the direction of demand and of consumption for a number of years in the future. The continuance and increase of trading by these means would counteract in an accentuated form the diversion of resources and the decrease in consumption which I have indicated as necessary to accomplish in the course of the next two years. Limitation of various forms of consumer credit will be a most effective means of facilitating the essential diversion of resources particularly in the immediate future, which is most significant for defence preparations.

31. In order to achieve a diversion of the national production to the extent previously indicated by me as necessary for defence preparations, it would probably be necessary, even in an economy not already suffering from shortages and inflationary conditions, to limit the increase of, and even to reduce, the existing level of turnover of the class of business carried on by the applicant company. The necessity is accentuated by the inflationary aspects of the present state of the national economy referred to in the next Part of this statement.

PART V.

32. Marked inflationary pressures are at present operating in the Australian economy, that is to say, an excess of consumption and investment demand for goods and resources over the supply of goods and resources. Total demand cannot be measured accurately, since the extent of unsatisfied demand is not represented by any evidence capable of record. Realized demand, however, can be measured by expenditure and this is conveniently recorded in the following tables:—

			<i>Personal Consumption</i>	<i>Private Investment</i>	<i>Public Expenditure & Maintenance</i>	H. C. OF A. 1952. MARCUS CLARK & CO. LTD. v. THE COMMON- WEALTH.
			£m	£m	£m	
1945-46	..	..	886	194	44	
1946-47	..	..	1,037	317	78	
1947-48	..	..	1,250	464	100	
1948-49	..	..	1,450	408	137	
1949-50	..	..	1,652	622	206	
1950-51	..	..	2,128	719	293	

33. Realized demand is expressed in monetary terms as above set out. Since prices have not remained constant, the supply of goods corresponding to this demand cannot be accurately measured in money terms, and cannot be effectively expressed in an overall figure of material quantities. The extent to which prices have risen provides some indication of the failure of supply to keep pace with demand expressed in actual purchases. The increases of expenditure are manifestly at a much greater rate than physical production. The average rate of increase in physical production has been indicated as certainly less than three per cent per annum. The contrast between the rates of increase in expenditure and the estimated rates of increase of production indicates the severity of the inflationary factors operative in the economy.

34. The connection between the inflationary condition of the economy and the defence preparations required to be executed within the next two years is both direct and indirect, but in each case real and substantial. The existence of these inflationary conditions at one and the same time, places additional difficulties in the way of diverting resources essential for defence preparations and makes more dangerous a reliance upon higher monetary inducements as a means of securing those diversions. These matters, and their relation to the refusal of the applicant company's applications, are dealt with in the remainder of this Part and in the concluding Part of this statement.

35. The existence of an inflationary condition in the economy has accentuated, and is accentuating, the difficulties of diverting resources and manpower to the activities required in defence preparations. The inducement flowing from large unsatisfied monetary demand for consumer goods naturally stimulates

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

widespread efforts to expand existing industries and to start new enterprises, since markets appear expansive and prices likely to rise. In consequence, the competition for labour, materials and plant becomes more intense. The result is to cause or continue the movement of labour and material away from, rather than towards, the basic productive activities essential to or part of defence production. In addition, the increased activity in the parts of the economy supplying consumer needs, and the activity promoted in satisfying the demands of those suppliers, accentuate the resistance to diversion and reshaping of the economy, thereby impeding defence preparations. With the prospect of profitable expansion and rising prices, businesses are more than usually reluctant to permit labour and materials to pass away from themselves to different uses, thus producing a rigidity impeding diversion.

36. Successful diversion of manpower and resources in the direction required by defence preparations, in the light of the matters set out in par. 35 above, could not be achieved by competitive bidding for labour and materials by defence contractors and Government departments producing war supplies. The resistances resulting from efforts of other businesses to expand due to inflationary conditions would be overcome only if very high monetary inducements in the form of higher wages and prices for materials were offered. But the paying of these monetary inducements in the form of higher wages and prices for materials would add to the inflationary pressures in the economy and reinforce the tendencies which defence preparations require to be reversed. The higher wages and prices paid by and on behalf of the Commonwealth for defence preparations would, within a short period, be translated into accentuated demand by the recipients thereof for consumer goods, and would stimulate increased buying of durable goods upon a basis of consumer credit in the form of hire purchase and time payment.

37. The situation arising from the facts and matters referred to above has grave consequences apart from the immediate connection with defence preparations. Some of these consequences, however, ultimately affect defence preparations by affecting the will power of the community and its sustained effort to defend itself. These matters are referred to in Part VI. of this statement.

38. Further, the facts and matters abovementioned cannot be counteracted or overcome solely by control over applications to raise capital as sought by the applicant company and other applicants. The control of such applications is taking place concurrently with other actions of the Government and Parliament of the Commonwealth, directed towards counteracting the tendencies

abovementioned, which arise from the inflationary condition of the economy. These other actions form part of the circumstances surrounding the exercise of capital issue control. The success of these other actions will make more practicable the diversion of resources and manpower which will result from the limitations that the refusal of the applicant company's applications, together with other applications having the same relation to, and effect upon, defence preparations, places upon the raisings of capital.

39. The other actions of the Government and Parliament abovementioned are directed to the reduction of the general level of consumption expenditure and, particularly but not exclusively, expenditure upon luxury goods and the less essential forms of civilian goods, and also to the restriction of the level of private investment, particularly in those forms which tend to promote consumption. In addition, restrictions upon various forms of public investment have been made effective. These objectives are being sought by taxation of individual incomes directed to reduction of consumer demand, by sales tax and excise taxation for the same purpose, and also by increased taxation upon companies, thereby curtailing further investment and reducing consumers' income. Public expenditure upon less essential public works is also being curtailed. In the situation resulting from these actions, the limitation of borrowing and issuing of new shares, as in the case of the applicant company, will become more effective in promoting the diversion of materials and manpower to defence preparations.

PART VI.

40. The carrying out of defence preparations necessarily involves diversion of manpower and resources. If these diversions are not achieved by the means of limitation of consumption and supply and expenditure, the necessary objectives will require either excessive compulsions, the moral and psychological costs of which would inevitably prove excessive, or the reliance upon financial inducements in the form of prices and wages offered to induce labour and other producers to abandon their existing activities and turn to defence production. This second course might well fail to achieve practical results. In any case, as I have stated in par. 36 above, it could not fail to accentuate the inflationary conditions existing in the economy. Those conditions, if continued and accentuated, would have the most dangerous and far-reaching effects upon the will of the community to work, to prepare itself for and fight in defending itself. My colleague the Prime Minister and I myself have in the past publicly expressed this view. We

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

have also expressed our conviction that this destructive consequence is the deliberate aim of the enemies of this country. With the concurrence of the Prime Minister, and also for myself and on behalf of the Government, I now affirm that the enemies of this country aim to undermine its national strength and defensive capacity by a variety of means, direct and indirect. These means include encouraging all those circumstances in which preparations for defence may bring about the destructive consequences to which I have referred. I affirm the urgent necessity of taking all action and selecting all means which will ensure effective defence preparations without producing those dangerous consequences to the will power and spirit of the nation. The regulation and control of the issue of capital is, as also are the other actions which I have mentioned, essential to avoid the dangers to which I have referred."

In the defence the defendants pleaded, *inter alia* : (a) Without regard to the facts and matters referred to in sub-par. (b) hereof except such of the said facts and matters as may be judicially noticed and having regard to any other facts and matters which may be judicially noticed, alternatively, (b) Having regard to the facts and matters contained in the statement made by the said the Right Honourable Sir Arthur William Fadden on 23rd November 1951, and filed herein in compliance with the order dated 8th November 1951, made by his Honour Mr. Justice *McTiernan* under reg. 17 of the *Defence Preparations (Capital Issues) Regulations*—(i) The *Defence Preparations Act* 1951, was a law validly made by the Commonwealth Parliament in pursuance of the powers conferred upon it by the Commonwealth Constitution. (ii) The *Defence Preparations (Capital Issues) Regulations* being Statutory Rule 1951 No. 84 were and each of them was validly made in pursuance of the powers conferred on the Governor-General by the *Defence Preparations Act* 1951. (iii) The refusal of the defendant the Right Honourable Sir Arthur William Fadden referred to in pars. 13 and 14 of the statement of claim at all times material was and is for the purposes of or in relation to defence preparations.

The plaintiff demurred to the defence.

R. B. Davies Industries Ltd. v. The Commonwealth and Others.

The plaintiff *R. B. Davies Industries Ltd.* brought a similar action against the same defendants. No statement by the Treasurer was sought in this case. In the defence the defendants pleaded, *inter alia* :

2. By reason of the facts and matters referred to in pars. 4 and 5 hereof the *Defence Preparations Act* 1951, so far as the same authorized the making of the *Defence Preparations (Capital Issues) Regulations* being Statutory Rule 1951 No. 84, was and is a law with respect to the naval and military defence of the Commonwealth.

3. By reason of the facts and matters referred to in pars. 4 and 5 hereof the said *Defence Preparations (Capital Issues) Regulations* were made and were at all material times for and in relation to defence preparations.

4. At all times material to this action :

(a) The effective defence of the Commonwealth has necessitated extensive defence preparations being made urgently by the Commonwealth within the period of the next two or three years.

(b) Such defence preparations have included : (i) the recruitment and training of additional men and women in the naval military and air forces of the Commonwealth up to the minimum total determined by Her Majesty's Government in the Commonwealth as necessary for the effective defence of the Commonwealth and (ii) the increased production of munitions and equipment for the use of such armed forces in the forms and quantities determined by Her Majesty's Government in the Commonwealth to be necessary for the same purposes as aforesaid, and (iii) the organisation and development of industries, including those more especially concerned with the supply of power fuel and transport, essential for the production of munitions and equipment as aforesaid and for the conduct of hostilities in time of war.

(c) The carrying out of the defence preparations referred to in sub-par. (b) above have necessitated many men and women changing from the occupations in which they have been and are at present engaged and entering in some cases into the armed forces and munitions and equipment production and into the other industries mentioned in sub-par. (b) (iii) above.

(d) The carrying out of the defence preparations abovementioned has involved the use of goods and commodities both as materials for and equipment utilised in producing the munitions and equipment mentioned in sub-par. (b) (ii) above and in creating and maintaining and protecting stocks of materials of special strategic or wartime importance.

(e) The carrying out of the defence preparations abovementioned has also involved the employment of goods and commodities both as materials for and productive equipment utilised in industries (such more particularly as those supplying power fuel and transport) not themselves producing munitions or equipment or stocks of

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & CO. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —

materials of special strategic or wartime importance but essential for the production of such munitions or equipment or stocks as aforesaid and essential for the conduct of hostilities in time of war.

(f) The transfer of men and women to the armed forces aforesaid and to the productive activities forming part of the defence preparations aforesaid has necessarily involved the diversion of men and women from other gainful occupations in which they have been or are or might otherwise hereafter be employed and further the production of munitions and equipment and materials of strategic and wartime importance has involved the diversion of material and equipment from existing or prospective use in other activities.

(g) The transfer without legal compulsion of the men and women referred to in sub-par. (f) above and the diversion without legal compulsion of the materials and equipment aforesaid has been assisted and promoted by the limitation of existing or prohibition of proposed productive activities which have either a remote or indirect connection with the production of munitions equipment and strategic and wartime materials or have no such connection at all. (Such productive activities are hereinafter referred to as "non-strategic production".)

(h) The control of the issue of capital has been a reasonable and necessary means of limiting the increase or preventing or limiting the establishment of the non-strategic production abovementioned and thereby facilitating the diversion without legal compulsion of the men and women and materials and equipment and productive capacity to carry out the minimum amount of defence preparations determined to be necessary by Her Majesty's Government in the Commonwealth.

5. Further to the matters set out in par. 4 above, at all times material to this action—

(a) The available total of purchasing power or money in the Commonwealth was and is excessive in relation to the available total amount of labour and goods and services in the Commonwealth, thereby causing an unbalanced situation in the national economy which is hereafter referred to as an inflationary condition and which condition threatens grave harm to the economic stability of the Commonwealth, to the welfare of its citizens, to the capacity of the Commonwealth to defend itself and the will-power of the nation upon which such capacity depends;

(b) The diversion of the men and women such as is referred to in par. 4 above and the diversion of materials and equipment therein mentioned has (by reducing still further the available supplies of labour, goods, commodities and services and not reducing

but possibly increasing the amount of money) tended to increase the inflationary condition referred to in par. 5 (a) above and thereby to increase the evils and dangers to the nation therein mentioned.

(c) The limitation or prohibition of non-strategic production by the means referred to in par. 4 (h) above has prevented or limited the increase in the inflationary condition referred to in sub-par. (b) above and thereby prevented or reduced the evils and dangers to the nation abovementioned and thereby promoted the defence of the Commonwealth.

6. Notwithstanding the facts and matters alleged in pars. 1 to 17 of the statement of claim the refusal by the Treasurer of the Commonwealth of Australia of the application by the plaintiff referred to in par. 4 of the statement of claim was for the purposes of or in relation to defence preparations by reason of the facts and matters referred to in pars. 4 and 5 hereof and in particular by reason of the following facts and matters:—

(a) The materials and production the increased supply of which is most urgently required in the production of the munitions and equipment referred to in par. 4 (b) (ii) hereof and the industries essential for the production of such munitions and equipment and for the conduct of hostilities in time of war referred to in par. 4 (b) (iii) hereof are more particularly set forth in the statement made public by the Treasurer of the Commonwealth of Australia on or about 13th February 1951, which described the industries production and enterprises which are, as abovementioned, most urgently required for purposes of defence preparations (hereinafter called “the said defence priorities”) as follows:—

1. *General—Basic Products :*

Cement Construction Materials.

Clay Products Manufacture—Bricks, Tiles, Pipes, Insulators and other Electrical Ceramica.

Timber Getting and Sawmilling.

Coal Mining and Processing.

Coke Production.

Production of Non-Ferrous and Radio-Active Metals Manufacture of Iron and Steel, including Finished Steel Products.

2. *List of Industries Vital for Security :*

Selected Heavy Chemicals (including Chemical Fertilizers) and Related Raw Materials.

Agricultural Fertilizers, Agricultural Chemicals and Related Raw Materials.

Selected Plastics and Related Raw Materials.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.

1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

Selected Solvents.

Petroleum Refining.

Chemical Products from Coal or Oil.

Carbide.

Graphite and other Electrical Carbon Products/Castings and Forgings of Metal.

Large Scale Power Raising Equipment, both Thermal and Hydro-electric.

Large Equipment for Power Transmission and Distribution.

Railway Rolling Stock Manufacture.

Crawler Tractor Manufacture.

Selected Food Processing Projects.

Gas Turbine Manufacture.

Reciprocating Internal Combustion Engines.

Electrical Equipment for Internal Combustion Engines.

Selected Motor Vehicle Components.

Wood Pulp.

Paper (other than Newsprint) and Paper Board.

Electronic Equipment for very high Frequencies and above.

Shipbuilding.

Aircraft and Accessories for Aircraft Manufacture and Servicing of Aircraft.

Heavy Earth Moving Equipment.

Manufacture of Tools and Gauges of Defence Importance.

(b) The defence preparations of the Commonwealth of Australia require the diversion of men and women and materials to the industries and enterprises included in the said defence priorities and in consequence the limitation of new industries and enterprises not included therein.

(c) The proposed new industry and enterprise of the plaintiff for which the capital sought in the application mentioned in par. 4 of the statement of claim was intended were not and are not within any of the said defence priorities.

(d) The industries and enterprises referred to in the said defence priorities at all material times were not and are not now operating to an extent necessary for the defence preparations of the Commonwealth of Australia and the men, women and materials necessary to provide for production in and the development of the said industries and enterprises can be obtained only from the total supply of the same available in the Commonwealth.

(e) The refusal of the application of the plaintiff mentioned in par. 4 of the statement of claim will prevent the absorption of men, women and materials in the industry and enterprise proposed

by the plaintiff and will thereby facilitate the diversion or absorption of the same to or by industries and enterprises within the said defence priorities.

The plaintiffs demurred to the defence.

The demurrers were heard together, and by consent counsel for the defendants was heard first.

P. D. Phillips Q.C. (with him *C. I. Menhennitt* and *R. Else-Mitchell*), for the defendants in both actions. The defence preparations mentioned in the preamble to the *Defence Preparations Act* 1951, include not only providing forces but the sustenance of the people, expansion of production and other efforts to meet demands in the case of war. The necessity for diversion of resources for defence preparations and many other matters in the preamble may be matters of judicial notice, but the extent of the necessity is a matter of judgment and therefore of evidence. Parliament has indicated the scope of the term "defence preparations". Section 4 (1) must be a valid law with respect to defence. The important problem is, to what extent. Even if s. 4 (2) is totally invalid, it would be struck out and s. 4 (1) would remain. The regulations are validly made under this Act. Section 4 (1) is either a simple authorization of legislation emphasizing preparations or it may seek to incorporate other legislative powers of the Commonwealth than the defence power. The regulations are for or in relation to defence preparations because they are for or in relation to matters in s. 4 (2) (b) and (c). The provisions of ss. 5 to 12 found their origin in the national security legislation. Section 13 shows the temporary nature of the Act. The true meaning of s. 4 (2) (b) is to give power to make regulations for the diversion and control of resources for purposes of defence preparations. A problem arises whether it authorizes regulations for diversion and control or diversion or control of resources. The regulations here are for both. The words are wide but the validity of the Act is not to be determined by saying that because the words are capable of a meaning which would embrace regulations which had no connection with defence therefore the grant of power is invalid. The second part of s. 4 (2) (c) does authorize regulations which are within power and these regulations provide an example of regulations which are for the purpose of avoiding economic dislocation caused by and impeding defence preparations. What must be considered is whether these particular regulations have a real connection with defence. These regulations are for the diversion and control of

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

resources and for the avoidance and reduction of economic dislocation. The presence of the exceptions in reg. 6 shows that the regulations are operating genuinely on extensions of existing enterprises. See reg. 8 (b) which must be read with reg. 9. Regulation 12 operates in the light of reg. 13 (2). Regulations 16 (1) and (2) and 17 (1) and (2) have to be considered together. The Treasurer may only refuse consent when his refusal has a relation to defence preparations. Regulations which require capital issues to be scrutinized and only those refused, the grant of which would affect defence preparations, the refusal being for or in relation to defence preparations, must be regulations within power. Otherwise it would have to be said that the scrutiny of all new capital expenditure for its defence significance is too remote from defence to be within power. It cannot be said that capital development may not be prejudicial to defence preparations. Mandamus would lie to compel the Treasurer to perform his duty i.e. not to refuse consent except for purposes of defence preparations.

[DIXON C.J.—Would mandamus go to make him consent or only reconsider ?]

It is immaterial for the present purposes. A “value judgment” must be made in a matter of this kind: reg. 17 (3). Mandamus is all the more possible if the Treasurer must disclose reasons.

[DIXON C.J.—What do the opening words of reg. 17 (3) contemplate ?]

It was contemplated that if the Treasurer was told by this Court that his refusal was erroneous as contrary to law he would abide by the law as laid down by this Court. Regulation 17 (3) to (7) guarantees effectiveness to the legal remedies available. Regulation 17 as a whole contemplates and effectuates legal remedies by an applicant who is refused, directed to ascertaining whether the refusal has a connection with defence. The facts and matters contained in the Treasurer’s statement show that he performed his duty under the regulations when he refused the application. The defendants are entitled to show by the facts set out in the defences that the Act and regulations will operate validly. The defendants do not seek to rely on any other facts. Some of these facts may be matters of judicial notice, others of evidence. It is all a question of whether the facts do support validity.

[DIXON C.J. referred to *Australian Communist Party v. The Commonwealth* (1), per *Williams J.*]

That is the view we want to stress. Five separate questions arise: (i) the Act on its face; (ii) the regulations on their face;

(iii) the Act in the light of additional facts; (iv) the regulations in the light of additional facts; (v) the refusal in the light of the Treasurer's reasons. As to (v) there is a marked difference between the two cases. In the *Marcus Clark & Co. Ltd. Case* the application was for more capital for the purpose of maintaining retail turnover: in *R. B. Davies Industries Ltd. Case* the application related to an entirely new industry, that of making brass pipe joints by a particular process. The defence power has three sectors: the preparation for war, the conduct of hostilities and the winding up of the effects of war. This Act authorizes regulations in the first sector only. Section 4 (1) must be valid, then the question whether s. 4 (2) is valid or not would not be discussed as a whole because the next question is does the Act authorize the regulations? All the regulations require is that anyone seeking capital in excess of £5,000 per year should submit the application for scrutiny and that the application be granted unless the refusal is for or in relation to defence preparations. If new capital may have relation to defence preparations then a law which directs that new capital proposals shall be scrutinized for the purpose of seeing if they have such a relation is within power. If the community arrives at a stage where effectual defence preparations cannot be carried out unless the necessary resources of manpower and materials are conserved then a law which requires every application to be scrutinized to see whether its refusal is related to defence preparations must be valid. It is self evident that every defence preparation necessarily involves that some other activity of the company cannot be carried out. In the present circumstances in this country a law authorizing this screening process until December 1953, the screening process being limited to defence preparations, is necessarily within power because the nature and extent of the defence preparations taken in conjunction with the known productive capacities of the community here and now make a law for screening so conditioned necessarily within power. This is substantiated by facts available and capable of proof which show what is the relative scale of productive activities involved in defence preparations. An appreciation of the circumstances with the consequential preparations appropriate to that appreciation cannot be determined by judicial knowledge. One of the functions of the Executive is the measurement of defence preparation. This does not infringe in any way on the decision in *Australian Communist Party v. The Commonwealth* (1). Defence preparations

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

are something relevant to a situation as perceived by the Executive. But it may be said that unless the scale of defence preparations is so great as to curtail civilian production a law of this kind has no real relation to defence. Therefore it is necessary to look at the actual scale. See the Treasurer's statement. Ultimately it is a question of degree whether the law in question has a sufficient or real connection with defence. What is a refusal which is prejudicial to defence preparations? The problem is whether a law prohibiting expenditure for defence reasons, within constitutional power, which operates upon a decision of the Treasurer, subject to judicial control, is valid. During the recent war there were many such cases where the law was held valid. In *Shrimpton v. The Commonwealth* (1) the regulations were expressed to be unlimited. He also referred to *Stenhouse v. Coleman* (2).

[FULLAGAR J. referred to *Reid v. Sinderberry* (3).]

See per *Starke J.* (3A). If it be assumed that a use by the Treasurer of these powers for general purposes of anti-inflationary policy would be invalid and a use of them for defence preparation would be valid the Court has only to ensure that the Treasurer is confined to the latter because then the law in its operation will be confined to defence purposes. [He referred to *Water Conservation and Irrigation Commission (New South Wales) v. Browning* (4) per *Latham C.J.* (5); per *Rich J.* (6).] It would be entirely destructive of the machinery of government if *Australian Communist Party v. The Commonwealth* (7) was supposed to assert that a discretion at the point of linkage with power can never occur in a valid law unless the whole of the matters involved in the discretion are always matters of judicial determination. The words "for or in relation to" are used as the words "in respect of" as interpreted in the Constitution. [He referred to *Australian Communist Party v. The Commonwealth* (8) per *Dixon J.*]. That case has no significance to the present case, because there the link with power was a matter as to which discretion operated and in respect of which no judicial examination was possible. The defendants do rely upon a passage in the judgment of *Kitto J.* in that case (9) which defines the kind of relation between an Act and the purpose of defence which is necessary for the Act to have a real relation with defence. You cannot tell whether a law is within power or not just by looking

(1) (1945) 69 C.L.R. 613.

(2) (1944) 69 C.L.R. 457.

(3) (1944) 68 C.L.R. 504.

(3A) (1944) 68 C.L.R., at pp. 515, 516.

(4) (1947) 74 C.L.R. 492.

(5) (1947) 74 C.L.R., at p. 496.

(6) (1947) 74 C.L.R., at p. 498.

(7) (1951) 83 C.L.R. 1.

(8) (1951) 83 C.L.R., at p. 180.

(9) (1951) 83 C.L.R., at pp. 276, 278.

at the legal operation of the law. Regard must be had to the practical results the law was calculated to produce.

[McTIERNAN J. referred to *Sloan v. Pollard* (1).]

The real problem in *Marcus Clark's Case* is whether the Treasurer's refusal was for or in relation to defence preparations. The Court is concerned to ensure that he has not directed his mind to any extraneous matters. [He examined the Treasurer's statement in detail.] From a review of that statement it follows that what might be described as the anti-inflationary operation of new capital issues has a real relation with defence for two reasons: (i) It is essential to check the very tendencies which defence preparations themselves engender in order to effect the programme; (ii) The anti-inflationary aspect of the operation of the regulations is only the reflection in monetary terms of the material diversion and the resistances to the material diversion. In *Davies' Case* the plaintiffs have not asked for the Treasurer's reasons but to some extent they have been set out in the defence. This case was an application for new capital to embark upon a manufacturing process not concerned with consumer goods. If the plaintiff desires to show that the Treasurer has exceeded power, it must show that there could not possibly be a valid application in the administrative process, as described in the defence, leading to a refusal. The administrative process contains a list of priorities. Any application falling within that list would be granted, but the fact that a grant is made in a case in which the Treasurer could have refused does not show that the refusal in any particular case is beyond power. In *Davies' Case* the application was refused because it was a new enterprise outside the priorities.

B. P. Macfarlan (with him *K. S. Jacobs*) for the plaintiff Marcus Clark & Co. Limited. The second recital in the *Defence Preparations Act* 1951 must be read as expressing the object or belief of Parliament and it shows that Parliament intended to enact a law giving it the same powers and authorities as it would have at the height of a war. That intention colours the operative part of the Act. The reference to the British Commonwealth of Nations and the United Nations shows that Parliament intended the powers of this Act to go beyond what was necessary for the defence of Australia proper.

[McTIERNAN J. referred to *Sloan v. Pollard* (1).]

The extent of the Parliament's legislative power within the country depends on whether the arrangements as a result of which

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

H. C. OF A.
1952.
MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.

it came to send troops overseas were entered into in time of peace or war. The recitals here control the operative sections; they provide a dictionary: see recitals 3 to 7. Recitals 4 to 7 are in substance reproduced in s. 4 (2) and at least recital 3 is in s. 4 (1). The preservation of the formality of s. 4 (1) by s. 4 (2) widens what is contained in s. 4 (1) and colours it with the powers in s. 4 (2) which are economic in character. It is not irrelevant that at all material times there were other Acts in force which gave Parliament and the Executive ample powers to deal with measures of an *ex facie* defence nature, e.g. the *Defence Act* 1903-1951, the *Naval Defence Act* 1910-1949, and the *Air Force Act* 1923-1950. Section 10 of the Act expressly preserves all powers given by any other Act. "Preparations" in this Act is not used in a limited sense because Parliament already had such powers under other Acts: see s. 63 of the *Defence Act* 1903-1951. On its proper construction the Act gives Parliament very wide powers which in the present defence situation are outside the scope of the defence power. If the suggested meaning is given to defence preparations, to give it any other meaning would be to give the phrase a different operation from what Parliament intended. The preamble is the obstacle to reading it down. The maximum borrowing allowed in any one year is £5,000: see regs. 13 and 6 (a). Parliament has said in the preamble that there is a state equivalent to a state of war, but the question is still one for the Court to determine: *Australian Communist Party v. The Commonwealth* (1). There is no defence situation which would warrant the Court extending the defence power or giving an extended application to it. This is a purely anti-inflationary measure. In *Aberdare Collieries Pty. Ltd. v. The Commonwealth* (2) counsel for the Commonwealth conceded and the Court held that the section of the Act there under consideration which was enacted in December 1951 could not be supported by any widening of the defence power based upon the likelihood of any future war. [He referred to *Australian Communist Party v. The Commonwealth* (1) is not of prohibitive effect: see per *McTiernan* J. (3), per *Williams* J. (4), per *Webb* J. (5), per *Fullagar* J. (6) and per *Kitto* J. (7); cf. per *Dixon* C.J. (8).]

[DIXON C.J. referred to *Harisiades v. Shaughnessy* (9).]

The decisions of this Court always make it clear that the connection with defence must always appear objectively. If it clearly

- (1) (1951) 83 C.L.R. 1.
- (2) (1952) 86 C.L.R. 12.
- (3) (1951) 83 C.L.R., at pp. 205, 206.
- (4) (1951) 83 C.L.R., at p. 224.
- (5) (1951) 83 C.L.R., at pp. 243, 244.

- (6) (1951) 83 C.L.R., at pp. 263, 265.
- (7) (1951) 83 C.L.R., at pp. 274, 278.
- (8) (1951) 83 C.L.R., at p. 200.
- (9) (1951) 342 U.S. 580 [96 Law Ed. 586].

appears that the opinion of the executive is wrong the duty of this Court is to make its own assessment of the situation: see per *Holmes J.* in *Chastleton Corporation v. Sinclair* (1). No attempt is here made to put before the Court any facts, from which the Court could make an objective judgment; cf. per *McTiernan J.* in *Australian Communist Party v. The Commonwealth* (2). To give the opinion of an officer of the Executive Government probative effect would be to deny the decision which has been made in that case. The defence power may never be used outside its primary aspect unless the emergency or unless the defence situation is seen to be such as to authorize it. The argument that the exercise of a power can increase that power has never been accepted in this Court: see per *Dixon J.* in *Hume v. Higgins* (3). [He referred also to *Australian Communist Party v. The Commonwealth* per *Dixon C.J.* (4), and per *Williams J.* (5); *Woods v. Lloyd W. Miller Co.* (6) per *Jackson J.*; *R. v. Foster*; *Ex parte Rural Bank of New South Wales* (7).]. The possibility of a future war will always exist. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which would be required to change or with any problem the presence of which would aggravate the conduct of such a war, the result would be that the Parliament would have power to legislate with respect to almost every subject. The regulations here authorize the calling up of any person from any place in Australia to any place for interrogation without any recompense. The regulations must stand or fall on their own without any other assistance from the exercise of other powers. Even if it be assumed that these regulations do achieve something in the sense of diverting some men or some materials to what are called defence preparations, in the relevant defence situation which was ostensibly a position of peace the Court cannot say that the regulations can reasonably be seen to assist the then requirements of defence. The regulations are said to be designed to achieve a diversion of men and materials but there is nothing in the law which requires that after that diversion they should assist defence purposes: see *R. v. University of Sydney*; *Ex parte Drummond* (8) particularly per *Starke J.* (9), and per *Williams*

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

(1) (1923) 264 U.S. 543, at p. 547
[68 Law Ed. 842, at p. 843].

(2) (1951) 83 C.L.R., at p. 208.

(3) (1949) 78 C.L.R. 116, at p. 134.

(4) (1951) 83 C.L.R., at p. 202.

(5) (1951) 83 C.L.R., at p. 222.

(6) (1947) 333 U.S. 138, at pp. 146,
147 [92 Law Ed. 596, at pp. 603,
604].

(7) (1949) 79 C.L.R. 43, at p. 83.

(8) (1943) 67 C.L.R. 95.

(9) (1943) 67 C.L.R., at p. 108.

H. C. OF A.
1952.
MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.

J. (1), and *Australian Communist Party v. The Commonwealth* (2) per Dixon J. If a restriction on capital issues for the purpose of defence preparations is invalid, it can make no difference if the discretion is restricted to defence preparations. The Act is aimed at the economy and Parliament has shown an intention to be content with nothing less than these overall powers; therefore, s. 15A of the *Acts Interpretation Act* 1901-1950 is excluded. As to the exercise of the Treasurer's discretion the Court cannot say that its exercise is in relation to defence preparations if the Treasurer has taken into account irrelevant considerations. Parts V. and VI. of the Treasurer's statement do not contain any relevant consideration in determining whether the exercise of the discretion was for the purposes of defence. The Treasurer has taken into consideration certain irrelevant matters: see par. 16.

J. D. Holmes Q.C. and Dr. *F. Louat*, for the plaintiff R. B. Davies Industries Limited. The *Defence Preparations (Capital Issues) Regulations* prevent capital issues in such a way as not necessarily to require that persons or materials are diverted to defence preparations. The test of validity must be, not what may follow after a capital issue has been limited, but what is done by limiting a capital issue. See per Kitto J. in *Australian Communist Party v. The Commonwealth* (3). A series of companies with not more than £10,000 of capital each might be formed to carry on the same new business as R. B. Davies Industries Ltd. proposed. Therefore the law itself does not necessarily achieve its declared object. Regarded as a law for diverting materials and persons it has no connection with defence. The regulations do not require the finance, if it is available, to be directed to any particular defence operation. The situation under which the regulations were enacted was one in which inflation was a major economic problem and the inflation was due to a variety of causes. The only cause associated with defence is that produced by the regulations themselves. To the extent that the defence preparations have increased the inflationary position, it is said that the increase has been stopped. The situation then is that the regulations when they commenced were completely unassociated with defence preparations. In other words, it is no justification of the regulations to say that they cure the evils which they themselves create. The regulations in their legal operation do not prevent any inflationary condition. The list of defence priorities includes castings

(1) (1943) 67 C.L.R., at p. 114.
(2) (1951) 83 C.L.R., at p. 185.

(3) (1951) 83 C.L.R., at p. 278.

and forgings. This is the business of R. B. Davies Industries Ltd. in its hot pressing process and consent should therefore have been given on that ground. The situation here is no different from the situation in *R. v. University of Sydney; Ex parte Drummond* (1). Mr. *Macfarlan's* further argument on the regulations is adopted. The contention that what is done under the defence power can provide a reason for an extension of the power is a revolutionary doctrine for which no authority exists and is fundamentally opposed to all decisions of this Court on the ambit of the defence power: see per *Dixon J.* in *Australian Communist Party v. The Commonwealth* (2). That case is authority for the proposition that the existence and degree of emergency cannot be established by Parliament or by the Executive: see per *Dixon J.* (3), per *McTiernan J.* (4), per *Williams J.* (5), per *Webb J.* (6), per *Fullagar J.* (7) and per *Kitto J.* (8).

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

Dr. *F. Louat*. Even if s. 15A of the *Acts Interpretation Act* 1901-1950 is applied the *Defence Preparations (Capital Issues) Regulations* are so framed that their necessary effect is to authorize the Executive to determine for itself the limits of the defence power. Regulation 17 (1) is wider than s. 4 (1) because it has different legal consequences. "Defence preparations" is in substance as wide as the defence power itself in 1951-1952. The only link between the regulations and the defence power is the grounds on which the Treasurer may refuse consent. [He referred to *Lloyd v. Wallach* (9), *Liversidge v. Anderson* (10) and *R. v. Halliday; Ex parte Sutherland* (11).]

P. D. Phillips Q.C. in reply. One ground of attack is that a secondary exercise of the defence power cannot be reached in peacetime. It is not possible to draw too rigid distinctions between the primary and secondary contents of the defence power. When the defence criteria are introduced, it is a law dealing with defence. In many cases the characterization of the law is sufficient but it is not the only test and in difficult cases regard must be had to the facts. There is really a difference in kind between the primary and secondary exhibitions of the defence power. If the appropriate

(1) (1943) 67 C.L.R. 95.

(2) (1951) 83 C.L.R., at pp. 195-198.

(3) (1951) 83 C.L.R., at p. 200.

(4) (1951) 83 C.L.R., at p. 206.

(5) (1951) 83 C.L.R., at p. 224.

(6) (1951) 83 C.L.R., at p. 243.

(7) (1951) 83 C.L.R., at p. 254.

(8) (1951) 83 C.L.R., at p. 274.

(9) (1915) 20 C.L.R. 299.

(10) (1942) A.C. 206.

(11) (1917) A.C. 260.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

authorities can show or declare an unmistakable emergency it cannot be that the secondary power only emerges where the emergency is of a character objectively determinable. The enlargement of the fixed concept may well take place, quite apart from the imminence of war, because of other factors. [He referred to *Ashwander v. Tennessee Valley Authority* (1); "*Federal Government*" by Professor K. C. Wheare (1945), Ch. 10; *Lend Lease Act* 1941 (U.S.) U.S. Statutes at Large Vol. 55 Part 1, p. 31.] This law has a relation to defence because it has or may have a reasonably practical connection with the allocation of materials. Capital issue control in the abstract has little relation to inflation. When the inflationary situation is in itself an inescapable demand through defence conditions, then the control of capital issues becomes significant because it may be used to prevent overdevelopment and so permit the defence programme to be carried out without any inflationary consequence.

Cur adv. vult.

Sept. 12

The following written judgments were delivered:—

Marcus Clark & Co. Ltd. v. The Commonwealth and Others.

DIXON C.J. The purpose of this suit is to establish that the plaintiff company is free, without the consent of the Treasurer, to borrow a sum of money upon security and also to issue further share capital. An application was made to the Treasurer under the *Defence Preparations (Capital Issues) Regulations* for his consent to the giving of the security and another application was made for his consent to the issue of further share capital, but both these applications were refused. The plaintiff company however maintains that the Treasurer's refusal of his consent cannot stand in the way of the proposed secured loan or of the proposed issue of share capital because the regulations are invalid or, if this be not so, because there was no lawful ground for the refusal of the Treasurer's consent. The relief which the plaintiff company seeks against the defendants, who are the Commonwealth, the Treasurer and the Attorney-General of the Commonwealth, consists in declarations of right and certain consequential orders. The declarations claimed are that the regulations or the *Defence Preparations Act* 1951 itself are void and alternatively that the Treasurer's refusals of consent are contrary to the regulations. On that footing, an order is sought that the Treasurer do consider and determine the applications of the plaintiff company according to law and a further order that he do consent to such applications.

(1) (1935) 297 U.S. 287 [80 Law. Ed. 688].

The matter comes before this Court upon a demurrer to a paragraph of the defendants' statement of defence. This paragraph asserts the validity of the Act, of the regulations and of the refusals of the Treasurer's consent. It pleads the validity of the Act and regulations and the lawfulness of the Treasurer's refusal of consent in two ways.

The first way is to justify their validity or legality independently of any facts outside judicial notice.

The second is to do so "having regard to" certain facts and matters. These facts and matters are not set out in the pleading, which refers to a statement made by the Treasurer pursuant to an order made in the suit under reg. 17 (3) of the regulations in question and describes the facts and matters relied upon as therein contained. This provision enables a person taking proceedings in a court for relief upon the ground that consent has been refused contrary to the regulation to apply to the court for an order directing the Treasurer to state in writing the facts and matters by reason of which the refusal of consent was for purposes of or in relation to defence preparations.

The Treasurer's statement prepared for the purposes of an order under this provision was not unnaturally an argumentative document. However convenient it may have been found to refer to it for the facts and matters upon which the pleader placed reliance, had the more regular course been followed of stating them with exactness in the pleading itself, it is probable that the considerations upon which the connection of the regulations with the defence power depend would have appeared with greater clearness and perhaps consequently with more force.

The *Defence Preparations (Capital Issues) Regulations* were made on 1st August 1951, as under a power conferred by s. 4 of the *Defence Preparations Act* 1951. Sub-section (1) of s. 4 is expressed to empower the Governor-General to make regulations "for or in relation to defence preparations", an expression to which it will be necessary to return. Sub-section (2) sets out in four paragraphs some particular or, at all events, some less general matters which the power is to include.

The regulations deal separately with the raising by companies of money by issuing or calling up share capital or by borrowing on deposit without security and with the borrowing by all persons, including companies, upon security. Part II. which is headed "Companies" deals with the former topic. Part III., headed "Securities", deals with the latter. By reg. 6 a company may not without the written consent of the Treasurer make an issue

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Dixon C.J.

H. C. OF A.
1952.
MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.
Dixon C.J.

of authorized capital over a certain limit. When the issue made is added to (a) the amount of capital issued within the last two years (b) the amount borrowed upon security within the same period and not repaid and (c) the amount borrowed upon deposit within the same period and not repaid, the total must not exceed £10,000. By reg. 8 a company may not without the written consent of the Treasurer accept or receive a deposit over a certain limit or pay interest on a deposit accepted or received after the commencement of the regulations over 10/- per cent per annum. From the operation of this regulation banks and declared pastoral companies, building societies and co-operative societies are excepted, and the prohibition against paying more than 10/- per cent interest does not apply to "deposits", i.e. unsecured loans, made by banks and pastoral companies. A declared pastoral company is a company or body which the Treasurer by order declares to be a pastoral company. A co-operative society may exist as such under State law, but the Treasurer may similarly declare a body to be a co-operative society for the purposes of the regulations. The limit of amount is an alternative one. When the amount to be borrowed under deposits or to be received is added to the amount so borrowed or received by the company during the last year and not repaid the total must not exceed £5,000. When the amount to be borrowed under deposit or received is added to (a) the amount so borrowed or received by the company during the last two years and not repaid (b) the amount of authorized capital issued by the company during the same period and (c) the amount borrowed under a security during the same period and not repaid, the total must not exceed £10,000. Regulation 8 has no direct application to the present case because the company does not propose to borrow under a deposit, that is to obtain an unsecured loan; the loan it sought is upon security. But it may be remarked that the restriction to 10/- per cent per annum interest evidently means that every deposit, unless made at nominal interest, must have the Treasurer's consent. The plan of Part III. which deals with the borrowing of money on security is somewhat more complicated. Security means for this purpose bonds, debentures, debenture stock, inscribed stock, mortgages or charges. It is not necessary to state more than the main outlines of the plan. The plan is to prohibit without the written consent of the Treasurer the issue or giving of a security by anyone, company or not, if it involves the raising of money beyond a certain limit or the reservation of a rate of interest over $4\frac{1}{2}$ per cent per annum upon a first mortgage of land or upon a further charge in favour of a first mortgagee of

land. There is an exception in favour of securities issued or given to the Commonwealth, a State, an authority of the Commonwealth or of a State, a bank, a declared pastoral company, a building society or a co-operative society; and there is an exception in favour of securities issued by a local authority with the approval of the Treasurer of the State concerned.

The limit of amount is again alternative. When the amount of the securities to be issued or given is added to the amount issued or given in the last year it must not exceed £5,000. When the amount of the securities to be issued or given is added to (a) the amount of the securities issued or given in the last two years, (b) the amount of the authorized capital issued by the company in the same period and (c) the amount borrowed under deposits in the same period and not repaid the total must not exceed £10,000. In ascertaining whether the limit is exceeded you do not count securities exempted by the Treasurer or exempted by the regulations and you do not count amounts representing rates, taxes, insurance, repairs and other outgoings paid or incurred for the enforcement protection or preservation of the security or costs charges and expenses incurred under or in relation thereto.

It will be seen from the foregoing description of the regulations requiring consent that they are directed to restraining the raising of substantial amounts of capital except in what might be called the ordinary course of business through banks pastoral companies or building societies, governmental and local governmental lending being excluded. But the question on what grounds the Treasurer may withhold his consent is not left at large. His discretion is not left uncontrolled. Regulations 16 and 17, though they are placed in Part IV. under the heading "Miscellaneous", make elaborate provisions upon the subject. Regulation 16 is concerned only with the grant of consent subject to conditions and the period over which the consent is to be effective, a period limited to six months. The regulation empowers the Treasurer to impose conditions. Regulation 17 restricts the reasons for which consent may be refused or conditions imposed. Consent may not be refused or conditions imposed "except for purposes of or in relation to defence preparations": sub-reg. (1) and (2). What appears to be an attempt to provide means of obtaining the Treasurer's reasons in aid of proceedings in which they are examinable is made by sub-reg. (3) to (7). Under these provisions "a person taking proceedings in a court for relief, whether by way of declaration or otherwise on the ground that", stated briefly, consent has been refused or conditions have been imposed contrary to the regulation may,

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.

THE
COMMON-
WEALTH.

—
Dixon C.J.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & Co. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —
 Dixon C.J.

by an application to the Court upon notice to the Treasurer, obtain an order, if the Court thinks fit to make it, directing the Treasurer to state in writing the facts and matters by reason of which the refusal of consent or the condition was for purposes of or in relation to defence preparations. The expression "proceedings for relief whether by way of a declaration or otherwise" doubtless would cover an application for a writ of mandamus. A declaration could at best declare that the purported refusal of consent or imposition of conditions was void. A mandamus might involve the further step of directing a reconsideration of the application for consent or, if the Treasurer's statement showed that consent would have been granted but for a reason outside the scope of his discretion, perhaps a direction to grant the application. Sub-regulation (6) requires the filing of the Treasurer's statement and makes it there-upon prima-facie evidence of the matters it contains subject to any objection as to relevancy. Apparently it is evidence for either side, so that the Treasurer obtains the benefit of his own statement, though he cannot make one unless the person attacking his determination obtains an order directing him to do so. But the all important thing is the restriction imposed upon the grounds upon which the Treasurer may refuse his consent or qualify it by a condition or conditions; he cannot do so except for purposes of or in relation to defence preparations. The phrase "defence preparations" comes from the Act. It is not expressly defined; but the Act contains a long preamble consisting of eight recitals. The second of these deals with the necessity of "preparations for defence . . . to an extent, and with a degree of urgency, not hitherto necessary except in time of war". The third fourth and fifth recital of the preamble proceed to state matters which "the defence preparations will include". They will include, "in the first place, the raising, equipping and provisioning of the armed forces of Australia in increasing numbers and the equipping and provisioning of armed forces of other members of the British Commonwealth of Nations and of the United Nations". Then they will include "also measures to secure the maintenance and sustenance of the people of Australia in the event of war and to contribute towards the maintenance and sustenance of the people of countries associated with Australia in defence preparations". I take the whole of this description to be governed by the words "in the event of war". In the third place defence preparations will include "also the expansion of the capacity of Australia to produce and manufacture goods, and to provide services, for the purposes of the defence preparations mentioned in the last two

preceding paragraphs and generally for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war ”.

I think that the expression “defence preparations” in the regulations must be interpreted in the light of the preamble of the Act and taken to include the foregoing matters recited therein. Accordingly what the regulations involve, stated briefly, is a restriction upon the raising of money in the case of companies by means of the issue of share capital or the taking of deposits and, in the case of both natural and artificial persons, by means of borrowing on bonds debentures and the like and mortgages and charges. The restriction applies only where substantial sums are raised otherwise than from banks and certain other financial institutions and does not apply to Governmental bodies. The nature of the restriction is to require an application for the consent of the Treasurer without which the proposed transaction must not proceed but which the Treasurer must grant unconditionally unless consent is refused, or a condition is imposed, for purposes of or in relation to defence preparations, understood according to the preamble. If he refuse or impose a condition in the exercise of the Treasurer’s discretion, his reasons may be obtained and his discretion is examinable by the courts to ascertain whether the grounds for his refusal or for imposing the condition fall within the description expressed by the words “for the purposes of or in relation to defence preparations”.

The question is whether a restriction of this character upon raising money amounts to a law with respect to defence within the meaning of s. 51 (vi.) of the Constitution. No question arises, if it be such a law, as to its falling within the power which s. 4 of the *Defence Preparations Act* 1951 purports to confer upon the Governor-General in Council, although there may remain a question whether that enactment is valid. No question arises concerning s. 51 (xx.) of the Constitution, the power to make laws with respect to trading and financial corporations formed within the limits of the Commonwealth. No such question arises because the statutory power contained in s. 4 under which the regulations were made cannot be referred in whole or in part to s. 51 (xx.). But unless the regulations, so far as material to this case, amount to a law with respect to defence they cannot be supported.

In considering the question whether they ought to be so characterised it is important to notice that, unlike the law held invalid in *Australian Communist Party v. The Commonwealth* (1), this

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Dixon C.J.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & CO. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —
 DIXON C.J.

case does afford objective tests by which its connection, or want of connection, with the defence power may be seen or ascertained ; its provisions do specify a course to be pursued and considerations and purposes to be effectuated the operation and practical consequences of which will show whether the measure does tend or might reasonably be considered to conduce to or to promote or to advance the defence of the Commonwealth. On its face it is directed against the raising of money in a way which the Treasurer judges to be prejudicial to purposes that are described as purposes for or in relation to defence preparations, the scope and meaning of the term " defence preparations " being made sufficiently clear. The judicial remedies available to ensure that the judgment or discretion of the Treasurer does not go beyond what is the true scope and meaning of " defence preparations " may or may not prove adequate to the purpose but at all events it is the intention of the regulations that his determination of that question should not be conclusive. Now the assumption which underlies the direction contained in reg. 17 (1) that the Treasurer shall not refuse consent except for purposes of or in relation to defence preparations is that the issue of share capital or of securities (in the defined sense) may be, or tend to be, prejudicial to defence preparations. Why this assumption is made is indicated in the sixth and seventh recitals of the preamble to the Act. They recite that in present circumstances the defence preparations mentioned in the preceding paragraphs of the preamble, to which reference has already been made in this judgment, cannot be carried out without the diversion of certain of the resources of Australia (including money, materials and facilities) for use in, or in connection with, defence preparations, and that they cannot be carried out to the necessary extent, and, in particular, the resources of Australia cannot be diverted to the extent necessary to fulfil the requirements of defence, unless at the same time measures are undertaken for adjusting the economy of Australia to meet the threat of war and for avoiding or reducing economic dislocation or instability caused by or impeding defence preparations.

The view so expressed by Parliament explains the adoption of the regulations. For, in situations where a country must divert to purposes of war its resources in men and materials from the ends of manufacture production distribution and the general services for civil requirements, the control of the issue of share capital and of bonds debentures debenture stock and inscribed stock has been considered a necessary measure. It was thought

necessary in the war of 1914-1918. In Australia after a period of informal control the *War Precautions (Companies) Regulations* 1916 (S.R. 1916 No. 49) were adopted on 10th April 1916. In England a committee of the London Stock Exchange exercised the control until 28th March 1919 when, the response in war-time to such informal controls having ceased or weakened after the armistice, a regulation was made under the *Defence of the Realm Consolidation Act* 1914 (5 Geo. 5 c. 8) (Reg. 30F of the *Defence of the Realm Regulations*) (S.R. & O. 1919 No. 367).

In the United States, after that country entered the war on 6th April 1917, a similar course was followed. The course taken appears from this passage from Volume 32 of the 12th Edition of the *Encyclopaedia Britannica* (1922) p. 897 :—"In order that available capital might be turned into channels contributing to the successful prosecution of the war, two agencies were devised. In January 1918, the Secretary of the Treasury asked the Federal Reserve Board to pass upon all proposed issues of securities that should be referred to it. The Board formed a Capital Issues Committee for this purpose, and all banking institutions were asked to refrain from assisting in the floating of new securities until passed upon by the Committee. In general, approval was given only to such issues as contributed to the winning of the war or to the promoting of national welfare. This committee, however, had no legal status. Accordingly by Act of Congress, 5th April 1918, there was created a Capital Issues Committee of the same nature, with authority to investigate and pass upon all issues, with certain specified exceptions, of securities of \$100,000 or more. However, it was not empowered to require the submission of such securities to its investigation or to impose acceptance of its decision. The production of non-essentials was discouraged and many doubtful enterprises were repressed". In Australia in the war of 1939-1945 the *National Security (Capital Issues) Regulations* (S.R. 1939 No. 117) were promulgated on 13th October 1939. They were soon superseded by stricter and more extensive regulations under the same title (S.R. 1939 No. 149). In the United Kingdom the control of capital issues was introduced by reg. 6 of the *Defence (Finance) Regulations* 1939 (S. R. & O. 1939 No. 1620) made under the *Emergency Powers (Defence) Act* 1939 (2 & 3 Geo. 6 c. 62) on 23rd November 1939. The borrowing of money and the raising of money by the issue of shares or securities by companies is now controlled by the *Borrowing (Control and Guarantees) Act* 1946 (9 & 10 Geo. 6 c. 58). In the United States the Securities and Exchange Commission had come into existence and in 1941 before

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Dixon C.J.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
DIXON C.J.

7th December that body began to use its powers to ensure that the proceeds of issues of stock and the like would not be employed inconsistently with the interests of national defence.

The purpose of referring to these measures adopted in the three countries when confronted with the necessity of a heavy diversion of their resources in men and materials to the armed services and to the production of arms and the instruments of war is to show that the control of capital issues and of the raising of money by the issue of debentures and other forms of security is a recognized means of facilitating the diversion and protecting the economy of the country in some degree from its inflationary consequences. It is true that they were measures taken after the outbreak of war. But it is not because hostilities had actually begun that they were considered necessary. In considering the application or operation of the defence power the distinction between a period of actual hostilities and a period of apprehended danger short of war can never be disregarded. In relation to practical measures of some descriptions it may prove decisive. Many restrictions upon civilian life may spring from the existence of an actual state of war or of actual hostilities, as for instance restrictions upon trading with the enemy, the use of radio transmitters or the display of lights. But the restrictions upon raising money by the issue of share capital or debentures or other securities are auxiliary to and consequential upon the diversion of tangible and intangible resources to warlike purposes, and such a diversion a country may feel constrained to make under a threat of war as much as when actually engaged in hostilities. According to the received view of such measures, the operation of a restriction upon the raising of money by the issue of share capital or debentures or other securities has in this respect a clearly understood purpose. That purpose is to close up or control one important channel through which the excessive supply of money which expenditure on warlike needs is apt to create would otherwise run, a supply of money excessive as compared with the volume of civilian consumer goods. And the reason is that the excessive supply of money may be applied in raising rival demands for men and material, for the production and supply of things and for the providing of services, things and services which not only may contribute nothing to strengthen or equip the country for the actual or potential conflict but may tend to weaken its economy and to distract its people from the essentials of national defence. With reference to the fact that hitherto this form of control had not been adopted in the United Kingdom in the United States or here until after the outbreak of war, the contrast must not be

forgotten between the traditional conception of military and economic preparation for war which then prevailed with us and that which prevailed with the enemy. It may be significant that in Germany a law containing a developing programme of credit supervision and control went into effect at the end of 1934. The application or operation of the constitutional power over defence is flexible enough to embrace either of the two conceptions or anything between the extreme courses they may be thought to represent. Indeed, as it seems to me, there is little or no question concerning the nature and scope of the power or the principles governing its application. It is not denied that the power authorizes legislation with respect to measures in preparation for the defence of the Commonwealth taken in anticipation of war and with respect to matters incidental thereto. It does not appear to be denied that measures that tend or might reasonably be thought conducive to such an end are within the power, provided that the tendency to the end or capacity to conduce to the end is not tenuous speculative or remote. Nor does it seem to be disputed that in deciding whether an enactment or statutory regulation or order is within the power the actual effect it does or will produce in advancing the preparations for the defence of the Commonwealth is not the subject of inquiry any more than the expediency or policy of the measures. These are for the Parliament or the subordinate legislating body to judge.

The subject of dispute wears somewhat the appearance of a question of fact or at all events of a question depending upon considerations and reasoning as to the effect which it may reasonably be thought that the operation of the restriction on capital issues &c., is calculated to produce in relation to a programme of defence preparation. In the end I think the question is reduced to one of degree; that is the remoteness or the sufficient proximity of the effects which, as it is considered, the operation of the regulation is calculated to produce in relation to preparations for defence.

The preamble to the Act recites the danger which occasions the need to make preparations against the possibility of war. The second recital states that in the opinion of the Parliament and of the Government, there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent and with a degree of urgency not hitherto necessary except in time of war.

Nothing need be said now about the weight which should be given to such a legislative declaration. For any one who took into account the public events of the times would be bold indeed

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Dixon C.J.

H. C. OF A.
1952.
MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.
Dixon C.J.

if he adopted any other view for the purpose of determining the limits of the application of the constitutional power to make laws with respect to defence.

The scale of the preparations planned which directly relate to the increase in the armed services and the production of the instruments of war and necessary supplies has been brought before us by the defence demurred to in the manner described.

In the same way we have figures as to the availability and use of manpower and the unfulfilled demands made upon it as at or about the date of the regulations. We are similarly informed too of what we are allowed judicially to know and do know, namely the existence as at that time of a condition of the national economy of excessive inflation marked by progressively rising prices and other indications of the pressure of a disproportionately high purchasing power creating a demand in excess of the available supply, at stable prices, of consumption goods. To embark, in these circumstances upon any defence programme involving substantial increases in the numbers of the armed services and in the volume of arms equipment and other warlike supplies and calling for the diversion of men and material to defence projects, would be regarded as not only adding new and rival demands to those already existing but as involving new government expenditure increasing the pressure of purchasing power. The defence demands so set up must compete not only with the existing demands for goods and services but with all additional demands involved in the establishment of new enterprises or in the extension of old enterprises or in other private capital expenditure which has no defence purpose. In this there might reasonably have been seen an economic incongruity which might present an ever mounting difficulty and involve a progressively increasing cost in carrying out the defence programme. The validity of the regulations does not depend upon our judgment of the actual operation of these considerations. That is not for us to decide. What we have to decide is whether the situation was one to which such an exercise of the legislative power with respect to defence as the regulations contain could be legitimately addressed because the restriction imposed by the regulations might reasonably be considered conducive to the main purpose, namely direct preparation for the defence of the Commonwealth at a time when fears of war exist, and be considered to tend to promote that purpose in a manner that is not tenuous or speculative or remote.

In considering this question the fact must not be overlooked that the restriction in question is qualified by the provision which

forbids the Treasurer to refuse consent except for purposes of or in relation to defence preparations. Imprecise as are the words "for purposes of or in relation to" they do exclude all grounds of refusal except such as are material or relevant to "defence preparations" in the wide sense which the preamble shows that the latter expression bears. That sense does not appear to go beyond purposes or matters covered by the legislative power with respect to defence.

I cannot agree that it is taken outside the power by the reference to the armed forces of other members of the British Commonwealth and of the United Nations or by the reference to the maintenance and sustenance (*scil.* in the event of war) of the people of countries associated with Australia. The preamble relates to the situation in which Australia now stands and that being so I do not see how the possibility can be denied judicially of these matters closely touching her defence.

The limitation upon the grounds for refusing consent is a consideration which combines with the evident legislative conception of the manner in which the restriction upon the raising of money without consent operates to prevent or reduce the setting up of demands on material and services incongruously with the effective pursuit of a programme of defence preparations. So too with what may be conceived to be its tendency to soften or weaken the impact upon the economy caused by the increased governmental expenditure upon defence preparation and by the diversion of resources. These considerations combine, as I think, to show that the true scope and object of the regulations is to stop the use of capital, raised by the means which they describe, for purposes tending to prejudice the full development or execution of the defence preparations undertaken. This in itself may not be enough to show that the regulations must be within power. But it shows that they are addressed to the subject matter of the legislative power. If the material provisions of the regulations were of a description which could not reasonably be considered as calculated to promote any object within the defence power, the purpose of the subordinate legislature might not suffice to support them. But, as it has been attempted to show, according to common understanding of the place the control of capital issues takes when it is necessary to counter the inflationary effects produced by arming for war, the connection is definite and real: it is not too remote or speculative.

There are two observations which it is necessary to make, if only by way of caution. The first is that the restriction of the raising of money by means of the issue of share capital, debentures

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.

Dixon C.J.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Dixon C.J.

and other securities is usually regarded as forming only one of a system of controls directed against excessive inflation and its consequences. That consideration, however, can have no bearing on the question whether the use of that particular control is within the defence power, even if some or all of the others be not. The second observation is that the operation of the restriction in the manner discussed depends upon its effect as a general rule restraining throughout the community the raising of funds in the specified ways: it is not a question of the consequences of the restraint upon a particular company or person.

The case does not appear to me to be like *R. v. Foster*; *Ex parte Rural Bank of New South Wales*; *Wagner v. Gall*; *Collins v. Hunter* (1) (the petrol rationing case) where one matter there decided was that the power with respect to trade and commerce with other countries would not support a law for the rationing of petrol. The argument was rejected that because by the control of consumption a reduction in the demand for an imported commodity may be effected, the control of consumption could be treated as a means of restricting or diminishing importation and for that reason as within the commerce power (2). The distinction made by s. 51 (i.) of the Constitution between the domestic commerce of a State and commerce with other countries and among the States would be defeated if such an extension were made of the power to deal with what is incidental to the main subject; a law controlling consumption could not be regarded as a law with respect to commerce with other countries. The defence power was invoked too in *Wagner v. Gall* (3), but on the ground that the need for rationing arose from the dollar shortage and that was caused by the war. The dollar shortage made it necessary to restrict the importation of liquid fuel. All this was considered to leave the law too remote from defence. There is no similarity in this alleged causal connection and that which, in my opinion, brings the material provisions of the *Defence Preparations (Capital Issues) Regulations* within the defence power. In my opinion they amount to a law with respect to defence.

I have already pointed out that reg. 8 does not come directly into question in this case and this is true of other provisions. I do not say this for the purpose of suggesting that they may not be supported upon the grounds I have given for saying that regs. 6 and 10, considered with reg. 17, are laws with respect to defence, but only in order to make clear what exactly I am deciding.

(1) (1949) 79 C.L.R. 43, at p. 89.
(2) (1949) 79 C.L.R., at p. 91.

(3) (1949) 79 C.L.R. 43.

From the regulations it is necessary to turn to the Act. The regulations depend upon s. 4. The validity of this section was attacked upon grounds in which I cannot agree. It was suggested that having regard to the provisions contained in the *Defence Act* 1903-1951 the *Naval Defence Act* 1910-1949 and the *Air Force Act* 1923-1950 and also the *National Service Act* 1951, any derogation from which by the *Defence Preparations Act* s. 10 prevents, it must be taken that the last mentioned Act was directed to economic matters which could only amount to defence preparations in a very wide and inadmissibly remote sense. It was further suggested that s. 15A of the *Acts Interpretation Act* 1901-1950 could not apply because the legislature meant to provide a complete power over the subjects recited in the preamble.

I can see no reason why, if it appeared that according to its terms s. 4 would have too wide an operation, s. 15A should not apply. But I think that the power covers the matters referred to in the third fourth and fifth recitals of the preamble and that there is no prima facie reason for treating them as beyond the power to legislate with respect to defence. It is true that the vague expressions used are susceptible of elastic application. But s. 15A will restrain any abuse of their elasticity. At all events s. 4 validly extends over a sufficient area to support the material provisions of the regulations.

It remains to consider whether in the actual refusal or refusals of his consent in the case of the applications of the plaintiff company the Treasurer decided otherwise than for the purposes of or in relation to defence preparations.

It was said by counsel for the defendants, such was his confidence in the structure or frame of the Act and of the regulations as a passport to validity, that this was really the only substantial question in the case. But be this as it may it is a question which in the view I have already expressed must depend only on particular facts. It is, I think, sufficient to say that I have considered the statement filed by the Treasurer in pursuance of the order made under reg. 17 and that I fail to see in it any sufficient reason for concluding that the Treasurer exercised his discretion inconsistently with that regulation.

I would overrule the plaintiff's demurrer with costs.

R. B. Davies Industries Ltd. v. The Commonwealth and Others.

This is a demurrer to a statement of defence. The suit is brought against the Commonwealth and the Treasurer and the Attorney-General of the Commonwealth by a company which complains

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.

THE
COMMON-
WEALTH.

Dixon C.J.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.

v.
THE
COMMON-
WEALTH.

—
Dixon C.J.

of the operation of the *Defence Preparations (Capital Issues) Regulations*. The plaintiff company applied to the Treasurer for his consent to a new issue of share capital. At the time of the application, namely 6th June 1951, the *Defence Preparations Act* 1951 had not been passed. The application was doubtless made under the *National Security (Capital Issues) Regulations* (S.R. 1946 No. 193 ; S.R. 1947 No. 86 ; 1949 No. 14 and 1951 No. 10). Regulation 5 (2) of the *Defence Preparations (Capital Issues) Regulations*, which were made on 1st August 1951, provides that an application for consent under the *National Security (Capital Issues) Regulations* which has not been granted or refused before the commencement of the first mentioned regulations shall be deemed to be an application under the *Defence Preparations (Capital Issues) Regulations*. Accordingly the application is governed by the *Defence Preparations (Capital Issues) Regulations*. The relief which the plaintiff company seeks by its statement of claim is declarations that the Act and these regulations are invalid and alternatively a declaration that the refusal of the Treasurer's consent to the plaintiff company's application was contrary to reg. 17, and orders that the Treasurer do consider and determine the application according to law and that he do consent to the application. In support of this alternative relief the statement of claim pleads a number of facts with a view of showing that in truth the refusal of consent was inconsistent with reg. 17 (1) which provides that the Treasurer shall not refuse consent except for the purposes of or in relation to defence preparations.

The defence pleads a number of facts and matters "by reason of" which, as it avers, the Act was and is a law with respect to the naval and military defence of the Commonwealth and the regulations were made, and were at all material times, "for and in relation to defence preparations" (*scil.* within the meaning of s. 4 of the Act). In another paragraph the defence pleads that notwithstanding the facts and matters alleged in the statement of claim the Treasurer's refusal of consent was for the purposes of or in relation to defence preparations by reason of the facts alleged in the earlier paragraphs of the defence and in particular by reason of certain other facts it proceeds to set out. Among these is the fact that the materials and production the increased supply of which is most urgently required for, stated briefly, defence purposes are set forth in a list of priorities. The list is made part of the pleading. There is then an averment the effect of which is that the purpose for which the plaintiff company sought the additional capital was outside the list. There is, however, some ground for

reading certain of the allegations in the statement of claim as setting up facts which would bring the plaintiff company's purpose within the list of priorities. But, as we are told, this involves a question of terminology.

The demurrer was argued together with the demurrer in *Marcus Clark & Co. Ltd. v. The Commonwealth*. Notwithstanding the differences in the manner in which the statements of defence in the respective cases are pleaded the conclusions as to the validity of s. 4 of the Act and of the material regulations must be the same. I find it enough to refer to the reasons I have given in that case for the conclusion, which I again state, that s. 4 of the Act and regs. 6 and 10, considered with reg. 17, are valid. Regulation 10, however, is not applicable to the facts pleaded in this case. As to the question whether the refusal of the Treasurer's consent was contrary to reg. 17 the situation here is not the same as in the case of *Marcus Clark & Co. Ltd.* In point of form the defence may not pursue the rules of good pleading in all respects but formally it suffices to support the Treasurer's exercise of his discretion, partly by affirmative allegations and partly by the inconsistency with the allegations of the statement of claim which some of the averments in the defence exhibit. The demurrer cannot therefore be allowed. But it is evident that without an investigation of the facts no decision can be given on the substantial question whether or not the Treasurer's refusal of consent was based on a misapprehension concerning the nature of the production the plaintiff company contemplated and the application to it of an item in the list of priorities and for that or some other reason the refusal was contrary to reg. 17. To determine the suit therefore a trial appears to be necessary.

In the circumstances the course which commends itself to me is to overrule the demurrer and reserve the costs for the judge at the trial or, if the suit does not go to trial, then for the order of a judge sitting in the original jurisdiction to whom application is made.

Marcus Clark & Co. Ltd. v. The Commonwealth and Others.

MCTIERNAN J. I have read the reasons for judgment of the Chief Justice and agree with them. For myself I desire to add some further observations.

The defence power of the Commonwealth is, subject to the Constitution, a plenary legislative power, as regards its subject matter, both in times of peace and of war. It is not open to doubt

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Dixon C.J.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
McTiernan J.

that the power extends to the making of laws, in time of peace, providing for effective preparations for war. The power carries with it a wide discretion as to the means, which Parliament may authorise, for the attainment of the proper end of the power. This is the protection of Australia against aggression. In time of war, the power extends to making laws imposing financial and economic controls and laws of many descriptions. These laws are warranted by the defence power upon the condition that they can aid the prosecution of the war. This condition is satisfied by a law which is calculated substantially to aid Australia to sustain its war effort or cope with extraordinary conditions resulting from war. The condition is also satisfied by a law which aims at removing specific hindrances to the war effort and the prosecution of the war. Such laws may be directed at economic factors hindering the war effort. If economic or financial factors impede preparations for war it is difficult to see why the defence power does not warrant laws aimed at such impediments. It cannot be doubted that it would be competent for the Parliament to make laws dealing with human interference with preparations for war. The Constitution does not expressly exclude economic and financial controls from the means which Parliament may, in times of peace, provide for the purpose of preparing the country to resist aggression and to meet the possible dangers and adversities that may overtake Australia under modern conditions of war.

Defence, the subject matter of the legislative power, which is in question, includes preparations for war and carrying on hostilities, when war breaks out. It is a complex subject matter and is not defined by a legal term. The limits of the subject matter are, of course, a question for judicial determination. The Parliament is not limited by the extent and nature of the measures regarded as appropriate defence preparation when the Constitution commenced, as if defence was a purely legal concept. Now such measures are obviously obsolete. The Constitution created the power for the safety of the Commonwealth in the first decade of its existence and in the future. The Parliament is authorised by the defence power to make such preparations for war as are appropriate in the circumstances when Parliament or the Executive deems that it is expedient to make Australia ready for war. The defence power authorises the Parliament to take such measures as are proportionate to the end for which the Constitution created the defence power. The end is the protection of Australia against invasion and the dangers of war. Defence preparations, as the term implies, are necessarily relative to a possible war. Against

that it is clearly competent for the Parliament and the Government to provide effectively. The defence power warrants the making of defence preparations with any degree of urgency and upon any scale which the Executive thinks expedient. When it is said that defence preparations are relative to a possible war, it should also be observed that it might reasonably be expected that the enemy would have prepared for it by utilising without stint all his resources of men, money and materials. Further, it could be supposed that he would strike suddenly and have the will to inflict injury and damage without limit in order to conquer; and his means of destruction would be machines and weapons with such range and speed that the geographical remoteness of Australia would not afford it the same amount of security as it formerly did. If such considerations are left out of account, the nature and extent of the defence preparations warranted, in this decade, by the defence power may not be truly determined. As already said, the defence power is plenary as regards its subject matter. The power is not subject to any restriction which is not expressly imposed by the Constitution. *Griffith C.J.* in *Farey v. Burvett* (1) applied the well-known passage from the judgment of *Marshall C.J.* in the case of *M'Culloch v. Maryland* (2) in order to explain the scope and strength of the defence power in war time. This criterion is no less applicable to the defence power in time of peace. While there is peace the laws which the Parliament may make in pursuance of the power are not as multifarious as those which may be made when war is seen to be imminent or has commenced. However, the test of the validity of any law purporting to be made in preparation for war is its connection with the purpose of defence. The Court may decide that the law is within the legislative power, if upon facts which the Court may judicially notice, or facts proved to the Court's satisfaction, or upon any rational considerations, the Court is of the opinion that the law may conduce to making the country ready for war, if it should come. By this test it seems to me that the *Defence Preparations Act* 1951 is valid. The preamble of the Act declares that a number of measures are included in the defence preparations which Parliament contemplates.

In the first place comes the raising, equipping and provisioning of Australia's armed forces. The preamble declares that the equipping and provisioning of the armed forces of other members of the British Commonwealth of Nations and of the United Nations

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.

THE
COMMON-
WEALTH.

McTiernan J.

(1) (1916) 21 C.L.R. 433.

(2) (1819) 4 Wheat. 316 [4 Law. Ed. 579].

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & CO. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —
 McTiernan J.

is also contemplated as part of Australia's defence preparation. It is plain that it is within the defence power to contribute in this way to the military strength of nations associated with Australia in the British Commonwealth of Nations. Nor can the defence power be so restricted that it does not justify legislative action authorising as part of the defence preparations undertaken by Australia the use of its resources to assist in the equipping and provisioning of the forces of friendly members of the United Nations who, with Australia, are pledged to support collective action for resisting international aggression.

Secondly, the preamble mentions measures to secure the maintenance and sustenance of the people of Australia in the event of war and to contribute towards the sustenance of the people of countries associated with Australia in defence preparation.

Thirdly, the preamble declares that defence preparations include the expansion of the capacity of Australia to produce and manufacture goods and to provide services for the defence preparations, which have been mentioned, and generally for the purpose of enabling the economy of Australia to meet demands upon it, in the event of war.

Having regard to the conditions in which war is waged in modern times and the dangers to which the outbreak of war would expose the people of Australia, evidence is not needed to show the connection between any of these measures, described in the preamble, as defence preparations and the purpose of defence. In my opinion, any regulation which truly answers to the description of any of these measures which Parliament intends that the Executive should have authority to take, is warranted by the *Defence Preparations Act* and is within the defence power. The raising of armed forces is at the centre of the power. It authorises any further measures which are truly preparations for war. The other measures mentioned in the preamble could conduce to the successful preparation of the country for war. It seems to me that, without them, preparations for war may reasonably be regarded as incomplete.

As already stated, the preamble of the *Defence Preparations Act* shows what Parliament intended by "defence preparations". The meaning of the words, as used in s. 4, must necessarily come up to Parliament's intention. The power which is given by s. 4 to make regulations extends to all defence preparations mentioned in the preamble.

We were not referred to any regulations, other than the *Defence Preparations (Capital Issues) Regulations*, which have yet been

made under s. 4. The raising, equipping and provisioning of the armed forces of Australia, as mentioned in the preamble, has at all material times been carried on. This fact gave rise to the power conferred by s. 4 (2) (b), to make regulations for or in relation to these particular defence preparations. This is a power to make regulations for or in relation to the diversion and control of money. It is a condition of the power that such diversion and control are for the purposes of defence preparations.

Regulation 6 of the *Defence Preparations (Capital Issues) Regulations*, combined with reg. 17, operates to divert and control money ; and this is also the case with reg. 10 in combination with reg. 17. The operation of the regulations is calculated to make finance available for industries which are of value to the defence effort or to prevent the investment of money in enterprises which are of no such value. By reason of this diversion and control of money, it could reasonably be expected that the industrial effort necessary to carry out the defence effort contemplated by Parliament would be facilitated. The demand of enterprises, which are of no value to the defence effort, for labour and materials, would be reduced, and there would be more labour and materials available for employment and use in industries essential to the defence effort. In my opinion the regulations have an operation which is warranted by the defence power. The diversion and control of money which would be brought about by the regulations and the exercise of the Treasurer's discretion, according to the rule in reg. 17, could, for the reasons which I have given, assist the industrial effort needed to accomplish the defence effort contemplated by Parliament.

Parliament contemplates, as the preamble shows, that defence preparations comprising the raising, equipping and provisioning of the armed forces would be carried on to an extent and with a degree of urgency not hitherto necessary except in time of war. The responsibility for such preparations lies with Parliament and the Executive and the extent and urgency of the preparations are entirely within their respective provinces and outside the province of the Judicature.

An international emergency is not needed to give constitutional support to the raising and equipping of armed forces. The emergency may provide political justification, but is not needed to provide a constitutional basis, for raising armed forces upon a scale which has no precedent in times of peace. But if Parliament's declaration, which is made by the preamble, of the existence of an international emergency, could be an aid to establishing the validity of the

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

McTiernan J.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
McTiernan J.

Act and the regulations, there is no reason why the Court should not give full faith and credit to this declaration.

The Parliament has further declared in the preamble that, in the present circumstances, the armed strength of the country cannot be increased to dimensions proportionate to the emergency without the diversion of money and other resources of Australia for use in or in connection with defence. These circumstances include the state of the country's economy. The Court may judicially notice that at the time the *Defence Preparations Act* was passed, the economy was subject to unhealthy inflationary pressures. If the industrial activity needed to carry out the defence effort which Parliament contemplated, were simply superimposed upon the economy without taking measures to meet the new demands upon it, there would be a strain on the country's resources which could not but be a hindrance to carrying out the defence effort. Regulations 6, 10 and 17 are well adapted to the purpose of reducing, at any rate, to a substantial degree the added inflationary pressure which the defence effort would apply to the economy. As this consequence would detrimentally affect the progress of the war effort, the avoidance of the consequence is incidental to defence.

In brief, the abovementioned regulations, in my opinion, are calculated to aid defence preparations by influencing the flow of money, available for investment, to industries engaged in production for the purposes of defence preparations; by preventing the use of such money for starting or expanding enterprises which are not useful or essential to defence preparations; and by moderating the inflationary pressure, detrimental to defence preparations, likely to result from the impact of industrial operations necessary for the defence preparations upon the economy of the country. In this view of the regulations I think that they are incidental to the purpose of defence and are valid.

I agree that the statement of the Treasurer's reasons demonstrates that his refusal to grant consent to the plaintiff to issue capital or borrow money was warranted by the regulations, and is therefore good in law. In my opinion the demurrer should be overruled.

R. B. Davies Industries Ltd. v. The Commonwealth and Others.

In this case I agree that the demurrer should be overruled and for the reasons stated by the Chief Justice. In *Marcus Clark's Case* I stated my reasons for deciding that the *Defence Preparations Act* 1951 and regs. 6, 10 and 17 of the *Defence Preparations (Capital Issues) Regulations* are valid.

Marcus Clark & Co. Ltd. v. The Commonwealth and Others; R. B. Davies Industries Ltd. v. The Commonwealth and Others. H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

WILLIAMS J. These demurrers which have been heard together raise the question whether the Treasurer of the Commonwealth was entitled to refuse permission to the plaintiff companies to raise further capital. The plaintiff Marcus Clark & Co. Ltd., hereinafter called the first plaintiff, proposes to borrow £100,000 from the Mutual Life & Citizens Assurance Ltd. and to increase its nominal capital and to issue from its unissued capital 401,114 ordinary shares of 10/- each. This plaintiff carries on an extensive business of selling goods by retail and owns real estate on which are erected large and valuable buildings. It wishes to raise this capital to provide funds wherewith to repair and remodel its buildings so as to increase the volume of its business. The plaintiff R. B. Davies Industries Ltd., hereinafter called the second plaintiff, is the holder of all the issued ordinary shares in R. B. Davies Pty. Ltd., a large scale manufacturer of hardware and particularly of types of hardware goods used in housing construction and building generally. It desires to issue 173,789 ordinary shares of £1 each to enable it to carry into effect an agreement with a manufacturing company incorporated in England for the establishment jointly by it and that company of a new industry to use a patented process in the manufacture of non-ferrous tubes. The agreement provides for the formation of a new company to be called Yorkshire Fittings (Aust.) Pty. Ltd. with an issued capital of 300,000 shares of £1 each to be applied for in cash as to 51 per cent by the English company and 49 per cent by the second plaintiff. The English company has already remitted to Australia the funds necessary to enable it to apply for its portion of the shares. The Treasurer has refused consent to both capital issues. He contends that his refusal is justified by regs. 16 and 17 of the *Defence Preparations (Capital Issues) Regulations* which were notified in the *Gazette* of 2nd August 1951, S.R. 1951 No. 84. Regulation 17 (3) of these regulations authorises a person taking proceedings in a Court for relief, whether by way of declaration or otherwise, upon the ground that an application for the consent of the Treasurer under the regulations has been refused contrary to the regulations, to apply to the Court for an order directing the Treasurer to state in writing the facts and matters by reason of which the refusal of consent was for the purposes of or in relation to defence preparations. Regulation 17 (6) provides that the statement shall, subject to relevancy, be prima-facie evidence of the matters it contains. In the case of the first plaintiff such an order was made and the Treasurer's

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

statement has been incorporated in the statement of defence and one ground of demurrer is that these facts and matters do not justify the Treasurer's refusal. The second plaintiff did not apply for such an order but par. 3 of the statement of defence states that by reason of the facts and matters referred to in pars. 4 and 5 thereof the *Defence Preparations (Capital Issues) Regulations* were made and were at all material times for and in relation to defence preparations. Paragraphs 4 and 5 contain a great deal of the same material as that contained in the Treasurer's statement.

The demurrers raise three principal questions of law (1) whether the *Defence Preparations Act* 1951 under which the regulations were made is a valid exercise of the constitutional powers of the Commonwealth Parliament; (2) if it is, whether it authorised the making of the Capital Issues Regulations; (3) if the regulations are valid, whether the refusals of the Treasurer were justified by the regulations.

The Act itself consists of eight recitals and thirteen sections. It received the Royal assent on 19th July 1951, and came into force on the same day. Section 13 provides that the Act shall continue in operation until 31st December 1953 or until such earlier date as is fixed by proclamation and no longer. The second recital states that in the opinion of the Parliament and of the Government of the Commonwealth there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent, and with a degree of urgency, not hitherto necessary except in time of war. Recitals follow enumerating the defence preparations necessary to meet such an emergency. They include raising, equipping and provisioning the armed forces of Australia in increasing numbers, measures to secure the maintenance and sustenance of the people of Australia in the event of war, the expansion of the capacity of Australia to produce and manufacture goods and to provide services for the purpose of such defence preparations and generally for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war. Then follow two recitals, the first of which states that these defence preparations cannot be carried out without the diversion of certain of the resources of Australia (including money, materials and facilities) for use in, or in connection with, defence preparations: and the second of which states that these defence preparations cannot be carried out to the necessary extent, and, in particular, the resources of Australia cannot be developed to the extent necessary to fulfil the requirements of

defence unless at the same time measures are undertaken for adjusting the economy of Australia to meet the threat of war and for avoiding or reducing economic dislocation or instability caused by, or impeding, defence preparations. Finally there is a recital that the military and economic strength necessary for the defence of Australia cannot in the opinion of Parliament and the Government be built up and maintained unless the Government has authority to take such measures as are from time to time required in relation to any or all of the matters mentioned in the preceding paragraphs. It would seem to be clear from these recitals that Parliament intended to delegate to the Governor-General in Council powers of legislation which, if exercised to the full, could only be supported by the defence power if that power is as wide as it is when Australia is at war.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Williams J.

The operative provisions of the Act do not belie this intention. The principal section is s. 4, the text of which is as follows:—

“4. (1) The Governor-General may make regulations for or in relation to defence preparations.

(2) The regulations which may be made under the last preceding sub-section include, without limiting the generality of the power to make regulations conferred by that sub-section, regulations for or in relation to—(a) the expansion of the capacity of Australia to produce or manufacture goods, or to provide services, for the purposes of defence preparations or for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war; (b) the diversion and control of resources (including money, materials and facilities) for the purposes of defence preparations; (c) the adjustment of the economy of Australia to meet the threat of war or the avoidance or reduction of economic dislocation or instability caused by, or impeding, defence preparations; and (d) measures to secure the maintenance and sustenance of the people of Australia in the event of war or to contribute towards the maintenance and sustenance of the people of countries associated with Australia in defence preparations.

(3) Nothing in this section authorizes the making of regulations—(a) imposing taxation; (b) with respect to the borrowing of money on the public credit of the Commonwealth; (c) for or in relation to the compulsory direction of labour; or (d) imposing any form of, or extending any existing obligation to render, compulsory naval, military or air-force service”.

It will be seen that sub-s. (1) of this section delegates to the Governor-General in Council the general legislative powers of the Commonwealth Parliament to make laws for or in relation to defence

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.

THE
COMMON-
WEALTH.

Williams J.

preparations except on the subjects withdrawn by sub-s. (3). Sub-section (2), without limiting the generality of the power to make regulations conferred by sub-s. (1), specifically authorises the Executive to make regulations upon the subjects defined in its four paragraphs. This sub-section is wide enough to authorise regulations controlling the whole political economy of the Commonwealth. The extraordinary width of the legislative powers that the Commonwealth Parliament has attempted to delegate to the Governor-General in Council is apparent from the language of the section. These powers are so wide that Parliament considered it necessary to introduce the express exceptions contained in sub-s. (3). As Mr. *Macfarlan* said, subject to these exceptions, s. 4 is in terms wide enough to authorise most of the regulations that were made under the *National Security Act* 1939-1943 at the height of the recent hostilities. The *Defence Preparations Act* is in a sense wider than the *National Security Act* because it does not confine the Executive to the making of regulations which could only be authorised by the defence power. It authorises the making of regulations for or in relation to defence preparations which could be sustained by any constitutional power.

The Capital Issues Regulations are, however, the only regulations so far made under the Act and it has not been contended that they can be justified as a delegation of any other power than the defence power. The nature and operation of this power and its capacity to expand and contract as the danger to the Commonwealth grows more acute or diminishes has been fully discussed in the judgments of this Court in the last twelve years. The power has a flexibility that does not exist in the case of any other constitutional power because its purpose is to clothe the Commonwealth Parliament with full authority to take all such steps as are reasonably necessary to ensure the national safety under all circumstances. I have never considered that there is a clear line of demarcation between the extent of the power in peace time and during hostilities. But it is obvious that the outbreak and course of hostilities, particularly a war of the recent dimensions, and their proximity to Australia, can rapidly extend the power beyond any limits that it is capable of reaching in peace time until it suffices to authorise the Commonwealth Parliament to assume almost complete control of the whole life and resources of the nation. But even at the height of hostilities certain regulations made under the *National Security Act* were held to be beyond the power: *R. v. Commonwealth Court of Conciliation and Arbitration* ;

Ex parte State of Victoria (1) (Parts of reg. 29 of the *National Security (Supplementary) Regulations*); *R. v. University of Sydney* (2) (reg. 16 of the *National Security (Universities Commission) Regulations*); *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (3) (certain of the *National Security (Subversive Associations) Regulations*); *Victorian Chamber of Manufactures v. The Commonwealth* (4) (*National Security (Industrial Lighting) Regulations*); *R. v. Commonwealth Court of Conciliation and Arbitration*; *Ex parte State of Victoria*; *Victoria v. Foster* (5) (*Women's Employment Regulations* in relation to State employees employed on purely governmental activities).

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Williams J.

It was contended by Mr. Macfarlan that the recitals supply a meaning for the vague words "defence preparations" in s. 4 and also indicate an intention on the part of Parliament that the Act should stand or fall according to whether or not the constitutional powers of the Commonwealth are sufficient, in the present international emergency, to support the Act to its full extent as a delegation to the Executive to legislate upon all measures which the defence power would authorize the Parliament to enact during hostilities. It is clear that Parliament did intend to delegate to the Executive the widest powers to legislate for or in relation to defence preparations and to make those powers, if possible, as wide as the power it could delegate during hostilities. That must be, it seems to me, the purpose of reciting that there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent, and with a degree of urgency not hitherto necessary except in time of war. But I am unable to discover in the Act any sufficient intention that, if that intention could not be carried into effect, the rule of construction laid down in s. 15A of the *Acts Interpretation Act* 1901-1950 should not apply, and that the Act should not operate as a valid enactment to the extent to which it is not in excess of power. Subject to the express exceptions, s. 4 of the *Defence Preparations Act* should be construed, I think, as s. 15A of the *Acts Interpretation Act* requires, as a delegation to the Executive of the same powers of legislation for or in relation to defence preparations, for the purpose of effecting any of the recited objects, as the Commonwealth Parliament could itself exercise under the Constitution at the time the regulations are made. The crucial question is therefore whether the Commonwealth Parliament could itself,

(1) (1942) 66 C.L.R. 488.

(2) (1943) 67 C.L.R. 95.

(3) (1943) 67 C.L.R. 116.

(4) (1943) 67 C.L.R. 413.

(5) (1944) 68 C.L.R. 485.

H. C. OF A. 1952. in exercise of the defence power, have enacted the Capital Issues Regulations in August 1951.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

It is necessary to examine their provisions to see what they really do. Broadly stated they forbid any further issue of capital by a company without the consent of the Treasurer if the amount of authorized capital issued by the company during the two preceding years together with the amount borrowed and not repaid by the company under a security issued or given by the company during that period and not repaid under a deposit accepted by the company exceeds £10,000. They forbid a company (other than a bank, a declared pastoral company, a building society or a co-operative society) without the consent of the Treasurer receiving a deposit if the amount borrowed and not repaid under deposits received (including the deposit then received) during the preceding year exceeds £5,000 or if the amount borrowed during the preceding two years together with the amount of authorized capital issued by the company during that period exceeds £10,000 or to pay interest on a deposit (other than a deposit made by a bank or a declared pastoral company) at a rate higher than 10/- per centum per annum. They also forbid a person without the consent of the Treasurer issuing or giving a security except where the securities issued or given (including the security then issued or given) by that person during the preceding year do not exceed £5,000. But a person cannot give a first mortgage over land not exceeding £5,000 if the rate of interest exceeds $4\frac{1}{2}$ per cent without obtaining the consent of the Treasurer. Security is defined to mean any bond, debenture, debenture stock, inscribed stock, mortgage or charge. There are a number of excepted transactions. A local authority can give a security to the Government of its State or with the approval of the Treasurer of that State, or a Minister of State for that State acting on his behalf, to a person other than the Government of that State. A security can be given to the Commonwealth, a State, an authority of the Commonwealth or of a State, a bank, a declared pastoral company, a building society or a co-operative society. The regulations provide that the Treasurer shall not refuse his consent except for the purpose of or in relation to defence preparations.

Great emphasis was laid by Mr. *Phillips* upon this limitation of the power of the Treasurer to refuse consent, and upon the further proviso that, if the Treasurer grants his consent subject to a condition, he shall not grant his consent subject to a condition except for purposes of or in relation to defence preparations. But these restrictions could not bring the regulations within power if

as a whole they are legislation on a subject matter which is beyond power.

The statement of the Treasurer in the first case and pars. 4 and 5 of the statement of defence in the second case allege facts, which must be assumed to be true for the purposes of the demurrers, relating to the defence programme contemplated by the Government of the Commonwealth during the next two years and the extent to which it will be necessary to divert persons and materials into industries essential to equipping the armed forces. They also contain opinions of the extent of the economic disturbance, particularly the stimulus to inflation, that is likely to occur in the process. The regulations are therefore evidently intended, in the words of the recitals, to be a law for the purpose of diverting certain of the resources of Australia (including money, materials and facilities) for use in or in connection with defence preparations, and for the purpose of adjusting the economy so as to avoid or reduce dislocations caused by or impeding such preparations. They appear to be an exercise of the legislative powers purported to be delegated to the Governor-General by s. 4, sub-s. 2 (b) and (c) of the *Defence Preparations Act*. In his statement the Treasurer admits that this diversion could be achieved by direct methods. But he states that another method is to limit and reduce various economic activities of the nation, particularly those related to the provision and sale of civilian goods, so that manpower and resources will be released, and, in particular, so that existing materials and manpower may be more effectively and easily diverted to defence preparations. The Commonwealth Parliament has a number of specific powers under which it can exercise extensive control over the Australian economy. It is only necessary to mention as instances the trade and commerce power (s. 51 (i.) of the Constitution), taxation (s. 51 (ii.)), borrowing (s. 51 (iv.)), banking (s. 51 (xiii.)), conciliation and arbitration (s. 51 (xxxv.)) and s. 105A agreements with respect to State debts.

But the Capital Issues Regulations cannot find support in any of these powers. They seek to control the raising of money by companies and individuals and the rates of interest that may be charged on loans. Legislation on these subjects is legislation which in times of peace has hitherto been considered to be beyond Commonwealth power. In *R. v. Foster; Ex parte Rural Bank of New South Wales* (1), it was said that, apart from the defence power, control of industry in general, food, clothing and housing, and

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

(1) (1949) 79 C.L.R. 43, at p. 81.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Williams J.

financial, economic and social conditions, 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". It was said that "this Court has never subscribed to the view that the continued existence of a formal state of war is enough in itself, after the enemy has surrendered, to bring or retain within the legislative power over defence the same wide field of civil regulation and control as fell within it while the country was engaged in a conflict with powerful enemies" (1). The distinction between the reach and operation of the power in times of peace and during hostilities has been pointed out in this Court on many occasions. In *Farey v. Burvett* (2), Griffith C.J. said "It is obvious, however, that the question whether a particular legislative act is within it" (that is within the defence power) "may fall to be determined upon very different considerations in time of war and time of peace." Barton J. said: "If an activity belongs solely to a State in time of peace it does not follow that it is not a means of defence for Commonwealth hands in time of war" (3). Isaacs J. said: "While peace prevails, the normal facts of national life take their respective places in the general alignment, and are subject to the normal action of constitutional powers" (4). In the *Australian Communist Party v. The Commonwealth* (5), the present Chief Justice said: "A war of any magnitude now imposes upon the Government the necessity of organizing the resources of the nation in men and materials, of controlling the economy of the country, of employing the full strength of the nation and co-ordinating its use, of raising, equipping and maintaining forces on a scale formerly unknown and of exercising the ultimate authority in all that the conduct of hostilities implies. These necessities make it imperative that the defence power should provide a source whence the Government may draw authority over an immense field and a most ample discretion. But they are necessities that cannot exist in the same form in a period of ostensible peace. Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors

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

(2) (1916) 21 C.L.R. 433, at p. 441.

(3) (1916) 21 C.L.R., at p. 450.

(4) (1916) 21 C.L.R., at p. 453.

(5) (1951) 83 C.L.R. 1, at pp. 202, 203.

which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.”

In my opinion the factors that could give the defence power sufficient reach and operation to support the Capital Issues Regulations were wanting in August 1951. All that was then certain was that there was severe international tension and danger of a third world war and that the threat of war was so grave that preparations on a large scale to defend the Commonwealth were urgent. That was a state of tension that might last for years and might require continued preparation for war on a similar scale for an indefinite period. If the defence power is wide enough in such a situation to support the Capital Issues Regulations, it must be wide enough to support the regulation of almost any aspect of the national economy, and all the economic regulations passed under the *National Security Act* at the height of hostilities would, if made under the *Defence Preparations Act*, be equally valid. The defence power could, as in the period of actual hostilities, throw an almost complete shadow over State constitutional powers. The Treasurer admits, as I have said, that the diversion of money, men and materials required to prepare the nation for war could be achieved by direct methods. Immense powers for raising and equipping the necessary armed forces are conferred by Acts which are in the very centre of the defence power, such as the *Defence Act* 1903-1951, the *National Service Act* 1951, the *Naval Defence Act* 1910-1949 and the *Air Force Act* 1923-1950. Equally immense powers of raising the necessary funds for these purposes are contained in the powers of taxation, borrowing, &c. already mentioned. Under the acquisition power, s. 51 (xxxi.) of the Constitution, the Commonwealth can acquire on just terms all the property it requires for purposes of defence. The Capital Issues Regulations are an example of legislation under what *Fullagar J.* in the *Communist Case* (1) called “the secondary aspect of the defence power”. As he said this aspect “has hitherto I think, been treated in the cases as coming into existence upon the commencement or immediate apprehension of war and continuing during war and the period necessary for post-war readjustment” (2). By “immediate apprehension of war”, I understand him to mean a threat of war of sufficient immediate gravity to justify the mobilization of the armed forces and the placing of the nation on a war footing. It could not be said in August 1951 that there was “an immediate apprehension of war”. The danger of war was no greater than

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.

v.
THE
COMMON-
WEALTH.

Williams J.

(1) (1951) 83 C.L.R., at pp. 253-258. (2) (1951) 83 C.L.R., at p. 254.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

the danger which existed in October 1950 when the *Communist Party Dissolution Act* 1950 came into force. In the *Communist Case* (1) the present Chief Justice said : “ I think that the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed.” *McTiernan J.* said : “ The state of affairs was peace not war. Indeed the constitutional position was that the defence power had declined from the zenith to which it had risen in the crisis of the last war practically to the level proper to it in time of peace. The Court has frequently declared, since the end of hostilities in the last war, that the defence power stands in that position ” (2). In my opinion the Court should be slow, at any time prior to the stage at which it is necessary to place the nation upon a war footing, to hold that the defence power is wide enough to authorise Commonwealth legislation on economic subjects normally exclusively within State legislative power. In the *Communist Case* (3) the present Chief Justice summarised the tests applied by the Court to determine the constitutional validity of legislation passed under the defence power during hostilities as follows : “ In all the cases concerning the validity of statutory regulations made for the war of 1914-1918 and for the war of 1939-1945 the principle was acknowledged or assumed that it was for the Executive Government to decide what was necessary or expedient for the purpose of the war and in doing so to act upon its opinion of the circumstances and conditions that existed and of the policy or course of action that should be followed. Various formulated as the tests have been for deciding whether regulations made under the war powers were within the power to make laws with respect to defence, they have uniformly been based upon the principle that there is to be no inquiry into the actual effect the regulation would have or be calculated to have in conducing to an end likely to advance the prosecution of the war and that it was at least enough if it tended or might reasonably be thought conducive or relevant to such an end ”. But I cannot think that these tests are appropriate to times of peace, even peace gravely endangered by the threat of war. In times of peace the legislative powers normally exclusively vested in the States should not lightly be encroached upon by an extended application of the defence power. There is no need to encroach upon these powers where the constitutional powers of the Commonwealth Parliament taken as a whole, including the defence power in its peace-time operation, are amply sufficient to enable the Executive to prepare the nation

(1) (1951) 83 C.L.R., at p. 196.
(2) (1951) 83 C.L.R., at p. 207.

(3) (1951) 83 C.L.R., at p. 199.

for war. I adhere to the statement in the *Communist Case* (1) that "The defence power can only invade subjects which are in most respects within the domain of State legislation to the extent to which it is reasonably necessary to do so for the purposes of defence. It is therefore largely a matter of degree". The capacity of the legislation in a real and substantial sense effectively to promote the particular purpose of defence should at least be established, to use the expression in *R. v. Foster* (2) "with reasonable clearness". The Capital Issues Regulations are not legislation of this nature. Their operation is purely negative, they do not directly divert any money, men or materials into defence preparations. They do not, and it is impossible to see how they could, provide that the money intended for investment in capital issues which the Treasurer refuses to sanction will be diverted to defence. They simply prevent the proposed investment leaving the investor free to invest his money in some other form of investment which does not require consent whether connected with defence or not. Nor do they provide, and again it is impossible to see how they could provide, that the materials which would be bought with the new capital if it was raised or the persons who might lose their employment if consent was refused should be diverted to defence. The success of the purpose of the regulations is therefore problematical and in this respect they suffer from the same kind of defect which destroyed reg. 16 of the *National Security (Universities Commission) Regulations* in *R. v. University of Sydney* (3), passed at the height of hostilities. That regulation provided that the Director-General of Manpower might, on the recommendation of the commission, determine the total number of students who might be enrolled in any faculty or course of study in the Universities of Australia. *Starke J.* summed up the position when he said that "the vital defect, however, in the Regulations is that, though the total number of students who may be enrolled in any faculty or course of study may be determined, yet the remainder are not diverted to the armed forces or to any purpose of defence or used for the safety of the Commonwealth" (4). Of this case the present Chief Justice in the *Communist Case* (5), after pointing out that in the complexities governing the life of a community some connection may be traced between the defence of the country and the greater number of

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

(1) (1951) 83 C.L.R., at p. 226.

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

(3) (1943) 67 C.L.R. 95.

(4) (1943) 67 C.L.R., at p. 108.

(5) (1951) 83 C.L.R. 1.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

factors which go to make up or influence any part of its economy or of its thought, said: "But even at a time when war placed the greatest strain upon the national life a regulation for determining the number of students who might be enrolled in a faculty in a university and giving no directions what the rest should do was held to be too remote for the purposes of the power" (1).

Let it be assumed that the carrying out of a large defence programme, involving the calling up for naval, military and air force training of a large number of men and the manufacture of the arms and munitions and other products necessary to equip the armed forces on a large scale will cause economic dislocation and provide an impetus to inflation where, as in August 1951, there is an existing inflationary situation. But a large programme of Commonwealth works under any other power or of State works could create a similar dislocation and it is notorious that the inflationary situation existing in August 1951, was due to many other, and probably more important, contributory causes. In *R. v. Foster* (2) the Court had to determine whether certain regulations passed during hostilities were still valid some time after hostilities had ceased. It was said that "there are many matters which result from a plurality of causes of which war is one. To point to the war as a contributory cause can hardly be enough" (3). *Mutatis mutandis* these remarks apply to the present case. It is not enough to support the Capital Issues Regulations that the defence programme was one of the contributory causes of any economic dislocation that existed in August 1951. It was a dislocation arising from many causes and affecting the general well-being of the community. It can be said of the Capital Issues Regulations, as the former Chief Justice said of the Industrial Lighting Regulations: "They do not deal with a subject which has any specific relation to the subject of defence, except in so far as all matters affecting the well-being of the community have such a relation, and that is the general and not a specific relation" (4).

The Capital Issues Regulations are a form of legislation which, consistently with the attitude which this Court has adopted to the exercise of the defence power in the past, can only be supported by that power when the nation is placed upon a war footing under the immediate apprehension of hostilities and during hostilities and their aftermath. That, as I understand it, is the basis of the unanimous decision of this Court in *R. v. Foster* (2). This attitude is summed up in the words of the present Chief Justice in *Dawson*

(1) (1951) 83 C.L.R., at p. 185.
(2) (1949) 79 C.L.R. 43.

(3) (1949) 79 C.L.R., at p. 85.
(4) (1943) 67 C.L.R. 413, at p. 418.

v. *The Commonwealth* (1): "To place a country on a footing to take an adequate part in such a war as that through which we have passed requires a co-ordinated and systematic series of measures which must reshape the economy of the country. It is impossible to suppose that the defence power will suffice to authorize the retention of such a legislative fabric so constructed throughout a long and indefinite period of peace".

Since the regulations are legislation on a subject beyond the reach of the defence power in peace time the provision that the Treasurer shall not refuse to consent or shall not grant consent subject to a condition except for the purposes of any matter in relation to defence preparations cannot suffice to bring the regulations within the defence power.

During the two world wars many regulations were held to be valid the operation of which depended upon the opinion of a Minister that certain action was necessary or expedient in the interests of defence or the prosecution of the war. But that was because the regulations related to a subject which fell within the defence power during hostilities. The effect of the regulations was therefore to confer upon the Executive authority to decide whether it was necessary or expedient that certain action should be taken upon a subject within constitutional power. For example in *Shrimpton v. The Commonwealth* (2), and *Dawson v. The Commonwealth* (3), questions arose as to the validity of the *National Security (Economic Organization) Regulations*. These provided that a person should not, without the consent of the Treasurer, purchase any land and that where an application was made for the consent of the Treasurer he might, in his absolute discretion, grant the consent either unconditionally or subject to such conditions as he thought fit, or refuse to grant the consent. As I understand the decision of the majority of the Court, the operation of the regulations was limited by construction to economic purposes falling within the defence power during hostilities so as to bring the subject matter within power, and the power of the Treasurer to consent or to consent subject to conditions or to refuse consent was held to be valid because it was limited to a consideration of these purposes. In *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (4) it was held that even during hostilities the opinion of Parliament or a Minister that a corporation or individual is carrying on activities which are prejudicial to the defence of the Commonwealth does not supply a sufficient connection

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Williams J.

(1) (1946) 73 C.L.R. 157, at p. 183.

(2) (1945) 69 C.L.R. 613.

(3) (1946) 73 C.L.R. 157.

(4) (1943) 67 C.L.R. 116.

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.

THE
COMMON-
WEALTH.

Williams J.

with the defence power to authorise a law to forfeit the property of such corporation or body to the Crown and thereby to destroy the rights of individuals and corporators and creditors in that property under State laws.

The *Communist Case* (1) is a clear authority that Parliament cannot leave it to the Executive to decide what constitutes a sufficient connection with defence. It necessarily follows from this case that the provisions of the Capital Issues Regulations which require that the Treasurer shall not refuse to consent or shall not refuse to grant his consent subject to a condition except for purposes of or in relation to defence preparations are not by themselves sufficient to bring the regulations within the defence power. Regulation 17 (3) contemplates a person taking proceedings in a court for relief, whether by way of a declaration or otherwise (presumably proceedings for a mandamus), where the Treasurer has refused his consent contrary to the regulations. But such a person could only obtain relief by way of mandamus where it was shown that the opinion of the Treasurer was not a real performance of the duty imposed upon him by the regulations because he had not properly applied his mind to the real question or because in purporting to decide it he had been actuated by extraneous considerations or in some other respect had so proceeded that his determination was nugatory or void: see the authorities collected in *R. v. Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (2). Provided the Treasurer in forming his opinion proceeded according to law his discretion could not be interfered with, and that would mean that his opinion and not the opinion of the Court would be decisive upon the crucial question whether his refusal to consent or his granting of consent subject to a condition was based upon a ground that had a sufficient connection with defence preparations. But, as I understand the decisions of this Court, it is the invariable rule that, if legislation under the defence power is challenged, it is the function of the Court and not of the Executive to determine whether the necessary facts exist to bring the legislation within the reach of the power. It is sufficient to cite a passage from the joint judgment of the former Chief Justice and *McTiernan J.* in *Reid v. Sinderberry* (3): "When the powers of a legislative authority are limited by law the opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority,

(1) (1951) 83 C.L.R. 1.

(2) (1950) 82 C.L.R. 54, at pp. 82, 83.

(3) (1944) 68 C.L.R. 504, at p. 511.

unless, indeed, the power was conferred by the law creating the power (in this case the Constitution of the Commonwealth) in terms which provided that the opinion of the authority should be so decisive. But there is no such provision relating to defence in the Constitution. The power of the Commonwealth Parliament is a power to make laws with respect to naval and military defence—see Constitution s. 51 (vi.)—not a power to make laws with respect to any matter which, in the opinion of the Parliament, or of an authority to which Parliament may confide a power of subordinate legislation, is naval or military defence”.

For these reasons I would allow the demurrers.

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—

Marcus Clark & Co. Ltd. v. The Commonwealth and Others.

WEBB J. This plaintiff’s demurrer raises questions as to the validity of the *Defence Preparations Act* 1951 and of the *Defence Preparations (Capital Issues) Regulations* purporting to be made thereunder, and the further question whether, if they are valid, the Treasurer’s refusal of consent to the plaintiff’s proposed capital issue was in accordance with those regulations.

The decision in *Australian Communist Party v. The Commonwealth* (1) throws no light on these questions. Nothing could be judicially noticed as to the conduct or objectives of the individuals who constituted the Australian Communist Party; and so ordinary evidence was required to show that their conduct or objectives, in peace and in war, were such as to bring them within the defence power and the power to protect the Constitution, and thus establish the validity of the *Communist Party Dissolution Act* 1950 which purported to dissolve the Party and forfeit its property. But no such evidence was forthcoming. Here, however, at the time of the enactment of the *Defence Preparations Act* in July 1951, it was notorious, and a matter to be judicially noticed, that there was, and had been for some time, considerable international tension, a distinct possibility of war among the Great Powers in the near future, and the probability that if war occurred it would be world-wide and release forces of destruction of a kind and to an extent not previously employed. That international situation warranted, I think, preparation for war on the scale authorised by the Act, involving the employment by the Commonwealth Parliament and Executive of the defence powers to their fullest extent, both in their primary and secondary aspects, i.e. by enacting measures *ex facie* defence measures, and measures exercising powers ordinarily reserved to the States, including measures for the adjustment of the economy

(1) (1951) 83 C.L.R. 1.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Webb J.

of the Commonwealth to ensure effective rearmament, priority among preparations for defence being given to such adjustment if necessary. I am unable to hold that while the defence powers in their secondary aspect can be employed in times of peace, whether real or ostensible, to rebuild a city bombed during war, as this Court of six justices unanimously held in *R. v. Foster*; *Ex parte Rural Bank of New South Wales* (1), yet they can never be employed to meet an international situation short of war, even when there is a distinct possibility of war with powerful enemies using weapons unprecedented in range and destructiveness. But during the year that has elapsed since the *Defence Preparations Act* was enacted no regulations have been made under it, except the Capital Issues Regulations, and these are of a very limited character, so much so that it is arguable that they have no real connection with defence, because, like the regulations declared invalid in *R. v. The University of Sydney*; *Ex parte Drummond* (2), they do not necessarily effect any diversion to defence activities. Moreover, Mr. Phillips of counsel for the defendants in his reply made it clear that the Commonwealth is not relying on any international situation, but contends that Appropriation Acts passed by the Commonwealth Parliament reveal that Parliament has resolved on an expenditure of money on raising and equipping armed forces so vast that the existing inflationary tendency would be increased to such an extent as to defeat the defence measures contemplated, unless checked by the Capital Issues Regulations. Now it is true that facts as to the international situation which can be judicially noticed are not necessarily determined by the assertions or denials or action or inaction of the Parliament or Executive. However, it is one thing to deny a claim by the Commonwealth that an international situation exists warranting legislation encroaching on the States' powers and attacked as unconstitutional for that reason, and another thing to concede a claim by the Commonwealth that there is no international situation on which it might rely to support the validity of its legislation. The distinction is like that between a self-serving statement and an admission.

But it is doubtful whether the validity of the Act can be challenged successfully on such a ground as the absence of a multiplicity of regulations under it. That would appear to constitute a wrong method of approach to the question of validity. And it would not, I think, be quite fair to the attitude of the defendants to treat them as conceding that there has been a change for the better in the international situation since July 1951 when the Act was enacted.

(1) (1949) 79 C.L.R. 43, at pp. 82, 83. (2) (1943) 67 C.L.R. 95.

The heavy appropriations in the meantime for defence purposes must not be overlooked. Those appropriations are evidence that Parliament takes an unfavourable view of the existing international situation, and to that extent such appropriations may afford support for the Act.

Naturally the failure of the defendants to rely on any international situation, although the burden of establishing constitutionality rests on them, gives rise to at least a fleeting doubt as to what the international situation really is; and for a time I was disposed to think that the doubt should be resolved in favour of the plaintiffs. But as against the attitude of the defendants there must be considered the large parliamentary appropriations for defence purposes. On further consideration I think these appropriations should be given greater weight than the defendants' attitude. After all the defendants do not, according to my understanding of their counsel's argument, either expressly or impliedly invite the Court to disregard the international situation simply because they do not think it necessary to rely upon it. Their attitude may be due to a conviction that the Capital Issues Regulations can be sustained on the narrower ground. Keeping in view these appropriations as Parliament's assessment of the international situation, which is not mere opinion but opinion backed by action, I am not prepared to find merely on the attitude of the defendants that there has been an improvement in that situation since July 1951; and there is no other evidence of such improvement.

I hesitate then to hold that the *Defence Preparations Act* is now beyond power although it was within power when enacted.

It may well prove that international tension will continue for a long time. If so the States might well be prejudiced by inroads made from time to time by the Commonwealth on the reserved powers. But that could also happen in the event of a protracted war. For the States the only safeguard, such as it is, is that referred to in *Farey v. Burvett* (1) per *Isaacs J.*: i.e. the Commonwealth legislation to be within power must be such as conceivably aids the effectuation of the defence powers.

As to the Capital Issues Regulations, it may well be that they will not succeed in diverting any men or materials to war preparations. But as to the effect of capital issue and expenditure restrictions generally, I agree with the Chief Justice that they are recognised as appropriate means to that end; and I am not prepared to hold that these Capital Issues Regulations are so inadequate as to

H. C. OF A.

1952.

MARCUS
CLARK
& Co. LTD.

v.

THE
COMMON-
WEALTH.

Webb J.

(1) (1916) 21 C.L.R. 433, at p. 455.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & CO. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 ———
 Webb J.

be incapable of bringing about any such diversion. I think that they might "conceivably, even incidentally, aid the effectuation of the powers of defence" (*Farey v. Burvett* (1)) by diverting some men or materials to war preparations, and so have the necessary real connection with defence, and therefore that they are within power and valid.

As to the submission of the defendants based on the likelihood of increased inflation resulting from heavy expenditure on armed forces, the maxim *quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest* applies to the exercise of the legislative powers given by s. 51 of the Commonwealth Constitution: *D'Emden v. Pedder* (2) per *Griffith* C.J. But the Court, and not the Parliament or Executive, decides whether the maxim applies to save the particular legislation or regulations attacked, and does so on the facts as the Court finds them. Now we have no evidence that warrants a finding that without the Capital Issues Regulations the proposed raising and equipping of further armed forces would be defeated by inflation: there is no evidence that if the Commonwealth resorted, say to compulsory service and acquisitions, there would be increased inflation. It is not even a partial answer to say that the Act prohibits resort to compulsory service. Parliament cannot by tying the hands of the Executive provide a justification for exercising the powers reserved to the States. However, I am dealing with this submission apart from the international situation, upon which, of course, it does not depend.

It should be added that Mr. *Phillips* did not say that he relied on the maxim quoted when the Chief Justice referred to it. In fact Mr. *Phillips* did not mention the maxim. Whilst on the one hand the power it postulates is narrower than the incidental power, on the other hand the incidental power does not extend to everything conducive to the effective exercise of any of the concurrent or exclusive powers given by ss. 51 and 52 of the Commonwealth Constitution. If it did surprising results would follow. It may be, of course that the defendants hope that if they succeed on the ground taken by them, the content of the defence power in peace time will be revealed as greater than has been thought.

But whatever may be the reasons of the defendants for their attitude and the scope of their argument, I am of the opinion that the state of international tension is such that a third World War within a few years is not wholly improbable. If it occurs victory might prove difficult and defeat mean annihilation, and the nature

(1) (1916) 21 C.L.R. 433.

(2) (1904) 1 C.L.R. 91, at p. 109.

and extent of the preparations for such a war and the time at which they are to begin must be determined accordingly. It is because of this tremendous and far from remote possibility that I think the Commonwealth Constitution authorises the *Defence Preparations Act* and any adjustment in pursuance of it of the economy of the nation as a step essential to the success of war preparations generally, although such adjustment involves an exercise of the reserved powers.

To sum up the position as I see it ; as the reserved powers can validly be exercised, even in normal peace times, by the Commonwealth Parliament and by the Commonwealth Executive if authorised by that Parliament, to rebuild an Australian city destroyed by enemy action, as this Court unanimously held in *R. v. Foster* (1) it follows, I think, that the Commonwealth Parliament, and the Commonwealth Executive if so authorised, can validly exercise the reserved powers to the fullest extent in making maximum preparations to preserve the Commonwealth itself from destruction in the event of a third World War, of which it is notorious that there is a distinct possibility at no remote period and which might begin without warning.

The aftermath of war does not provide a more solid foundation for the exercise of the reserved powers than does a state of international tension so great that it could lead to a third World War. The content of the defence power is determined by practical considerations of the danger of attack by external enemies as well as by the consideration of a technical state of war or its aftermath.

It is also to be judicially noticed that it takes many years to prepare fully for a major war.

In my opinion not only are maximum preparations warranted in the face of such a possibility as the third World War at no very distant date, but nothing short of maximum preparations can be adequate. Such preparations necessarily include any adjustment of the economy of the nation calculated to contribute in some measure to effective re-armament.

As to the question whether the Treasurer's refusal of consent was authorised by the Capital Issues Regulations, I agree with the Chief Justice that it was.

I would overrule the demurrer.

R. B. Davies Industries Ltd. v. The Commonwealth and Others.

I would overrule the demurrer for the reasons given by me in *Marcus Clark & Co. Ltd. v. The Commonwealth.*

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Webb J.

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

H. C. OF A. *Marcus Clark & Co. Ltd. v. The Commonwealth and Others.*

1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.

FULLAGAR J. The *Defence Preparations Act* 1951, which commenced on 19th July 1951, contains a preamble, which consists of eight recitals. The first refers to the obligation of Australia, as a member of the British Commonwealth of Nations and of the United Nations, "to support collective action for resisting international aggression". The second declares that "in the opinion of the Parliament and of the Government of the Commonwealth, there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent, and with a degree of urgency, not hitherto necessary except in time of war". The third refers to the necessity of providing for the raising, equipping and provisioning of armed forces. The fourth recites that the defence preparations of Australia will include also measures to secure the maintenance and sustenance of the people of Australia and of the people of countries associated with Australia in the event of war. The fifth recites that the defence preparations of Australia will include also the expansion of the capacity of Australia to produce and manufacture goods, and to provide services, for the purposes already mentioned and generally for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war. The sixth recites that in present circumstances the defence preparations contemplated cannot be carried out without the diversion of certain of the resources of Australia (including money, materials and facilities) for use in, or in connection with, defence preparations. The seventh recites that the defence preparations contemplated and the necessary diversion of resources cannot be effectively achieved unless at the same time measures are taken "for adjusting the economy of Australia to meet the threat of war and for avoiding or reducing economic dislocation or instability caused by, or impeding, defence preparations". The eighth and last recital declares the opinion of the Parliament and of the Government that it is necessary that the Government should have "authority to take such measures as are from time to time required in relation to any or all of the matters mentioned in the preceding paragraphs".

The main operative provisions of the Act are contained in s. 4. Section 4 is in the following terms:—

"4. (1) The Governor-General may make regulations for or in relation to defence preparations.

(2) The regulations which may be made under the last preceding sub-section include, without limiting the generality of the power to make regulations conferred by that sub-section, regulations for

or in relation to—(a) the expansion of the capacity of Australia to produce or manufacture goods, or to provide services, for the purposes of defence preparations or for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war; (b) the diversion and control of resources (including money, materials and facilities) for the purposes of defence preparations; (c) the adjustment of the economy of Australia to meet the threat of war or the avoidance or reduction of economic dislocation or instability caused by, or impeding, defence preparations; and (d) measures to secure the maintenance and sustenance of the people of Australia in the event of war or to contribute towards the maintenance and sustenance of the people of countries associated with Australia in defence preparations.

(3) Nothing in this section authorizes the making of regulations—(a) imposing taxation; (b) with respect to the borrowing of money on the public credit of the Commonwealth; (c) for or in relation to the compulsory direction of labour; or (d) imposing any form of, or extending any existing obligation to render, compulsory naval, military or air-force service”.

It may be observed that the four paragraphs of sub-s. (2) of s. 4 correspond with, and reproduce part of, the language of, the fifth, sixth, seventh and fourth respectively of the recitals contained in the preamble.

Purporting to act under s. 4 of the Act, the Governor-General, on 1st August 1951, made the *Defence Preparations (Capital Issues) Regulations* (S.R. 1951 No. 84). The regulations were notified in the *Gazette* on the following day. Their effect is expounded in the judgment of the Chief Justice, and need not be again set out here. They follow lines similar to those of the *National Security (Capital Issues) Regulations*, the main operative provisions of which were repealed by Statutory Rule 1951 No. 83, which was notified in the *Gazette* on 2nd August 1951. The new regulations refer to the *National Security (Capital Issues) Regulations* as “the previous Regulations”. They prohibit (*inter alia*) certain borrowings by companies and certain share issues by companies unless the consent in writing of the Treasurer of the Commonwealth is first obtained. Regulation 16 provides that, where application is made for the consent of the Treasurer, the Treasurer may, subject to reg. 17, grant the consent either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent. Regulation 17 provides that the Treasurer shall not refuse consent or impose a condition upon the grant of consent “except for purposes of or in relation to defence preparations”. A person taking proceedings

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.

THE
COMMON-
WEALTH.

Fullagar J.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Fullagar J.

for relief on the ground that a consent has been refused, or a condition imposed, contrary to reg. 17, may apply to the court for an order directing the Treasurer to state in writing the facts and matters by reason of which the refusal or the imposition of the condition is for purposes of or in relation to defence preparations. The court is empowered to make such an order, and a statement furnished in compliance with such an order is to be filed in the court and is to be prima-facie evidence of the matters contained therein.

The plaintiff is a company having an issued capital of more than £1,000,000, which carries on in New South Wales a very large business of selling goods by retail. It desires to borrow, and has arranged to borrow, a sum of £100,000 on mortgage of real estate owned by it, and it desires also to increase its nominal capital and to issue about 400,000 new shares of 10/- each. The regulations prohibit the company from doing either of these things without the consent of the Treasurer, and the company accordingly applied for consent. The Treasurer refused to consent to either of the company's proposals. The company thereupon commenced an action against the Commonwealth and the Treasurer and Attorney-General of the Commonwealth, in which it claimed a declaration that the Act, in so far as it purports to authorise the regulations, is invalid, and a declaration that the regulations are invalid. Alternatively it claimed a declaration that the refusals of consent were contrary to the regulations, and in particular to reg. 17, and either an order that the Treasurer grant his consent, or an order that he determine each of the company's applications according to law. To a defence setting up the validity of the Act and regulations and alleging that the refusals were "for the purposes of or in relation to defence preparations", the plaintiff company demurred and it is this demurrer which is now before the Court. The plaintiff company, after the commencement of the action, applied for and obtained an order under reg. 17 that the Treasurer should state in writing the facts and matters by reason of which his refusals of consent were for purposes of or in relation to defence preparations. This order has been complied with, and the Treasurer's statement is part of the material before the Court, being in fact referred to in the defence to which the plaintiff demurs. No objection was taken to the determination on the demurrer of all the questions which arise, and no inconvenience, so far as I can see, attaches to determining them all on the demurrer.

I would observe at the outset that there is, in my opinion, nothing in any of the judgments of any of the majority in the *Australian*

Communist Party v. The Commonwealth (1) which affords the slightest assistance to the plaintiff in the present case. That case, as I understand it, turned wholly on the nature of the law in question, and not at all upon the subject matter of that law. I should have thought it indisputable that the matters mentioned in the preamble to the *Communist Party Dissolution Act* 1950 were matters upon which the Parliament could legislate under the defence power in peace or in war. But the provisions of the law actually enacted were of an altogether exceptional and peculiar character. The statute did not merely prescribe rules of conduct or create duties or impose prohibitions. In the first place it imposed, of its own mere force and without the possibility of judicial intervention, what were really penalties upon a particular specified organisation. And, in the second place, it attached, of its own mere force, what were really penal consequences to the formation of an opinion of the Executive, not judicially examinable, that a person or a body of persons was engaged, or likely to become engaged, in activities prejudicial to defence. Laws having such a character had been held valid under the defence power in *Lloyd v. Wallach* (2); *Ex parte Walsh* (3) and *Little v. The Commonwealth* (4), but only when the actual engagement of the Commonwealth in a great war could be said to have expanded the scope of the defence power to an extent approaching its maximum. In the *Communist Party Case* (1) I was prepared to take judicial notice of a disturbed international situation affecting Australia and of certain matters which were forcibly put by Mr. *Barwick*, but those matters did not appear to me to justify a decision that laws of so exceptional a character fell in October 1950 within the defence power. I do not think that the view taken by four of the five other justices who formed the majority differed substantially from mine. The Act and the regulations which are in question in the present case do not possess the exceptional character which belonged to ss. 4, 5 and 9 of the *Communist Party Dissolution Act*.

I think that the only relevance of the *Communist Party Case* (1) in the present case lies in the fact that it is recognised in all of the judgments delivered in that case that a situation falling short of actual war may so expand the scope of the defence power as to enable the Parliament to legislate with respect to subject matters which have *ex facie* no relation to naval and military defence. This was, indeed, I think, implicit in most of the general statements of the nature of the defence power, although before the *Communist*

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.
v.
THE
COMMON-
WEALTH.
Fullagar J.

(1) (1951) 83 C.L.R. 1.
(2) (1915) 20 C.L.R. 299.

(3) (1942) A.L.R. 359.
(4) (1947) 75 C.L.R. 94.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & Co. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —
 Fullagar J.

Party Case (1) what I called the secondary aspect of the defence power had never been invoked except in time of war. It is clearly implicit in the well-known passage in the judgment of *Dixon J.* in *Andrews v. Howell* (2). But it is expressly stated and emphasised in the *Communist Party Case* (1). Thus *Dixon J.* said :—" it is no doubt true that a mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand " (3). *Williams J.* said :—" The defence power in peace time authorizes any legislation which is reasonably necessary to prepare for war, including, as I have said, any legislation which would be authorized by an expansion of the power in view of the increasing probability of imminent war. Any conduct which is reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power " (4). And *Kitto J.* said :—" the determinant of the ambit of the defence power at a given point of time is the situation, however it may have been brought about, in which Australia finds itself at that time " (5).

It is impossible to maintain that sub-s. (1) of s. 4 of the *Defence Preparations Act* is invalid. It is true that it is in very wide and general terms, but the opening words of s. 5 (1) of the *National Security Act* 1939-1940 were in equally wide and general terms and were held in *Wishart v. Fraser* (6) to contain a provision which was a valid exercise of the defence power: see especially the judgment of *McTiernan J.* (7). No doubt much controversy might arise as to the scope of sub-s. (1) of s. 4 if it stood alone, unexplained and unexpanded. In particular, I should have thought that, if it had stood unexplained and unexpanded, it would have been impossible to say that it authorised the making of the *Defence Preparations (Capital Issues) Regulations*. But sub-s. (1) does not stand alone. Its scope is explained by the preamble and very greatly expanded by sub-s. (2). The two questions which thus emerge are (1) whether sub-s. (2) is valid, and (2) whether it authorises the Capital Issues Regulations. In cases which arose during the war under the *National Security Act* it was often convenient to telescope, so to speak, the two questions, and to ask simply whether particular regulations challenged were within the defence power. The powers given by the *Defence Preparations Act*, however, are not so wide as were those given by the *National*

(1) (1951) 83 C.L.R. 1.

(2) (1941) 65 C.L.R. 255, at p. 278.

(3) (1951) 83 C.L.R., at p. 195.

(4) (1951) 83 C.L.R., at p. 225.

(5) (1951) 83 C.L.R., at p. 274.

(6) (1941) 64 C.L.R. 470.

(7) (1941) 64 C.L.R., at p. 488.

Security Act, and they are concerned with a different situation. I, therefore, think it preferable to approach the two questions separately.

I have not been able to see any sound reason for saying that s. 4 (2) is invalid. I would not be prepared to regard the fact that the words “defence preparations” occur in every paragraph as conclusive—as I think we were, in effect, invited to do by counsel for the defendants. And I express no opinion as to the validity of such provisions in what *Isaacs J.* once called a period of “profound peace”. No one would regard the present state of peace as very “profound”. The view taken of the situation by the Parliament and the Government is expressed in the second recital in the preamble, and facts which may be judicially noticed go a considerable distance towards supporting that view. It is impossible for a court to say that it is not justified. And it seems to me equally impossible to say that the execution of a substantial defence programme is not quite likely to bring about economic strains and dislocations of such a nature that, unless they can be controlled by the authority constitutionally responsible for defence, the defence programme itself may be imperilled or impeded.

It was said that the Act claimed complete war powers for the Commonwealth, and amounted to the re-enactment, in a time of peace, of the *National Security Act*. Whether, if this were so, it would be fatal, I need not consider, because I am clearly of opinion that it is not so. It was said that the exercise of a power could not extend a power—that the Commonwealth could not, by taking steps which were within power, achieve the result of extending the ambit of its power. I do not understand this argument. It must often happen that one step will not be fully effective, or will be in danger of defeating its own object, unless another step also is taken. It is true that “you may complement, but you may not supplement a granted power”. But, as the gravity of a situation increases, the scope of what is complementary to the defence power must become progressively enlarged, and the reactions of measures taken must often call for control or modification by other measures.

I am of opinion, in the next place, that the Capital Issues Regulations are a valid exercise of powers conferred by s. 4 (2) of the Act. It may be said that the provisions of reg. 17 (1) and (2) are conclusive on the question, for they prohibit a refusal of consent or the imposition of a condition upon consent “except for purposes of or in relation to defence preparations”, and, although the words “defence preparations” must be given a wide meaning in the light of the preamble and s. 4 (2) of the Act, the opinion has already

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Fullagar J.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & Co. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 ———
 Fullagar J.

been expressed that s. 4 (2) is valid. But some such limitation or restriction upon the discretion to refuse consent or impose a condition would have to be implied: cf. *Shrimpton v. The Commonwealth* (1). And the question arises whether a measure imposing a prohibition of certain borrowings and capital issues is a measure of the character authorised by s. 4 (2). It appears to me that the view may be reasonably entertained that the "expansion of the capacity of Australia to produce or manufacture goods or to provide services" for one purpose will be aided by measures tending to limit or restrict the production or manufacture of goods or the provision of services for other purposes. It appears to me also that such measures may also be thought quite reasonably to conduce to the diversion of resources from other purposes to the purposes contemplated by s. 4 (2). If these conclusions are reached, the regulations must be held valid. They are, in my opinion, valid.

I must notice one argument which was pressed particularly by Mr. *Holmes*. It was put as resting on a supposed principle laid down in *R. v. University of Sydney; Ex parte Drummond* (2). It was said that the regulations were invalid because their direct operation was merely negative, and that it did not necessarily follow that prohibitions effected under them would achieve any such expansion or diversion of resources as was said to be intended and desired. The argument appears to me to cut right across the principle, which has never been doubted since *Farey v. Burvett* (3) that the Court cannot be concerned either with the wisdom or with the effectiveness of a particular measure adopted in pursuance of the defence power. The measure is to be held valid if it is one which could reasonably be regarded as a means towards attaining an object which is connected with defence. I have expressed my view that the measure now in question fulfils this test.

It remains only to consider the attack on the Treasurer's refusals of consent in the particular case. The question thus raised is to be approached, I think, from the same point of view as the question of the validity of the regulations. The Court will not substitute an opinion of its own for an opinion of the Treasurer, but it will form an opinion as to whether the reasons for the refusals of consent can reasonably be regarded as connected with defence preparations in the sense in which that expression is used in the Act.

In the present case we have a full statement, obtained and filed in pursuance of reg. 17, of the "facts and matters by reason of

(1) (1945) 69 C.L.R. 613.

(2) (1943) 67 C.L.R. 95.

(3) (1916) 21 C.L.R. 433.

which " each refusal was " for purposes of or in relation to defence preparations ". The statement is long and elaborate, and I do not think it necessary to set it out in any detail. It is divided into six parts. Part I. sets out the view taken by the Government of the international situation and the requirements of the defence programme on which the Government has embarked. It declares, and on its face shows, that this programme " involves a progressive absorption of resources " over a period in preparations for defence. It goes into some detail, and gives figures and estimates. Part II. examines, against the background sketched by Part I., the purposes for which the plaintiff requires the capital which it seeks to raise by way of loan and by an issue of new shares. The plaintiff's business is " primarily concerned with the retail sale of household and residential furniture, furnishings and fittings, and also male and female clothing. The view is expressed that the capital expenditure contemplated by the company is not shown to be ' of essential importance or urgent in character ' ". Part III. sets out to show how the defence programme of the Government necessitates a diversion from other avenues of the resources of the country in labour and materials. Three courses of governmental action, which could achieve or conduce to such a diversion, are set out. The third of these, which is considered in present conditions to be the most practicable and the least disturbing, is " by limiting and reducing various economic activities, particularly those relating to the provision and sale of civilian goods ". Part IV. expresses and explains the Treasurer's opinion that the capital expenditure contemplated by the plaintiff would involve an attraction of manpower and resources in the opposite direction to that required for defence preparations. Part V. deals with certain economic factors which at the present time accentuate the difficulties attending the desired diversion of resources. Part VI. emphasises the urgencies of the general situation. Parts V. and VI., while by no means without importance, do not, I think, so far as reasons for a particular refusal are concerned, carry the matter much further than what has gone before.

Having read with care the Treasurer's statement, which I have somewhat inadequately summarised above, I find it impossible to say either that he has refused consent for reasons not connected with defence preparations or that he could not reasonably regard refusals of consent as conducing to the attainment of the objects of the *Defence Preparations Act*. I cannot say that his refusals were not " for purposes of or in relation to defence preparations ".

The plaintiff's demurrer should, in my opinion, be overruled.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.

v.
THE
COMMON-
WEALTH.

Fullagar J.

H. C. OF A. *R. B. Davies Industries Ltd. v. The Commonwealth and Others.*

1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—

This case raises the same constitutional questions as the case of *Marcus Clark & Co. Ltd. v. The Commonwealth*. For the reasons which I have stated in that case I am of opinion that the demurrer in this case also should be overruled. The plaintiff, however, should have an opportunity of pursuing further, if it thinks fit, its attack upon the refusal of the Treasurer to give his consent in the particular case. I agree, therefore, with the order proposed by the Chief Justice.

Marcus Clark & Co. Ltd. v. The Commonwealth and Others.

KIRTO J. This is a demurrer in an action by which the plaintiff challenges on constitutional grounds the validity of the *Defence Preparations Act 1951* and the *Defence Preparations (Capital Issues) Regulations* made thereunder, and seeks, by way of alternative relief, a declaration that two applications which it has made for consents under the regulations have been refused by the Treasurer contrary to their provisions. The defendants, by a curiously expressed paragraph of their amended defence, displaying rather more indifference to the rules of pleading than is usually overlooked even in these days, assert the validity of the Act and of the regulations, and allege that it was for authorized purposes that the Treasurer refused the applications for consent. To this paragraph the plaintiff demurs. I am of opinion, for reasons which I shall state, that a law in the terms of the regulations is not within the power of the Commonwealth Parliament with respect to defence in the circumstances of the present times. No other head of legislative power is relied upon. I therefore consider the regulations to be invalid; and being of this opinion, I would uphold the demurrer without considering the independent attack which the plaintiff makes upon the action of the Treasurer in refusing the applications for consent.

The question upon which the validity of the regulations depends is whether it is right to say that a law which does what these regulations do, "in the way of changing or creating or destroying duties rights or powers" (*South Australia v. The Commonwealth* (1)), can fairly be said, in the situation of recognizable danger which confronts Australia in these days, to possess the character of a law with respect to defence. What, then, is the legal effect of these regulations? Briefly, they prohibit a variety of transactions except with the consent of the Treasurer of the Commonwealth, and they place

(1) (1942) 65 C.L.R. 373, at p. 424.

a restriction upon his power to refuse consent or to grant it upon conditions. The transactions, shortly described, are : (i) the issue by a company of authorized capital so as to bring the total issued within two years, plus the amounts within that period borrowed and not repaid under certain kinds of securities and under unsecured loans, to more than £10,000 (reg. 6) ; (ii) the making by a company of any call upon certain classes of shares unless stated conditions are fulfilled (reg. 7) ; (iii) the accepting or receiving of a deposit (an unsecured loan) by a company (other than a bank, a declared pastoral company, a building society or a co-operative society) if the amount borrowed and not repaid during the preceding two years (including the deposit), plus the amount of authorized capital issued during that period and the amount borrowed and not repaid under a security given during that period, exceeds £10,000 (reg. 8 (a)) ; (iv) the payment of interest by such a company as in (iii), on certain deposits, at a rate higher than ten shillings per centum per annum (reg. 8 (b)) ; (v) the issue or giving by a person, of a security, which means bond, debenture, debenture stock, inscribed stock, mortgage or charge (except to the Commonwealth or State, an authority of the Commonwealth or of a State, a bank, a declared pastoral company, a building society or a co-operative society), unless the amount is limited in a manner similar to (iii) and the security is not a first mortgage or charge over land at a rate of interest exceeding £4 10s. 0d. per centum per annum (regs. 10, 12, 13) ; and (vi) the paying or charging by a person of interest on certain securities at a rate higher than the rate payable under the security, or the repayment or receipt of an amount of capital in excess of the amount borrowed under a security (reg. 11). The consent of the Treasurer may be granted unconditionally or subject to such conditions as he thinks fit, or refused (reg. 16). It is not to be refused, nor is it to be granted subject to a condition "except for purposes of or in relation to defence preparations" (reg. 17 (1), (2)). The substantial effect is that the Treasurer is empowered, provided that he acts "for purposes of or in relation to defence preparations", to restrict, in the case of companies, the issue of share capital, the making of calls, the borrowing of money, and the rate of interest which may be paid ; and to restrict, in the case of individuals, the giving of securities and the rate of interest payable.

Financial controls of this general description have become familiar as devices appropriate to situations of actual or potential inflationary tendencies. They provide a means of assisting a

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.

v.
THE
COMMON-
WEALTH.

Kitto J.

H. C. OF A.
1952.

MARCUS
CLARK
& Co. LTD.

v.

THE
COMMON-
WEALTH.

Kitto J.

selected category of purposes in the economic life of a community, by precluding access for other purposes to some of the chief sources of finance. By thus controlling the flow of purchasing power, they have the practical effect of diverting goods and services away from those purposes which are not within the favoured class and (since they are unlikely to be allowed to lie idle if there is a demand for them in another direction) towards the purposes which the controls are designed to help. Their value in an inflationary situation is twofold, for the flow of goods and services is then disproportionately small in relation to the flow of purchasing power in the community. In the first place the control of capital issues may be used to divert purchasing power from those purposes which have the greatest tendency to accelerate the inflationary process. In the second place, and it is here that its usefulness mainly lies, the control enables the limited flow of goods and services to be left available for such purposes of government or of private enterprise as are considered of greatest national importance. When this method is employed, the purposes not favoured are denied the purchasing power which commands goods and services; and thus some of the competition for the inadequate flow of goods and services is eliminated, and as a consequence the purposes for the advancement of which the control is imposed are more likely to be satisfied, and are likely to be satisfied more cheaply. It is true that the desired diversion of goods and services to the favoured purposes is achieved by a negative or indirect means. It is also true that a diversion away from some purposes is not necessarily the same thing as a diversion to other purposes. But reason and experience combine to teach that in a practical world a system which closes one channel to the flow of purchasing power is nothing less than a system which increases the flow into those which are left. Conscription and direction of labour, and the compulsory acquisition and rationing of goods, are direct and obvious means of satisfying the requirements of governmental and private purposes from a volume of goods and services which is insufficient for the demand; but it is not always expedient, and it may not always be practicable, to resort to such courses to meet the difficulty. Capital issues control, operating as it does to limit the purposes for which would-be consumers may get purchasing power into their hands, is an indirect but effective means of achieving the same ends. It produces less disruption of the life of the community and less interference with personal liberty; but its true nature, if for these reasons it is less apparent, is not different.

It follows that, for the purpose of deciding the real character of legislation setting up a particular system of capital issues control, the decisive consideration must be found in the range of purposes which the system, on the true construction of the legislation, is adapted to assist by enabling supplies of money (purchasing power) to be cut off from others which are the actual or potential rivals of those purposes in drawing upon the inadequate flow of goods and services. To say this involves no departure from the well-established proposition that the character of legislation is to be determined, for the purpose of deciding its constitutional validity, by considering its operation in law, and not by looking to consequences which lie outside its legal operation. The operation of capital issues control legislation is necessarily to give one set of purposes a preferred position over others in point of law, and its character is therefore determined by the nature of the purposes to which, by construction of its provisions, it is found to enable preference to be given. If these purposes may be truly described as incidental to the defence of the Commonwealth, I see no difficulty in ascribing to the legislation the character requisite to support it under s. 51 (vi.) of the Constitution. If, on the other hand, these purposes are not confined to purposes incidental to defence, the legislation has not a specifically defence character, and I fail to see how the defence power can be relied upon to support it.

The necessity for a specific relation to defence appears to me to be critical in this case. It is of profound importance that the Court's constitutional duty of deciding the limits of the legislative power with respect to defence should be performed with a lively appreciation of the likelihood that any future war will be a total war, and of the serious error it would be to adopt any narrow or pedantic test in the search for a specific connection between legislation which is said to rest on the defence power and the purpose for which the power exists. But it is also essential that there should not be allowed to the imagination which is proper for the task so loose a rein that the power of defence ceases to have any real boundaries. Unless the federal system of government which the Australian people have chosen is virtually to be turned into a unitary system by every emergence of a danger of war, it is imperative that insistence shall constantly be laid upon the insufficiency of the defence power to support any measure which cannot be seen with reasonable clearness, upon consideration of its legal effect, to have a special relevance to some aspect or incident of defence, considered as a purpose separate and distinct from governmental

H. C. OF A.
1952.
MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
Kitto J.

H. C. OF A.
 1952.
 {
 MARCUS
 CLARK
 & CO. LTD.
 v.
 THE
 COMMON-
 WEALTH.
 —
 Kitto J.

purposes in general or the general well-being of the community : see *Victorian Chamber of Manufactures v. The Commonwealth* (1) ; and cf. *R. v. Foster* ; *Ex parte Rural Bank of New South Wales* (2).

It may well be that at the present time we are not far from war, and for my part I take the situation to be so fraught with danger that it is indeed essential, as the *Defence Preparations Act* recites, that preparations for defence should be immediately made to an extent, and with a degree of urgency, not hitherto necessary except in time of war. But the fact remains that, since it is the danger of war and not war itself which is upon us, the facet of defence which presents itself as a subject for legislative and executive attention is preparation for war and not the immediate conduct of war. It is not possible to affirm that the incidents in the exercise of the defence power are identical in these two departments of activity. The difference may be described as only one of degree ; and a pre-war situation may be such as to merge very gradually into a war situation. But it remains true that before hostilities break out it must be seldom that the range of the incidents of defence is at its maximum. Because of this, there seems to me to be room for error in reasoning which starts from the postulate that a given measure would be within the defence power as it exists during a great war, and relies upon symptoms of the times suggestive of impending war as a sufficient warrant for giving the power a more or less similar application. It is true that even when the nation is not at war the limits of the power are not constant ; they may indeed vary with changing situations ; but it does not follow that in a situation which, while dangerous, is still definitely short of war, it is proper to decide the ambit of the power by reference to its ambit during hostilities. Each situation must, I think, be considered, not for the purposes of assimilation to any other, but for the sake of the light which its own features provide for the ascertainment of the presence or absence of such a relevance in challenged legislation to purposes of or incidental to defence as suffices to give it the character of legislation with respect to that subject.

However seriously one may regard the portents of the present day, there is no denying that the range of particular purposes which are incidents in defence is more limited than it is when the actual prosecution of a tremendous struggle demands to be made the all-absorbing national pre-occupation. That makes it all the

(1) (1943) 67 C.L.R. 413, at pp. 417, 418. (2) (1949) 79 C.L.R. 43, at p. 83.

more difficult and yet all the more necessary to see that legislation setting up a system of capital issues control is so limited in operation as to exhibit a specifically defence character.

Now, in the international situation which faces Australia at present, it is obvious that preparations against the contingency of war, if made on a scale which pays any regard to the character of modern warfare, must be expected to absorb a considerable proportion of the goods and services from time to time available in the community. A law is clearly, I should think, within the defence power if its operation is to reduce the opposition which defence purposes have to meet in the endeavour to secure an adequate supply of goods and services. To disqualify competitors with defence purposes is necessarily to assist defence ; and capital issues regulations, if their character may fairly be described by saying that their operation is to do that, must, I think, be within the defence power, whether the time at which the question arises is one of war or not. On the other hand, capital issues legislation has no claim to be supported under the defence power in such a situation as the present, if one cannot say more by way of describing its character than that it operates to disqualify competitors with general governmental purposes, or with purposes less likely to accentuate inflationary pressure upon the national economy, or with any other kind of purposes not distinctively related to defence. I do not overlook the fact that the continuing soundness of the financial system is essential if the nation is to put itself in any shape to meet the eventuality of war. So it is if the nation is to maintain or improve its position in any other direction. The truth is, I think, that the financial stability of the country cannot fairly be regarded as a specifically defence matter when the country is not engaged in war, because the view is not then justified, as it may be during war, that the end to which the economy is for the time being predominantly directed is the defeat of the nation's enemies. And even the probability that the inflationary conditions already existing in Australia will both impede and be aggravated by extensive preparations for war provides no justification for characterizing capital issues control legislation as legislation upon an incident of defence by reason of any aptitude the legislation may have for dealing with inflationary tendencies generally. The legislation would need to reveal some special capacity to assist in counteracting the tendency of the inflationary situation to hamper the defence programme, or some special capacity to prevent the acceleration of inflationary tendencies by the carrying out of that programme.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Kitto J.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.

THE
COMMON-
WEALTH.

—
Kitto J.

The defendants contend that in the case of the *Defence Preparations (Capital Issues) Regulations* the necessary specific connection with defence is supplied by the provisions of reg. 17; and the whole case seems to me to come down in the long run to the question whether reg. 17 upon its true construction so limits the Treasurer's power to refuse consent, or to grant consent subject to a condition, that the category of purposes which the regulations operate to prefer is a distinctively defence category. There are two reasons which lead me to conclude that an affirmative answer should not be given to that question.

The first reason lies in the great width of the expression "purposes of or in relation to defence preparations". The regulations themselves do not define "defence preparations". The Act, by its recitals and by the provisions of s. 4, refers to a number of matters which the expression as used in the regulations must, I think, be taken to include; but nothing in the nature of an exclusive definition is to be found. In some contexts the expression might doubtless be used in a narrow sense, as comprising only the raising, equipping, training and maintaining of armed forces. Even so, "purposes of or in relation to" defence preparations would cover a field to which different minds might well set different limits. But in the regulations it is impossible to doubt that "defence preparations" is used in the far wider sense which is indicated by the recitals and s. 4 of the Act, with the result that "purposes of or in relation to defence preparations" must include, to take two examples only, any purpose which has a relation to "the expansion of the capacity of Australia to produce or manufacture goods, or to provide services, . . . for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war", and any purpose which as a relation to "the avoidance or reduction of economic dislocation or instability caused by, or impeding, defence preparations". It seems to me that the briefest consideration of the enormous sweep of these completely vague abstract conceptions should suffice to make it plain that, although there is ample proof in the language used that the legislature in passing the Act was looking at national problems from a defence point of view, the regulations have been so drafted that their operation (and it is their operation that matters) is to empower the Treasurer to assist by his veto a multitude of purposes which cannot be said to have any greater significance for defence than for the general advancement of the country. Purposes connected, directly or indirectly, with public works, or with any aspect of the production or distribution of primary produce, from wool to asparagus, or with

any aspect of a great variety of secondary industries from the manufacture of steel to the production of shaving cream, all these and more lie open to a Treasurer, acting in good faith and in accordance with reg. 17, as purposes for which he may exercise the power reposed in him. Indeed the limits to which the regulation purports to subject the power of veto defy specification. This being so, the regulations in my opinion cannot be held to have a specifically defence character unless we are to say that in these days it is primarily for defence that the national economy exists. In the midst of open war, it may well be far from extravagant to say precisely that; but it cannot be said in the present situation, despite its dangers.

The second reason which leads me to the conclusion I have stated is this. Suppose that the purposes to which reg. 17 refers are all purposes within the present reach of the defence power notwithstanding the great uncertainty of the language used to describe them. Even so, the limit which reg. 17 places upon the Treasurer's power of absolute or conditional veto is that he shall not use it "except for" purposes within the description. That is to say, it is a limit by reference, not to the purposes which are really apt to be served by a refusal of the Treasurer's consent, but to the purposes which the Treasurer aims to serve by his refusal. It is a subjective and not an objective test which the regulation lays down. When the country is in the throes of a great struggle such a test may suffice to give the requisite connection with the subject of legislative power; indeed the *National Security (Capital Issues) Regulations* which were in force during the last war did not contain any express provision circumscribing the Treasurer's authority by reference to purposes, and their validity doubtless depended upon an implication that the consent might not be refused except for purposes having a real connection with the prosecution of the war: cf. *Shrimpton v. The Commonwealth* (1); *Dawson v. The Commonwealth* (2). In the midst of hostilities it may not be difficult to regard legislation which depends for its application upon an executive judgment concerning a matter material to the prosecution of the war as legislation upon an incident of defence: cf. *Australian Communist Party v. The Commonwealth* (3). But when no major war is in progress it is not possible, I think, to concede a defence character to legislation conferring upon the Executive a power to interfere with rights

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.

v.
THE
COMMON-
WEALTH.

Kitto J.

(1) (1945) 69 C.L.R. 613.

(2) (1946) 73 C.L.R. 157.

(3) (1951) 83 C.L.R., at pp. 195, 258,
282.

H. C. OF A.
1952.

MARCUS
CLARK
& CO. LTD.
v.
THE
COMMON-
WEALTH.
—
Kitto J.

existing under State law, unless there is to be found in the legislation some more substantial connection with defence than is supplied by making the exercise of the power conditional upon an intention thereby to assist some purpose of defence.

In my opinion the regulations are void and the demurrer should be allowed.

R. B. Davies Industries Ltd. v. The Commonwealth and Others.

I would allow the demurrer for reasons similar to those which I have stated in the case of *Marcus Clark & Co. Ltd. v. The Commonwealth of Australia*.

Marcus Clark & Co. Ltd. v. The Commonwealth and Others.

Demurrer overruled. The plaintiff to pay the costs of the demurrer.

R. B. Davies Industries Ltd. v. The Commonwealth and Others.

Demurrer overruled. Costs of the demurrer reserved for the judge at the trial of the action or, if the action do not go to trial, then for the order of a judge sitting in the original jurisdiction to whom application is made.

Solicitors for the plaintiffs: in the first action, *Stephen, Jaques & Stephen*, by *Blake & Riggall*; in the second action, *J. Stuart Thom & Co.*, Sydney, by *Ellison, Hewison & Whitehead*.

Solicitor for the defendants in both actions: *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. McI. Y.