[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . } PLAINTIFFS ;

AND

BOGLE . . . . . DEFENDANT.

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . } PLAINTIFFS ;

AND

CLARK . . . . . DEFENDANT.

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . } PLAINTIFFS ;

AND

BOREHAM . . . . . DEFENDANT.

Crown—In right of Commonwealth—Immunity—Instrumentality—Commonwealth Hostels Ltd.—Applicability of State legislation—Price control—Declared services—Board and lodging—Fixation of maximum charges—Payments by migrants to Commonwealth Hostels Ltd. for accommodation—Prices Regulation Act 1948-1951 (*Vict.*) (*No.* 5310—*No.* 5580)—*Prices Act* 1948-1951 (*S.A.*) (*No.* 2 *of* 1948—*No.* 23 of 1951)—*Prices Regulation Act* 1948-1949 (*N.S.W.*) (*No.* 26 *of* 1948—*No.* 24 *of* 1949).

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1952, SYDNEY. *Nov.* 24-26 ;

1953, MELBOURNE, *March* 13.

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

From 1949 the Commonwealth Government provided a number of hostels throughout the Commonwealth for the accommodation of immigrant families. One such hostel, situate in Victoria, was erected on land held by the Commonwealth under a lease. B. and his wife and child lived there continuously from July 1951. All furniture, furnishings, fittings and equipment in the hostel were at all times the property of the Commonwealth. For such accommodation B. was charged, up to 27th April 1952, £6 13s. 0d. per week and later £6 18s. 6d. per week. Up to 27th January 1952, the hostel—and other

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hostels throughout the Commonwealth—was managed and controlled by the Department of Labour and National Service, but on that date, the management and control was taken over by Commonwealth Hostels Ltd., a company incorporated in September 1951, under the *Companies Act* 1938 (Vict.). Each of the seven signatories to the company's memorandum and articles of association was a civil servant. The memorandum empowered the company (1) to " provide, take over, establish, equip, maintain, conduct, control, manage or supervise " hostels for the accommodation of " migrants " and others; and (2) to enter into any arrangement with any Government and to carry out a number of subsidiary objects. It provided that the income of the company should be applied solely towards its objects. Any surplus on a winding-up was to be paid to the Minister for Labour and National Service, who controlled the appointment and resignation and removal of directors, as well as the matter of winding-up. The lease of the hostel was never assigned to the company, nor was any sub-lease to the company executed, nor was any property of the Commonwealth ever transferred to the company. In a contract in writing made on 20th November 1951, between the Commonwealth and the company it was recited that it was intended that the company should " assume responsibility for managing and conducting the hostel . . . now being managed and conducted by the Commonwealth through the Department of Labour and National Service," and provisions to that end were inserted retaining close contact with and control by the Minister, including, *inter alia*, provisions (a) not to alter the scale of charges from time to time approved by the Minister for accommodation facilities provided in the hostels; and (b) that nothing in the instrument should be deemed to confer on the company any right, title or interest in any of the real and personal property of the Commonwealth comprised in the hostels. The existence of that contract was unknown to B. The company, with the approval of the Minister, as from 27th April 1952, increased the hostel tariff charges for adults. Payments were made by B. to the company after the " taking over " and receipts, stamped as required by the *Stamps Act* 1946 (Vict.) were given therefor in the name of the company. He paid the increased charges for the three weeks ended 17th May 1952 and thereafter refused to pay the amount of the increase. Under the *Prices Regulation Act* 1948-1951 (Vict.) the provision of board and lodging was a declared service, and maximum charges were fixed by orders made under the Act. The Commonwealth and the company sued B. to recover the amount of the increase unpaid to 12th September 1952. Upon a case stated,

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

(1) that at the time when the increased charges were imposed the contractual relationship of B. in respect of accommodation was with the company and not with the Commonwealth. (2) That the company was not an agent or instrumentality of the Crown and entitled to its immunities and (3) that the *Prices Regulation Act* 1948-1951 (Vict.) and the orders made thereunder made illegal the agreement by B. to pay the company the increased charges.

Marks v. *Forests Commission* (1936) V.L.R. 344, doubted.

CASES STATED.

In separate actions brought by way of a specially endorsed writ of summons in the original jurisdiction of the High Court, the Commonwealth of Australia and the Commonwealth Hostels Ltd. sued: (a) Andrew Bogle to recover the sum of £24 13s. 0d. being the balance of moneys alleged in the writ to be owing for board and lodging supplied to the defendant, his wife and child, at the Brooklyn Hostel, Victoria; (b) Terence Clark to recover the sum of £27 2s. 0d. being the balance of moneys alleged in the writ to be owing for board and lodging supplied to the defendant and his wife at the Finsbury Hostel, South Australia; and (c) Harry Edward Boreham to recover the sum of £40 9s. 6d. being the balance of moneys alleged in the writ to be owing for board and lodging supplied to the defendant, his wife and two children at the Bunnerong Hostel, New South Wales.

The relevant facts are sufficiently stated in the judgment of *Fullagar* J. hereunder.

J. D. Holmes Q.C. and *C. I. Menhennitt*, for the plaintiffs in *Boreham's Case*.

J. D. Holmes Q.C. The two main questions which are propounded are whether the defendants are tenants in respect of the premises they are occupying and whether, therefore, the amounts which they pay are rents, and whether the plaintiffs, or either of them, are bound by the appropriate State legislation as to landlord and tenant, and in particular that part of the legislation which forbids an increase of rent without the determination of a fair rent court or other similar authority. Similarly, in the alternative way of putting their defence, the defence has been that what is being charged for board and lodging is something which is regulated under the Prices Regulation Acts of the States, and the increases in the tariff in April 1952, were made without the consent of the appropriate Prices Commissioner in the States. It was made clear in the agreement entered into between the Commonwealth and the company that the property, both real and personal, did not pass to the company but remained in the Commonwealth, and the company undertook to carry out the obligations under the direction of the Minister. The defendant Boreham and his wife and family went to live at the Bunnerong Hostel on 16th October 1951, while the Commonwealth itself was conducting the hostel. What was being done by the Commonwealth and what was subsequently being done through the Commonwealth Hostels Ltd. was a step

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in the Commonwealth immigration scheme. It was a step in carrying out part of Government policy with respect to the introduction of new people into the Commonwealth and the subject matter, that is the Executive policy with respect to immigration, was a matter of general national policy. It was incidental to that policy, or scheme, that the Commonwealth itself should have available at suitable centres facilities for the accommodation, sheltering and feeding of such migrants as came to Australia and wished to avail themselves of those facilities on the terms for which the Commonwealth was prepared to make those facilities available. The Commonwealth maintains reception and distribution centres from which migrants are assimilated into the community as part of its general immigration scheme. The Commonwealth did not by providing the facilities on those terms, enter into business or enter into the business of a proprietor of a residential or a boarding house, or, indeed, the proprietor of service flats. The statutory basis upon which the foregoing was done is to be found in the Appropriation Acts of 1949, 1950 and 1951, where financial provision is made for, *inter alia*, hostel trust accounts, Commonwealth accommodation establishments, equipment for reception and training and holding centres; losses on workers' hostels. Act No. 52 of 1949 and Act No. 37 of 1950 show that the Commonwealth appropriated money itself for the Executive to carry out the hostel scheme as incidental to the general national policy of immigration. In the Act of 1951 and in the 1952 appropriations, appropriations were made for the company to carry out a similar function and activity as the Department of Labour and National Service was doing in the two preceding years. Under the first two Acts the conduct of the hostels was, by Parliament, made a function of the Government, and by the second two Appropriation Acts, that function of the Government was continued and the distribution was not to the Department of Labour and National Service or directly to the Department of Immigration, but through that Department for the activities of the company. The primary object of the company is to provide and maintain, conduct and control and manage hostels for migrants, and then members of the defence forces of the Commonwealth, persons in the service of the Commonwealth, or working for authorities of the Commonwealth. The company cannot provide accommodation unless the persons come within a specified class as described in object 1 of the company's memorandum of association, and the Minister requests the company to provide accommodation for particular persons or persons of a particular class. Both of those conditions must operate for the

company to carry out within its powers the function of accommodating persons. The memorandum and articles of association show that the company is of limited character, and, as a company, is at all points under the direct control of the Minister, and he has the power of appointing, and requesting and enforcing the resignation of directors. The agreement between the Commonwealth and the company shows that that company took over the conduct and management of hostels which were conducted and managed by the Department. The company is the mere servant, or the mere agent, of the Commonwealth. Any contract entered into by the person accommodated is made through the company as servant or agent with the Commonwealth (*Briscoe* v. *Bank of Kentucky* (1)). Irrespective of the State statutory provisions, the company controls the price of the services and is free from the control of rent under the *Landlord and Tenant (Amendment) Act* 1948-1951 (N.S.W.); the Commonwealth is expressly excluded. The activity of the company is a limited activity and is incidental to the immigration scheme. Whether or not a view is taken that the parties to the contract at the time of the increase in tariff, or at an earlier stage, were one of the defendants and the company, the position would be, if either of the first of the two ways of putting the case is correct, that the principal, if the principal was ever undisclosed, is now disclosed and it is the principal which is suing on the contract. Even if the suing party is the company, a servant or agent of the Commonwealth as principal, the Commonwealth as principal could come in at any time before judgment and sue. On the evidence the company at all times acted as a servant or agent, and really for a disclosed principal, and acted in the position where it was obvious that it was not itself completely in control. In each case the Minister approved of the increase in the charge. For the purpose of managing hostels the company would be entitled in this context to the shield of the Crown; the immunity of the Crown. The characteristics which attached to the company at all relevant times are characteristics which are familiar characteristics of Crown instrumentalities (*Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (2); *Skinner* v. *Commissioner for Railways* (3)). There is not any "necessary intendment" on the part of the State legislature (*Province of Bombay* v. *Municipal Corporation of Bombay* (4); *Essendon Corporation* v. *Criterion Theatres Ltd.* (5)). It cannot be said of the *Prices Regulation Act* 1948 (N.S.W.) that

(1) (1837) 36 U.S. 257, at p. 344 [9 Law. Ed. 709, at p. 743].
(2) (1946) 73 C.L.R. 70, at pp. 75, 76.
(3) (1937) 37 S.R. (N.S.W.) 261, at pp. 269-271; 54 W.N. 108, at p. 109.
(4) (1947) A.C. 58, at p. 63.
(5) (1947) 74 C.L.R. 1, at pp. 15, 30.

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at the time it was assented to, namely, 18th August 1948, the intention of the legislature was that it should bind the Crown in any of its activities. It would be beyond the power of any of the States so to do.

C. I. Menhennitt, for the plaintiff in *Bogle's Case*. These arguments are put on behalf of all the three States in the particular matters, and in respect of Victoria and South Australia the arguments of Mr. *Holmes* are adopted. The *Prices Regulation Act* 1948-1951 (Vict.) does not reveal any intention to bind the Crown, and, indeed, various sections in that Act indicate that the Crown should not be bound. The expression "public utility undertaking" in s. 3 (1) is used in the sense in which it was defined in the New South Wales statute, that is to refer to undertakings of the Crown set out in the New South Wales statute and no more. It was not intended that by the wide discretion conferred in s. 9 of the statute of the State of Victoria, it should apply to the Crown. The provisions of ss. 19, 22, 25 (1), 32 and 34 (1) do not contemplate the Crown, or, in any event, the Commonwealth Crown. By its definition of the expression "residential business" in the Act the Parliament of Victoria has shown that when it used that expression in s. 35 it had in contemplation board and lodging supplied by the proprietor of any residential business, or of an ordinary inn-keeper. Neither the Commonwealth nor the company can be said to be the proprietor of a residential business. The whole activity in the subject hostels is not a business at all. Section 36 has no application to the situation where a Government provides in a special type of area for a special class of persons services under special conditions, namely, the condition that the persons are migrants in the process of assimilation into the community. Section 35 has no application to this case whatsoever. Section 37 (2) (e) merely gives effect to what is otherwise the implied intention in Pt. II of the Act. As in the case of the New South Wales statute, if the relevant statute of Victoria and of South Australia purported to bind the Crown the absolute discretion in the commissioner would render each of those statutes invalid. The *Landlord and Tenant (Control of Rents) Act* 1942-1951 (S.A.) does not disclose any intention to bind the Crown in right of the Commonwealth, but shows indications to the contrary. Wherever the Crown is referred to in that statute it is clear that the reference is to the Crown in right of the State and not of the Commonwealth. There is not any logical reason for expanding the meaning of the reference to the Crown so as to include the

Commonwealth (*Essendon Corporation* v. *Criterion Theatres Ltd.* (1)). The Act of South Australia does " not apply to any premises let by the Government of the Commonwealth . . . or any instrumentality of any such Government ". It is clear beyond doubt that the defendants are not tenants. In order to establish tenancy on their part the onus is on the defendants of showing an intention by the parties to create an interest in land. There was not any such intention. There is nothing from which it can be shown there was exclusive tenancy in fact. On the contrary there are a number of considerations which all point strongly the other way. In the definition sections " rent " is defined to mean rent payable under a lease, and the definition of " lease " requires a letting or sub-letting. The company did not at any time have any interest in the land out of which a tenancy could be carved (*Cobb* v. *Lane* (2)). The class of persons accommodated is migrants in transit and any tenure is negatived. That is a positive indication that not merely was there any suggestion that the parties should enter into a tenancy but on the contrary that they contemplated an entirely different arrangement, the Government providing for migrants in transit. There is not any exclusive possession of any part of the hostel, nor is it stated that the plaintiffs could be excluded from the rooms occupied by the defendants. Exclusive possession of one part of the premises to be used and occupied is not enough. The nature of the occupation of the other parts gives its colour to the part possessed exclusively (*Burns* v. *Shire of Woorayl* (3)). In each a case a master key was retained by the management of the Department or the company. It is consistent with the facts stated that the plaintiffs could, at discretion, shift the defendants from place to place within the hostel. A " rent " is negatived by the exclusive charge, by the basis of the charges, and by the fact that it can change from week to week consequent only upon a rise or fall of earnings. The provision of food and the amenities is somewhat analogous to similar provision for workmen at camps of railway commissioners and road departments or others in course of contemplated transit, such as shearers. Even if there were the *sine qua non* of exclusive possession, there is not the necessary mutual intention of creating a tenancy (*Booker* v. *Palmer* (4); *Cobb* v. *Lane* (5)). That is *à fortiori* in the case of the company which has not any interest in land or chattels. The fact that persons used the rooms almost exclusively is not sufficient to raise the presump-

(1) (1947) 74 C.L.R., at p. 26.
(2) (1952) 1 All E.R. 1199.
(3) (1944) A.L.R. 333, at p. 335.
(4) (1942) 2 All E.R. 674, at p. 676.
(5) (1952) 1 All E.R., at pp. 1200-1201.

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tion of tenancy. It must be found that they were intended to have the right to exclusive possession. The defendants are not tenants but are in the position of licensees (*Minister of Health* v. *Bellotti* (1), see also *Sauter* v. *Sangster* (2) and *Errington* v. *Errington* (3)). The foregoing submissions are to the effect that the proper plaintiff is the Commonwealth suing and that the company is merely the agent, or, alternatively, that the company, if principal, is the Crown, and in those circumstances both of the plaintiffs are completely outside the operation of the statutes; that the Landlord and Tenant Acts do not apply to either of the plaintiffs, and that the Prices Regulation Acts or Prices Act on their true construction do not apply to either plaintiff. The onus is upon the defendants to show that the subject services were declared services and that the increase was prohibited in some way. It is denied that any relevant declaration of the services was made and it is further denied that the orders do prevent the increases. Declarations are used in relation to designating services which are controlled. Orders are the operative orders which lay down the rule in relation to the declared services and goods. The Acts came into operation in each State on 20th September 1948. The services supplied in each State are board and lodging. Each defendant admits liability to pay, and the amount payable is that claimed, subject—for this purpose only—to the effect of the Prices Regulation Acts and the Prices Act. The *Prices Declarations* Nos. 112 and 166 (Cth.), and *Prices Regulation Orders* Nos. 2426 and 2486 (Cth.), which were in force up to 20th September 1948 did not apply to services supplied by "semi-governmental bodies" and there was not any rate, therefore, fixed for such services. In the case of (a) New South Wales, that express exclusion has been continued by the declaration. In no case is a service declared at the present time if it is supplied by a semi-governmental body; (b) Victoria, because the relevant declaration was by way of revocation of all Commonwealth declarations with certain exceptions which included board and lodging but did not include services supplied by semi-governmental bodies. Victoria did not make any specific order as regards board and lodging and depended on the Commonwealth orders until 31st July 1952 when order 436 was made on the same lines as the Commonwealth orders, but applied to newcomers; (c) South Australia, board and lodging was declared but rates were not fixed apart from s. 23 of the Act which operates to take over such rates as were in force under the Commonwealth orders 2426 and

(1) (1944) K.B. 298.
(2) (1950) 67 W.N. (N.S.W.) 74.
(3) (1952) 1 All E.R. 149.

2486 which do not apply to semi-governmental bodies. Even if the company has not the shield of the Crown, it is certainly a semi-governmental body. The expression "semi-governmental bodies" is not confined to State semi-governmental bodies, the word "State" having been introduced to exclude the State Crown. That expression was dealt with in *R.* v. *Portus*; *Ex parte Federated Clerks Union of Australia* (1) and *Electricity Trust of South Australia* v. *Linterns Ltd.* (2). The questions submitted in the Victorian case should be answered as follows: 1 (a). "No", because the Acts do not apply, and in any event it is not rent; 1 (b). "No"; 2. "No"; 3. "No", partly because they do not apply to the Crown and partly because the orders and declarations did not in their terms apply in any event; 4. "No", because it was not a residential business, and in any event the company is not the proprietor of the residential business within s. 35 of the *Prices Regulation Act* 1948-1951 (Vict.), and that section is so expressed; 5. "No", the materiality of this question is doubted; 6. "to the Commonwealth or, alternatively, to the company"; 7. "Yes", on the ground that it is the Commonwealth. If the proper plaintiff is the company it is the Crown therefore it comes within s. 75 (iii.) of the Constitution; if it is the Crown itself, then it is still covered, alternatively it is a company suing on behalf of the Commonwealth, also within the section. It does not matter to what extent the defendants knew the nature or extent of the relationship, the documents themselves reveal the position. Clause 7 of the agreement makes it clear that the company was acting as the Commonwealth's agent or servant in this matter. Practically every clause in the agreement contains some reference to Ministerial control or Commonwealth intervention. Clause 9 clearly shows that the company is not to have any interest in the real or personal property. The objects of the company were so sufficiently widely drawn to have permitted the company to do much more than manage and control hostels. Expressions used in the agreement support the view that it was a service agreement. At all stages where the Minister intervenes he gives directions. In those circumstances it is true to say the company is a servant of the Minister. If the company were an agent strictly so called one would expect in the agreement some reference to contracts entered into by the agent. But when the company is a servant that is taken for granted. In the light of that concept, it was just taken for granted that the contracts would be entered into as servant or agent. In the sense that it is a gratuitous servant the company is a voluntary servant. The agreement is

(1) (1949) 79 C.L.R. 428. (2) (1950) S.A.S.R. 133.

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throughout, in all respects, directed to the management of the hostels and in that respect the company is the servant only and the contract was entered into as servant or agent. Upon the matter of whether the company has the immunity of the Crown as a principal the matter of prime significance is the memorandum and articles of association and the Appropriation Acts and not the agreement. On their true construction the orders and declarations do not apply. If any of those orders and declarations do declare one service, what is declared is the service, and once the Commonwealth has supplied the service, assuming the Commonwealth were free of control, it is the service itself that is declared and controlled and thereafter if some other person provided that service on behalf of the Commonwealth, none the less the service itself is not controlled.

H. G. Alderman Q.C. (with him *C. I. Menhennitt*), for the plaintiffs in *Clark's Case*.

G. Gowans Q.C. (with him *J. R. Campton*), for the defendant Bogle. The *Prices Regulation Act* 1948-1951 (Vict.) was intended to bind the Crown in all its rights. Alternatively, at all events it was intended to bind the Crown in right of the Commonwealth. This defendant is not concerned to present to the Court an argument that the payments made constituted rent within the meaning of the *Landlord and Tenant Act* 1948 (Vict.). Provisions of the *Prices Regulation Act* indicate that there is not a clear separation of obligations imposed by that Act and those imposed by the *Landlord and Tenant Act*. The two ideas of a lease and the supply of board and lodging co-exist with the existence of a lease. The determination of the question as to whether there was a letting or a lease within the *Landlord and Tenant Act* would not decide the question as to whether the Crown was completely free of State legislation; it would still be necessary to determine whether under the *Prices Regulation Act* there was any obligation to the Crown in those circumstances. There are positive indications in that Act that both in the language and in the mischief to which the Act was directed, that that part of the Act which deals with goods and services was intended to bind the Crown in all its rights. Accepting the principle as stated in *R.* v. *Sutton* (1) and *Province of Bombay* v. *Municipal Corporation of Bombay* (2) the position is that while the presumption is that the legislation is made for subjects nevertheless that may be rebutted by the language or by the nature of the mischief to which

(1) (1908) 5 C.L.R. 789. (2) (1947) A.C. 58.

the Act is directed. In the circumstances the *Landlord and Tenant Act* 1948 (Vict.) should be regarded as *in pari materia* with the *Prices Regulation Act* 1948-1951 (Vict.). Having regard to the express exclusion of the Commonwealth and the States from the *Landlord and Tenant Act* provisions, and the express exclusion of the Commonwealth and the States from the land sales provisions of the *Prices Regulation Act* there is a strong inference that it was intended that there should not be any such exclusion of the Crown in any of its rights so far as the provisions of the *Prices Regulation Act* applying to goods and services were concerned. The very existence of the discretion conferred upon the Minister and the commissioner under that Act should be regarded as a reason why the legislating body thought it unnecessary to exclude the general operation of the Act from the activities of the Commonwealth and the States. It does not in any way lead to a conclusion that the Act does operate in respect of the essential functions of government. Alternatively, whatever may be the position so far as its application to the Crown in right of the State of Victoria is concerned it does not apply in respect of the activities of the Crown in right of the Commonwealth (*R.* v. *Sutton* (1); *Pirrie* v. *McFarlane* (2); *Minister for Works (W.A.)* v. *Gulson* (3); *Essendon Corporation* v. *Criterion Theatres Ltd.* (4)). The statement in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (5) that the "Crown . . . is one and indivisible" left a distinction to be drawn between the powers of the Crown in its various rights and left it open to any particular legislating authority to limit the powers of the Crown in respect of any one or more of those rights. Regard should be had to the subject matter in respect of which the legislating authority is purporting to exercise its supreme powers. The assumption is that that body is not intending to legislate for itself, but that in respect of any Crown rights outside the particular right which that particular legislating authority is exercising, then there is not any presumption in favour of the exclusion of other Crown rights. The test is: what is the subject matter with which this legislature was dealing? Is it a subject matter within its legislative authority? If it is, then it is concerning itself with its subjects in relation to that subject matter, and anybody who comes within that subject matter, and there is not any presumption of exemption in respect of the Crown in any other right at all.

[McTIERNAN J. referred to *Roberts* v. *Ahern* (6).]

(1) (1908) 5 C.L.R. 789.
(2) (1925) 36 C.L.R. 170, at p. 218.
(3) (1944) 69 C.L.R. 338.
(4) (1947) 74 C.L.R. 1.
(5) (1920) 28 C.L.R. 129, at p. 152.
(6) (1904) 1 C.L.R. 406.

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That case turned upon some very special circumstances. On the question of presumption, in *Minister for Works (W.A.)* v. *Gulson* (1), *Starke* J., and in *Essendon Corporation* v. *Criterion Theatres Ltd.* (2) *Latham* C.J. and *McTiernan* J., regarded it as still being open to them to say that there was not any presumption one way or the other when it came to the case of a State Act and its operation in relation to a Commonwealth activity. The Appropriation Acts cannot have any effect in constituting the company the servant or agent of the Commonwealth. The Commonwealth or the State subsidize many corporations carrying on activities but that does not make those corporations servants or agents of the Government. There is not any evidence that the Commonwealth had in fact been responsible for the incorporation of the company. The company attracts to itself the same qualities as a company limited by guarantee under the State Act, no more and no less, and it attracts all the controls which are exercised under State company legislation in exactly the same way as any other company. There is not any Commonwealth legislation setting up or authorizing the setting up of the company. The objects set out in par. (1) of the company's memorandum of association are not such as to give any real basis for any inference that the company was in a vicarious relationship with the Commonwealth. Nor does any inference of a relationship of principal and agent arise therefrom. The provision in the articles as to winding up is insufficient to show that vicarious relationship. There is not any field creating a special relationship between the company and the Commonwealth. If the company is a principal or agent it is according to ordinary common law principles and not by virtue of any statutory concepts creating a special relationship, as in the case of bodies brought into existence by virtue of a special Act. There is nothing associated with the incorporation of the company which is sufficient to make it an agent of the Commonwealth. Cases like *R.* v. *Portus*; *Ex parte Federated Clerks Union of Australia* (3), far from supporting the view that a body like the company is an agent of the Commonwealth, go the other way. A relationship of principal and agent between the Commonwealth and the company up to the date of the agreement has not been established. That document is in the form of an agreement between two separate individuals, the terms of which negate any relationship of principal and agent existing between the parties. The effect of the decision in *R.* v. *Foster*; *Ex p. Commonwealth Life (Amalgamated) Assurances Ltd.* (4) is

(1) (1944) 69 C.L.R., at p. 358.
(2) (1947) 74 C.L.R. 1.
(3) (1949) 79 C.L.R. 428.
(4) (1952) 85 C.L.R. 138.

merely that in some circumstances parties might be servants notwithstanding the terms of the agreement, but it is not an unusual circumstance associated with the status of servant. Control to a limited extent, as here, is not inconsistent with the absence of the position of servant (*Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (1)). The effect of the change-over operation was to vest in the company the rights which were previously vested in the Commonwealth under the contract for board and lodging. The company became the contracting party and the party charging the rates for board and lodging. At that stage the company was within the operation of the *Prices Regulation Act*. The company conducted and carried on a business of providing in a building board and lodging for a valuable consideration (*Rolls* v. *Miller* (2)). The wording of s. 35 of the *Prices Regulation Act* 1948-1951 (Vict.) " private residential business " is apt language to describe the situation of the company in carrying out the activities which it did carry out in the hostels. That is none the less so notwithstanding the association of the company with Commonwealth activities (*Victorian Railways Commissioners* v. *Herbert* (3)). The effect of the agreement is that the Commonwealth has passed over entirely to the company the responsibility of providing the services, assigning to the company the benefit of existing contracts and the company undertaking to discharge responsibilities in connection with providing services for all the future migrants who come into the hostels and they do it for their own benefit. In those circumstances to describe the company as the proprietor of that business is an apt way of describing the situation. The company runs the business for its own benefit. The expression " emanation of the Crown " in association with " agent or servant of the Crown " was discussed in *International Railway Co.* v. *Niagara Parks Commission* (4). When the Commonwealth brings into existence, as it did, a company of this kind which has all the ostensible characteristics of an independent entity, and shows all the characteristics of the proprietor of a residential business, there is not any reason why s. 35 of the *Prices Regulation Act* 1948 (Vict.) should not apply to it. The company is not a " semi-governmental body ". The phrase considered in *Renmark Hotel Inc.* v. *Federal Commissioner of Taxation* (5) was " a public authority of the Commonwealth ". The same content is obtained by the use of expression " governmental ", that is a

(1) (1946) 73 C.L.R. 70.
(2) (1884) 27 Ch. D. 71, at pp. 85, 88.
(3) (1949) V.L.R. 211.
(4) (1941) A.C. 328, at pp. 342-343.
(5) (1949) 79 C.L.R. 10.

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body which exercises some governmental powers. The original declaration of board and lodging continued up to the date when the *Prices Regulation Act* came into operation, firstly, because *Prices Declaration* No. 166 (Cth.) should not be taken as amending or repealing the previous declaration; secondly, because "semi-governmental bodies" should, in its context, be treated as "State semi-governmental bodies"; and thirdly, because in any event even if it included Commonwealth semi-governmental bodies, the company is not a Commonwealth semi-governmental body. It is agreed that cll. 4 and 5 of *Prices Regulation Order* No. 1 (Vict.) do not apply but cl. 3 (*a*) did apply to fix a ceiling price or a ceiling rate for goods or services of a kind previously sold or supplied. If the transferor is the Commonwealth and the Commonwealth does not come within the scope of the regulations at all, then cl. 6 of that order, and similar provisions do not have any application to such a case. If this really were a case in which cl. 6 applied, then it would be a concession that s. 35 of the *Prices Regulation Act* 1948-1951 (Vict.) fairly fitted it because cl. 6 refers to a boarding house or hotel business or the assets thereof which are sold or otherwise transferred, and the transferee carries on such business. *Prices Regulation Order* No. 267 (Vict.), dated 18th July 1951, is not applicable at all. On the prescribed date, 1st January 1951, the company did not supply any board and lodging. For that reason *Prices Regulation Order* No. 436 (Vict.) does apply in the case of that company. An affirmative answer to Question 1 (a). in the Victorian case is not contended for. The other questions should be answered as follows: 1 (b). "Yes"; 2. "No"; 3 and 4. "Yes", to the extent of making the sums claimed irrecoverable; 5. The argument to be addressed to the Court and the answer to be suggested will be adopted; 6. No money is owed either to the Commonwealth or the company but if owed it would be owed to the company; 7. "Yes": see *R.* v. *Murray*; *Ex p. Commonwealth* (1). The Commonwealth having divested itself of the right to occupy the premises and having handed over the occupation to the company, no proprietary rights of the Commonwealth are affected by the operation of the *Prices Regulation Act* or any part of it. The Commonwealth has transferred the occupation rights to the company as fully and effectually as it could. In those circumstances the *Prices Regulation Act*, in so far as it operates upon the provision of the services by that company, does not touch any proprietary rights of the Commonwealth.

(1) (1916) 22 C.L.R. 437, at p. 454.

F. W. Paterson (with him *P. G. Evatt*), for the defendant Boreham. The arguments addressed to the Court by Mr. *Gowans* (a) that in this particular case and on the facts of this case the company was not at any material time an agent of the Commonwealth; (b) that there is not any contract of lease, therefore the *Landlord and Tenant* (*Amendment*) *Act* 1948-1951 (N.S.W.) does not apply; (c) that there is a contract for board and lodging and in so far as (i) the facts in the Victorian case and the New South Wales case are similar, and (ii) the legislation is similar, are adopted on behalf of this defendant. Paragraphs (a) and (e) are the relevant paragraphs of sub-s. (1) of s. 3 of the *Prices Regulation Act* 1948-1949 (N.S.W.). On the facts of this case the accommodation and other amenities supplied are a service supplied by a body of corporated persons engaged in a business, using the word "business" with the meaning as submitted by Mr. *Gowans*. That submission is strengthened by the further provision in par. (e) of sub-s. (1) which deals with any rights under an agreement for the provision of lodging. The accommodation and other amenities which are stated in the facts of the stated case come within the definition of "service"; they are board and lodging within the meaning of that term "board and lodging" in the declaration and therefore come within the limits of a declared service under the Act. This defendant adopts also the arguments of Mr. *Gowans* that the *Prices Regulation Act* and the declarations and orders made thereunder are binding on the Crown in right of the Commonwealth except to the extent that whereas in the Victorian Act there is a specific reference to the Crown in right of the Commonwealth being bound there is not any such provision in the New South Wales Act. The company was not during the relevant time an agent or a servant of the Crown or any subordinate body of the Crown which attracted to it the immunities of the Crown. Even if it be held that the Crown in right of the Commonwealth is not bound by the *Prices Regulation Act* and that in fact the Commonwealth is the principal then, in that event, the company was acting for an undisclosed principal. If the company was not the principal, then it was acting for a principal which was undisclosed to the defendant, therefore in any action by the undisclosed principal against the defendant the defendant is entitled to make use of all defences, legal or equitable, which he would have had if the company itself had been suing as the principal. If it be the fact that the company is the agent but is acting for an undisclosed principal, then when the Commonwealth, the true principal, but undisclosed, sued the defendant he would say as portion of his defence "If the company

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had been the real principal, and I believed it was, and I could have made use of the provisions of the Act, I am entitled to use that same defence against the Commonwealth " : see *Anson* on *Contracts*, 19th ed. (1945), p. 411, and *Montagu* v. *Forwood* (1). It would be extremely unjust for a principal to be undisclosed and to have an agent entering into a contract for him with a person who honestly believed that the agent was the principal (*Isaac Cooke & Sons* v. *Eshelby* (2)). The arguments of Mr. *Gowans* relating to the relevant declarations and orders are adopted by this defendant. Paragraph 6 of *Prices Regulation Order* No. 259 (N.S.W.) covers this case. No matter which way par. 5 of *Prices Regulation Order* No. 190 (N.S.W.) is regarded, the plaintiffs cannot draw any comfort from it. The question of the interpretation of statutes to avoid absurdities is dealt with in *Maxwell* on *The Interpretation of Statutes*, 8th ed. (1937), p. 182. The arguments of Mr. *Gowans* as to the meaning of " semi-governmental bodies " are correct. Obviously it refers to Commonwealth semi-governmental bodies as well as to such bodies of the State. This defendant adopts the answers submitted by Mr. *Gowans* to all the questions in the New South Wales case where those answers are relevant. Question 4 in the New South Wales case, being question 5 in the Victorian case, should be answered " Yes ". If it is found that defendant did not know the nature or extent of the relationship, if any, between the Commonwealth and the company and did not believe that the company was acting as the agent of the Commonwealth, then the defendant is entitled to rely on the *Prices Regulation Act* and any relevant declarations or orders made thereunder. *Prices Regulation Order* No. 277 (N.S.W.), made 11th October 1951, amended pars. 5-8 of *Prices Regulation Order* No. 259 (N.S.W.).

G. Gowans Q.C., by leave. There is not any particular provision in s. 9 of the *Prices Regulation Act* 1948-1951 (Vict.), which would cover the case of the commissioner fixing a rate by reference to a rate. Reliance must be placed on the principle in *Fraser Henleins Pty. Ltd.* v. *Cody* (3).

[TAYLOR J. referred to *Arnold* v. *Hunt* (4).]

It would not be too vague or uncertain to fix a rate in particular provisions which had been operating immediately prior to the fixation.

D. A. Dunstan (with him *J. H. Roder*), for the defendant Clark. The South Australian case differs in several material particulars

(1) (1893) 2 Q.B. 350, at pp. 353, 355.
(2) (1887) 12 App. Cas. 271, at p. 278.
(3) (1945) 70 C.L.R. 100.
(4) (1943) 67 C.L.R. 429.

from the other two cases, both as regards the facts and as regards the legislation. This defendant and his wife were provided accommodation, meals and facilities at the hostel as from a date after the company commenced to manage and conduct it. The payments therefor were made to the company and the company gave receipts for such money in its own name. The receipts were expressed to be for board and lodging. The defendant at no time contracted with the Commonwealth direct. The *Prices Act* 1948-1951 (S.A.) does not, as apparently did the Acts of the other States, purport to include the declarations and orders made under the *National Security* (*Prices*) *Regulations*. It only refers to a rate fixed for services under an order, and it is the rate to which one looks. Orders in relation to board and lodging have not been made under the *Prices Act* 1948-1951 (S.A.), but there are declarations of the generic service of board and lodging. The *Prices Regulation Order* No. 2426 (Cth.) applies : see cl. 5. Regard should be had to whether the person is supplying something that he supplied on the prescribed date, something of a substantially similar nature, and if he is supplying some other service or some new service, then he is not supplying something that he supplied on the prescribed date and this order applies to that matter. The service supplied by the company falls within the definition of service in the Act as a business enterprise. A business is anything which may be said to be an occupation whether it is or is not carried on for profit, e.g., the postal service. " Board and lodging " means board and lodging no matter who supplies it or whether it is limited in any way. It does not matter if a person gives board and lodging for some particular and narrow purpose, or to some particular class of persons. The expression " board and lodging " in this context must mean board and lodging generally provided. There is not any substantial difference between a hostel and a boarding house. A contract for the supply of board and lodging at more than the maximum rate specified is an illegal contract (*Holman* v. *Johnson* (1)). *Prices Declarations* Nos. 112 and 166 (Cth.) cannot be imported into the *Prices Act*. If they could then those declarations were amended by declarations made later specifying board and lodging as a general and generic service. *Prices Declaration* No. 166 is contrary to the intention of the legislature in view of the definition of " service " contained in cl. 3. The Executive of the Commonwealth has no power to constitute a separate entity, an organ with executive functions of the Commonwealth itself. It cannot delegate its executive powers to an independent body in the absence of

(1) (1775) 1 Cowp. 341, at p. 343 [98 E.R. 1120, at p. 1121].

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legislation. It is only the legislature which may create a special body standing in a special statutory relation to the Crown, and it is only in those circumstances that the courts could be called upon to give any meaning to a notion of instrumentality. The Commonwealth cannot by contract constitute an executive of the Commonwealth. The contract between the Commonwealth and the company is not one which is consonant with the position of either agent or servant, and the significant thing is that the company received these moneys, and gave its own receipts for them, in respect of board and lodging. There is not any provision made under the instrument that the company should account to the Commonwealth in respect of these moneys. *Montagu* v. *Forwood* (1) was a case of set-off. Whether the matter could be limited to set-off see *Isberg* v. *Bowden* (2). Any statutory or common law defence, and not merely set-off, may be raised as a defence. In the South Australian case the Crown is expressly bound under s. 3 in the definition of "service". "The Crown" in any statute means the Crown in any capacity, and consequently a reference to the Crown in a State statute prima facie is binding on the Commonwealth in any capacity (*Minister for Works (W.A.)* v. *Gulson* (3); *Essendon Corporation* v. *Criterion Theatres Ltd.* (4); see also *R.* v. *Sutton* (5); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (6) and *Pirrie* v. *McFarlane* (7)). Either the reference to the Crown is a reference to it in all its capacities or, if such a reference is only a reference to a particular capacity, then there is not any presumption that the Crown is not bound in another capacity by failure to mention the Crown in that other capacity. A reference to "the Crown" in a State or a Commonwealth statute is not, prima facie, only a reference to the Crown in that particular capacity. Nor is it necessary that in order to bind the Crown in any other capacity whatever the Crown must be expressly mentioned in that other capacity. *Gauthier* v. *The King* (8) was wrongly decided. By necessary intendment this Act does bind the Crown in right of the Commonwealth (*Pirrie* v. *McFarlane* (9); *Essendon Corporation* v. *Criterion Theatres Ltd.* (10)). A State Act can bind the Commonwealth with respect to any function of the Commonwealth which is not a function essential to the existence of the Commonwealth Government. In the same way a Commonwealth statute

(1) (1893) 2 Q.B. 350.
(2) (1853) 8 Ex. 852, at p. 859 [155 E.R. 1599, at p. 1602].
(3) (1944) 69 C.L.R., at pp. 355-357.
(4) (1947) 74 C.L.R. 1.
(5) (1908) 5 C.L.R., at pp. 804-808.
(6) (1920) 28 C.L.R., at p. 165.
(7) (1925) 36 C.L.R., at p. 218.
(8) (1918) 56 S.C.R. (Can.) 176.
(9) (1925) 36 C.L.R., at pp. 218, 219.
(10) (1947) 74 C.L.R., at p. 28.

can bind a State in respect of any activity which is not an activity essential to the existence of the State. An essential function of government is one which goes to the existence of government (*Essendon Corporation* v. *Criterion Theatres Ltd.* (1)). If a State or the Commonwealth chooses not to exempt itself and the function infringed upon is not essential to its existence, then it is barred. There is not any legislation here which is contrary to the prices regulation legislation. The same principle is shown in *In re Richard Foreman & Sons Pty. Ltd.*; *Uther* v. *Federal Commissioner of Taxation* (2). The questions should be answered as follows: 1. "It is for a declared service within the meaning of the *Prices Act* 1948-1951 (S.A.)"; 2. "It does not apply"; 3. "Yes, to the extent of making the sums claimed irrecoverable"; 4. "If the company is found to be the agent of the Commonwealth, Yes"; 5. "To neither, but if to one then to the company"; 6. "The Court has jurisdiction".

H. G. Alderman Q.C., in reply. *Prices Declarations* Nos. 112 and 166 (Cth.) must be read together. They show a clear intention at that time, on the part of the Commonwealth Government that semi-governmental bodies should be exempt from control. It is impossible to imagine in the light of the second and later declaration exempting States and semi-governmental bodies and local governmental bodies, that the Commonwealth after that date intended that as regards board and lodging States and semi-governmental bodies and local governmental bodies should be controlled. In New South Wales the relevant declaration is *Prices Declaration* No. 82 which excludes services supplied by semi-governmental bodies and the relevant order, *Prices Regulation Order* No. 190, is in exactly the same language as the Commonwealth orders. In Victoria the relevant declaration was by way of revocation of all Commonwealth declarations with certain exceptions, which included board and lodging but did not include anything not previously included. The declarations referring to board and lodging are in the four documents. In all of the three States, by slightly different means, all those bodies are in the same position at relevant times as they were immediately prior to the commencement of the Acts. *Prices Declaration* No. 82 (N.S.W.) has no application because the company is a semi-governmental body. *Prices Regulation Order* No. 190 does not apply to either the Commonwealth or the company because on the prescribed date, 1st March 1949, board and lodging

(1) (1947) 74 C.L.R., at pp. 19-22.

(2) (1947) 74 C.L.R. 508, at pp. 518-521.

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was not being supplied at Bunnerong. If the company is not within the shield of the Crown and is a principal, cl. 5 of *Prices Regulation Order* No. 2426 (Cth.) operates and exempts the company from any fixation because the rates charged by the transferor, the Commonwealth, were not fixed before the transfer. In the *Prices Regulation Act* 1948-1949 (N.S.W.) there is not any section which operates like s. 35 of the *Prices Regulation Act* 1948-1951 (Vict.), nor any which operates like s. 23 of the *Prices Act* 1948-1951 (S.A.). Section 4 of the *Prices Regulation Act* 1948-1949 (N.S.W.) and *Prices Declaration* No. 2 (N.S.W.) do not apply to either the Commonwealth or the company because on the prescribed date, 15th April 1942, board and lodging was not being supplied at Bunnerong, and cll. 4 and 5 of *Prices Regulation Order* No. 2426 (Cth.) therefore do not apply. The same point applies to Victoria as to New South Wales, that under that *Prices Regulation Order* No. 267 (Vict.) it does not apply to the company because it was not supplying any services at the ceiling date, 18th July 1941, the position being similar to that stated above. As regards *Prices Regulation Order* No. 436 (Vict.) if the company is not within the shield of the Crown and is a principal then cl. 6 operates and exempts the company from any fixation because the rates charged by the Commonwealth were not fixed before the transfer. "Service" is defined in the *Prices Act* 1948-1951 (S.A.) to include the supply "by the Crown and any statutory authority". Prima facie, at least, that means the Crown in the right of the State and negatives the intention to apply the Act to the Commonwealth or any Commonwealth agency or body (*Essendon Corporation* v. *Criterion Theatres Ltd.* (1)). "Service" is limited to the supply by persons engaged in business and the like in which neither the Commonwealth nor the company is engaged. Section 23 of the *Prices Act* 1948-1951 (S.A.) is the only operative section. Sub-section (*b*) is not applicable because the service was not "supplied" (either by the Commonwealth or the company) "immediately before the commencement of" the Act. Sub-section (*a*) brings in *Prices Declarations* Nos. 112 and 166 (Cth.) and *Prices Regulation Orders* Nos. 2426 and 2486 (Cth.), but those declarations and the orders under them do not apply to "services" supplied by a "semi-governmental body" which, at the least, the company is (*R.* v. *Portus*; *Ex p. Federated Clerks Union of Australia* (2); *Electricity Trust of South Australia* v. *Linterns Ltd.* (3), and service was not supplied on the prescribed date, 15th April 1942. There are not

(1) (1947) 74 C.L.R., at p. 26.
(2) (1949) 79 C.L.R. 428.
(3) (1950) S.A.S.R. 133.

any other effective orders. *Prices Order* No. 192 (S.A.) does not advance the position beyond the Commonwealth orders. *Prices Order* No. 220 (S.A.) is irrelevant. "Prescribed date" in *Prices Regulation Order* No. 2426 (Cth.) has no application to the Commonwealth or to the company. Neither of them was supplying any such service at all on the prescribed date, and if there cannot be any prescribed date in relation to the company or to the Commonwealth cl. 5 of that order cannot operate at all. There is nothing inconsistent with the company being either a servant or an agent; every servant and every agent to some extent is able to act in a capacity outside that of his service. It was never contemplated by any legislature that the Commonwealth would be, or that it could be, restricted by any State instrumentality in carrying out the duty which the Commonwealth Government owed to the migrants whom it brought to Australia. This is a Commonwealth service which the Commonwealth must carry out as a matter of duty, and a State never intended and could not be permitted to interfere with the carrying of them out.

Cur. adv. vult.

March 13, 1953.

The following written judgments were delivered:—

DIXON C.J. I have had the advantage of reading the judgments prepared by *Fullagar* J. in these three cases and I agree both in the conclusions and the reasons they express.

McTIERNAN J. The management and conduct of a hostel is not ordinarily a function of government unless the hostel provides for special classes of people in whom the Executive has a special interest. The people living in the hostels, managed and conducted by Commonwealth Hostels Ltd., came to Australia under a migration scheme conducted by the Executive. The provision of food and shelter for these people fell within the sphere of the Executive's responsibility. Although it may be said that it did not become an essential function of government, the hostels which the Minister for Labour and National Service handed over to Commonwealth Hostels Ltd. were established by the Government to meet the needs of the migrants.

The question which arises is whether the company manages and conducts these hostels merely under its status as a company incorporated according to State law and as non-governmental enterprises, or whether the company is an agency conducting these hostels as governmental institutions. I should think that Commonwealth Hostels Ltd. is in the latter situation.

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It is obvious that the company was formed solely for the purpose of filling departmental needs. The fact that the company was incorporated under the *Companies Act* 1938 (Vict.), does not prevent it from carrying out its objects in the capacity of a departmental agency. The memorandum of association confines the objects of the company to the provision of accommodation for migrants, members of the forces and their dependants, and persons in the service of the Commonwealth or of an authority of the Commonwealth and their dependants, and to the provision of accommodation only for such members of these classes as the Minister for Labour and National Service requires the company to provide accommodation.

The company plainly owes its incorporation to an executive decision; all the corporators are public servants; otherwise, the special character of its objects could not be explained. The memorandum of association provides that upon the winding up of the company any property remaining after payment of debts is not to be distributed among the members but to be transferred to the Minister for Labour and National Service. The articles provide that each director shall be appointed by an instrument in writing under the hand of the Minister and that the remuneration of a director is subject to the Minister's control. The articles require that the accounts of the company shall be audited by the Commonwealth Auditor-General. These articles also provide that the company shall take steps to wind up its affairs as soon as practicable after receiving a written notice from the Minister that in his opinion such a course is in the circumstances necessary or desirable. The finances of the company are provided out of moneys appropriated by Parliament for the services which the company undertakes; it can undertake them only at the Minister's request: its objects extend to no other services.

The relationship of the company to the Commonwealth is settled not only by the terms of its constitution, but by the agreement dated 20th November 1951 made between the Commonwealth and the company. This agreement recites the objects mentioned above for which the company was formed and that the memorandum of association is framed to preclude the company from paying any portion of its income or property directly or indirectly in any form by way of profit to the members of the company. The agreement provides that the company shall have no right, title or interest in any of the real or personal property of the Commonwealth comprised in the hostels. The company is not entitled under the agreement to manage and conduct any hostel unless it is specified by the

Minister. Practically, the company has little if any discretion of its own in the management of any hostel specified by the Minister. It must not act without the Minister's approval in matters of policy and many matters of detail. Nominally the company employs the managers and staff of the hostels committed to it by the Minister, but this authority is granted under the terms of the agreement. The paymaster of all the personnel ranking as employees of the company is, in truth, the Commonwealth. In my opinion the company, by reason of its constitution and the relationship created by the agreement with the Commonwealth, manages and conducts the hostels in the capacity of an agency of the Commonwealth. I think that, if an unincorporated committee of persons were appointed by the Executive to manage and conduct these hostels upon the terms of an agreement similar to that made with this company, there could be no doubt that it would be an agency of the Commonwealth and the provision of sustenance and shelter to the people admitted to the hostels would retain the character of services rendered by the Executive.

Commonwealth Hostels Ltd. owes its corporate status to State law. It does not follow that it is not a mere instrumentality of the Commonwealth while exercising its powers as a corporation. The question whether it is a mere instrumentality of the Commonwealth depends upon the control which the Minister may exercise over it through its constitution and the conditions, stipulated by the agreement, upon which it managed and conducted the hostels. In my opinion it managed and conducted the hostels committed to it by the Minister as departmental establishments and as manager the company was an agency of the Executive. It would be difficult to contemplate this company in its capacity of manager of the hostels as a taxpayer of a State if it decided to impose a company tax.

In my opinion none of the State Acts regulating prices, with which the cases are concerned, manifests an intention to control the price of any service rendered by the Commonwealth. A service rendered by any agency of the Commonwealth is not therefore within the purview of the Act. It follows that each of these cases should be determined against the defendant.

WILLIAMS J. In these three cases I am of opinion that the questions asked in the cases stated should be answered as follows. In *Bogle's Case*: 1. (a) and (b): No; 2. and 3.: Do not arise; 4. No; 5. No; 6. The Commonwealth of Australia; 7. Does not arise. In *Clark's Case*: 1. (a) and (b): No; 2. and 3.: Do

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not arise; 4. No; 5. The Commonwealth of Australia; 6. Does not arise. In *Boreham's Case*: 1. (a) and (b): No; 2. and 3. Do not arise; 4. No; 5. The Commonwealth of Australia; 6. Does not arise.

I do not propose to give reasons at length for reaching these conclusions. There are two plaintiffs, the Commonwealth of Australia and Commonwealth Hostels Ltd. The company was incorporated on 13th September 1951 under the provisions of the *Companies Act* 1938 (Vict.). It is a company not for profit limited by guarantee having seven members all of whom are civil servants of the Commonwealth and all of whom undertake to contribute to the assets of the company in the event of it being wound up &c. such amounts not exceeding £1 as may be required for payment of the debts and liabilities of the company &c. Its principal object is to provide, acquire, take over, establish, equip, maintain, conduct, control, manage or supervise hostels in Australia for the accommodation of migrants; members of the defence forces of the Commonwealth and their dependants; persons in the service of the Commonwealth of Australia or any authority under the Commonwealth and their dependants; persons engaged upon work for the Commonwealth of Australia or any authority under the Commonwealth or their dependants for whom the Minister of State for Labour and National Service requests the company to provide accommodation. Clause 6 of the memorandum of association provides that if upon the winding up or the dissolution of the company there remains after the satisfaction of all its debts and liabilities any property whatsoever, the sum shall not be paid to or distributed amongst the members of the company, but shall be paid or transferred to the Minister of State for Labour and National Service and shall be applied in such manner as he may direct. The articles of association of the company provide that its directors shall be appointed by the Minister and that the office of director shall be vacated if the director is required by the Minister to resign. Article 59 provides that the company shall take steps to wind up its affairs as soon as practicable after receiving a written notice from the Minister that in his opinion such a course is in the circumstances necessary or desirable.

On 20th November 1951 an agreement in writing was entered into between the Commonwealth and the company and it is under this agreement that the company is managing and conducting the hostels referred to in the suits. One of these hostels is situated in New South Wales, one in Victoria and one in South Australia. It is an agreement to manage and control such of the hostels as

are from time to time specified by the Minister. There is no transfer of title of the hostels from the Commonwealth to the company, they remain the property of the Commonwealth as heretofore. Clause 9 of the agreement expressly provides that nothing therein contained shall be deemed to confer on the company any right title or interest in any of the real or personal property of the Commonwealth comprised in the hostels. Clause 2 of the contract provides that the Commonwealth will make available by way of loan to the company upon such terms and conditions as may be determined by the Minister such funds as are appropriated by Parliament for this purpose. Clause 7 provides that the company will at all times observe and comply with any directions given by the Minister relating to the policy to be adopted by the company in carrying out its undertaking as to the management and control of the hostels. The agreement contains a number of other provisions intended to give the Minister complete control of the manner in which the hostels are to be managed and conducted. It is unnecessary to refer to all of them. There is an undertaking by the company not to alter the scale of charges from time to time approved by the Minister for the accommodation and facilities provided in the hostels. Another undertaking is to proceed to close down any hostel under the management or control of the company as soon as is reasonably practicable after being so requested in writing by the Minister.

The principal object of the company, its constitution as a whole, and the provisions for its internal management clearly indicate to my mind that the company was created by the Commonwealth so that it would have a convenient corporate agent for carrying out a governmental purpose of the Commonwealth where it is incidental to such a purpose to provide hostels, housing and other forms of accommodation for migrants and the other persons referred to in the principal object. The terms and conditions of the agreement of 20th November 1951 prove that the company is in fact managing and conducting the hostels in execution of the first of these governmental purposes as the mere agent of the Commonwealth. It is managing and conducting on behalf of the Commonwealth a certain activity in which the Commonwealth considers it necessary to engage as incidental to its national purpose of promoting and assisting immigration into Australia. This activity is providing board and lodging for immigrants when they first land in Australia pending their absorption into the community. For this purpose the Commonwealth has acquired a large number of hostels and the Commonwealth Parliament has voted the large

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sums of money in the Appropriation Acts to which we were referred. In *Skinner* v. *Commissioner for Railways* (1) *Jordan* C.J. has summed up with his usual lucidity the considerations which determine whether a body represents the Crown for the purpose of being entitled to the benefit of the Crown's prerogatives, privileges and immunities including that of not being bound by statutes unless an intention in that behalf appears either expressly or by necessary implication. If the body is really an agent of the Crown it is immaterial, as his Honour pointed out, that it is incorporated or that it can sue or be sued or is carrying on trading activities. Later cases are collected in *Bank of New South Wales* v. *The Commonwealth* (2).

The extent to which the Crown in right of the Commonwealth can be bound by State legislation is a subject upon which there has been a difference of opinion in this Court: *In re Richard Foreman & Sons Pty. Ltd.*; *Uther* v. *Federal Commissioner of Taxation* (3). In *Minister for Works (W.A.)* v. *Gulson* (4) there was also a difference of opinion whether the immunity under discussion only applies, in the case of Commonwealth legislation, to the Crown as sovereign head of the Commonwealth, and in the case of State legislation to the Crown as sovereign head of the State. For the reasons given in *Gulson's Case* (4) I am of opinion that whenever it is intended that Her Majesty shall be bound in respect of her prerogative, rights or property, whether as the sovereign head of the United Kingdom or any part of the British Commonwealth, or of the Commonwealth of Australia, or any State it is necessary that she shall be expressly named or that a necessary implication to that effect shall appear from the purpose and provisions of the statute. Accordingly, since the company is an agent of the Commonwealth, it cannot be subject to the provisions of the various State Acts relied upon unless these Acts bind the Crown expressly or by necessary implication. The Acts in question are the Landlord and Tenant Acts passed in New South Wales, Victoria and South Australia in 1948 and the Prices Regulation Acts of those States passed in the same year. In the end, the defendants did not, if I understood the argument correctly, claim that they were tenants and entitled to rely on the Landlord and Tenant Acts. If they had attempted to do so the attempt must have failed because these Acts expressly exempt the Crown in right of the Commonwealth. But the defendants did claim that they were being provided

(1) (1937) 37 S.R. (N.S.W.) 261, at pp. 269-270; 54 W.N. 108, at p. 109.

(2) (1948) 76 C.L.R. 1, at p. 273.

(3) (1947) 74 C.L.R. 508.

(4) (1944) 69 C.L.R. 338.

with board and lodging by the company and entitled to rely on the Prices Regulation Acts and particularly the provisions of those Acts relating to declared services. The New South Wales and Victorian Acts do not bind the Crown expressly and there is nothing to be gathered from their purpose or provisions to raise a necessary implication. The South Australian Act provides that service means the supply for reward of water, electricity, gas, transport, or other rights, privileges or services (not being services rendered by a servant to a master) by any person (including the Crown and any statutory authority) engaged in an industrial, commercial, business, profit-making or remunerative undertaking, or enterprise. This definition refers to the Crown but, when it is read as a whole, it would seem that the Crown is intended to mean the Crown in right of the State of South Australia, a meaning which accords with that placed upon the Crown in *Essendon Corporation* v. *Criterion Theatres Ltd.* (1).

It was submitted for the defendants that, even if the company was an agent of the Commonwealth, it had nevertheless contracted with the inmates of the hostels as a principal and that the Commonwealth could not come in and claim the benefit of the contract without becoming subject to the principle that where A employs B to make a contract for him and B makes a contract with C, if B is a person who might reasonably be supposed to be acting as a principal and is not known or suspected by C to be acting as the agent of anyone, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal (*Montagu* v. *Forwood* (2); *Isaac Cooke & Sons* v. *Eshelby* (3)). It was submitted that if the company sued the defendants, they would be able to plead the Prices Regulation Acts and that the Commonwealth as an undisclosed principal could not be in a better position. In my opinion this principle cannot be invoked to whittle away the immunity of the Crown. A person who is a mere agent of the Crown is entitled to the same shield as the Crown itself, and the company as such agent is as much immune from the provisions of these Acts as the Crown itself (*Roberts* v. *Ahern* (4); *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (5)).

WEBB J. In all three cases I agree with the answers proposed by *Fullagar* J. and substantially for the reasons given by his Honour but I wish to add a few words.

(1) (1947) 74 C.L.R. 1.
(2) (1893) 2 Q.B., at p. 355.
(3) (1887) 12 App. Cas., at p. 278.
(4) (1904) 1 C.L.R. 406.
(5) (1949) A.C. 326.

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It is not contested that the Commonwealth can employ as its servant a company incorporated under the laws of a State. However I do not think that this company is the servant of the Commonwealth. One naturally looks for a clear indication of an intention to do such an unusual thing as to employ a company as a mere servant of the Commonwealth, and I can find no such indication. I am unable to regard the agreement between the company and the Commonwealth as constituting the former merely the manager of the latter. The appointment of a manager is not ordinarily effected in such form. In my opinion the terms of the agreement reveal the company to be an independent contractor for the supply of board and lodging to specified persons who seek it from the company. It is true that the combined effect of the memorandum and articles of association of the company and the agreement is that the Commonwealth controls the exercise of the powers and the scope of the operations of the company; but it is not true that the Commonwealth controls the manner of performing those operations to such an extent as to make the company its servant. In all essential particulars the position of the company under the agreement appears to me not to be different from what it would be if the company were an ordinary hotel keeper or boarding house keeper.

To meet the point that the company is an independent contractor there seems to be no alternative but to contend that the company is at most only apparently so; and that, having regard to its memorandum and articles of association, it is really the Commonwealth in the guise of a Victorian company limited by guarantee. To establish that contention it is necessary either to deny the incontestable, that is, that the company is a separate entity; or to prove that the company is in fact a mere puppet, whatever the documents may represent; but as to this there is no evidence.

No assistance can, I think, be derived from the cases dealing with specially created statutory corporations, such as railway and education commissioners. Their position in relation to the Crown always depends on the terms of the particular statutes.

In my opinion then this company, like other companies, is bound by the landlord and tenant and price fixing legislation of the States. However, the relevant landlord and tenant legislation is not applicable to the facts stated in any of the three cases.

FULLAGAR J.—*Commonwealth and Commonwealth Hostels Ltd.* v. *Bogle*: This is a case stated by *Kitto* J. in an action in which the Commonwealth and a company named Commonwealth Hostels

Ltd. are plaintiffs and one Andrew Bogle is defendant. The claim is a claim for the price of board and lodging and other services and facilities provided for the defendant. The plaintiffs sue in the alternative, alleging that the one or the other of them is entitled to the amount claimed.

From about the end of 1949 the Commonwealth Government provided, as a matter incidental to the carrying out of its immigration policy, a number of hostels for the accommodation of immigrant families. One such hostel is situate at Brooklyn in the State of Victoria, and is known as the Brooklyn Hostel. It consists of a large building, containing seventy rooms, which is erected on land held by the Commonwealth under a lease. The defendant and his wife and child commenced to live at the Brooklyn Hostel on 18th July 1951, and they are still living there. The accommodation provided for the defendant and his wife and child consists of three rooms, two of which are furnished as bedrooms, and the third of which is furnished as a sitting-room. Blankets and bed linen are provided in all the bedrooms in the hostel. Meals are provided for the residents of the hostel in a central dining hall. Electric light and power are provided. There are bathrooms and lavatories and laundries for the use of the residents. The washing of one sheet and one pillow-slip per person per week is done for the residents. There is a playground for children, a first-aid station, and a library. All furniture, furnishings, fittings and equipment in the hostel have at all times been the property of the Commonwealth.

For the accommodation of himself and his family and for the services and facilities mentioned above the charge made to the defendant, up to 27th April 1952, appears to have been at first £6 13s. 0d. per week and later £6 18s. 6d. per week. The exact manner in which these sums were calculated need not be considered, but it should be mentioned that the charges made were arrived at on a basis which took into account the earnings of members of a household.

Up to 27th January 1952 the Brooklyn Hostel and the other hostels were managed and controlled by a Department of State of the Commonwealth, the Department of Labour and National Service. On that date a change took place, the effect of which is one of the matters in controversy in this case. Up to that date, however, the position seems clear enough. It was not, I think, contended that the residents of the hostels were tenants. Having regard to the purpose of the hostels, to the character of the services and facilities provided, to the inclusive nature of the charge made, and to the fact that master keys of all the rooms were retained

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by officers of the Department, it seems clear that they were not tenants but lodgers. And the contracting parties were the Commonwealth and the respective residents of the hostels. In particular there was a contract between the defendant Bogle and the Commonwealth that, in consideration of the Commonwealth providing the accommodation and services and facilities which have been described, he would pay to the Commonwealth the sum of £6 18s. 6d. per week. It is not necessary, for the purpose of answering the questions in the case stated, to inquire further into the implied terms of the contract, but one would suppose that it was terminable on reasonable notice by either party, and that a week's notice would in the circumstances be reasonable notice.

The change which, as has been said, took place on 27th January 1952 consisted in the taking over of the management and control of the Brooklyn Hostel by the plaintiff company, Commonwealth Hostels Ltd. The legal effect of what was done in this connection requires examination, but, before entering upon that examination, it will be convenient to explain why the question is or may be important and to state the contentions of the parties to the action.

On or about 16th April 1952 notice was given to the residents of the Brooklyn Hostel, including the defendant, that, as from Sunday, 27th April 1952, the charges for the accommodation and facilities provided in the hostel would be increased to a specified amount. The amount of the increase in the case of the defendant was from £6 18s. 6d. to £8 7s. 6d. For the three weeks commencing on 27th April 1952 and ending on 17th May 1952 the defendant made payments to the plaintiff company at the rate of £8 7s. 6d. per week, but thereafter, although he remained in occupation, he paid £6 18s. 6d. only and refused to pay any more. What is claimed in the action is the difference between £8 7s. 6d. per week and £6 18s. 6d. per week for the period commencing on 18th May 1952 and ending on 12th September 1952. The writ was issued on 18th September 1952. The prima facie basis of the claim presumably is that a contract to pay at the increased rate for the future is to be inferred from the facts that the defendant remained in occupation and paid the increased rate for three weeks.

The defendant relies on a declaration and a prices regulation order relating to the provision of board and lodging and in force under the *Prices Regulation Act* 1948-1951 (Vict.), and he also relies on s. 35 of that Act, which provides, so far as material, that no person who is the proprietor of any residential business (as defined) shall charge any person for lodging board and amenities

provided at a rate higher than the rate charged at the commencement of that person's period of occupation as a lodger. Section 35 may, in my opinion, be eliminated from consideration at once. I do not think it can be said that either the Commonwealth or Commonwealth Hostels Ltd. was the proprietor of a residential business within the meaning of that section. This view, however, does not dispose of the defendant's case, for the prices regulation order on which he relies is quite general in its application and is not limited to persons who carry on a business. If it applies to the present case, its terms will operate to make illegal the raising of the charge for accommodation and facilities provided, which was announced on 16th April 1952.

In the view which I have ultimately taken of this case it is not necessary to decide whether the Commonwealth is bound by the *Prices Regulation Act* (Vict.). I think I should say, however, that, in my opinion, the Commonwealth is not bound by that Act, and, if I had thought that the Commonwealth, as the party with whom the defendant contracted, was the proper plaintiff in this action, I should have held that the defence to which I have referred failed. To say that a State can enact legislation which is binding upon the Commonwealth in the same sense in which it is binding upon a subject of the State appears to me to give effect to a fundamental misconception. The question whether a particular State Act binds the Crown in right of a State is a pure question of construction. The Crown in right of the State has assented to the statute, and no constitutional question arises. If we ask whether the same statute binds the Crown in right of the Commonwealth, a question of construction may arise on the threshold. In considering that question we are, or should be, assisted by a presumption that references to the Crown are references to the Crown in right of the State only. If the answer to the question of construction be that the statute in question does purport to bind the Crown in right of the Commonwealth, then a constitutional question arises. The Crown in right of the State has assented to the statute, but the Crown in right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth. The Commonwealth—or the Crown in right of the Commonwealth, or whatever you choose to call it—is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament. If, for instance, the Commonwealth Parliament had never enacted

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s. 56 of the *Judiciary Act* 1903-1950, it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria. The Commonwealth may, of course, become affected by State laws. If, for example, it makes a contract in Victoria, the terms and effect of that contract may have to be sought in the *Goods Act* 1928 (Vict.) (see *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (1) and *In re Richard Foreman & Sons Pty. Ltd.*; *Uther* v. *Federal Commissioner of Taxation* (2)). But I should think it impossible to hold that the Parliament of Victoria could lawfully prescribe the uses which might be made by the Commonwealth of its own property, the terms upon which that property might be let to tenants, or the terms upon which the Commonwealth might provide accommodation for immigrants introduced into Australia.

On the other hand, if the plaintiff company is the party with which the defendant contracted, and is therefore the proper plaintiff in the action, I should think that, unless some special reason could be found for excluding it from the field covered by the *Prices Regulation Act* 1948-1951, that company, like any other company in Victoria, was bound by regulations and orders made under the Act. It is necessary, therefore, to consider whether the party with which the defendant contracted (assuming, as the case stated assumes, that he contracted with one or the other) was the Commonwealth or the plaintiff company. This means that we must examine the constitution of the company and what took place after its incorporation.

The plaintiff company was incorporated, evidently on the initiative of the Commonwealth Government, under the *Companies Act* 1938 (Vict.) on 13th September 1951. It is a company limited by guarantee, the maximum amount for which a member can be made liable being £1. Each of the seven signatories to the memorandum and articles is described as a civil servant. Apparently there are not and never have been any other members. The memorandum empowers the company to "provide, acquire, take over, establish, equip, maintain, conduct, control, manage or supervise" hostels for the accommodation of "migrants" and others. It also empowers the company to enter into any arrangement with any Government and to carry out a number of subsidiary "objects". It provides that the income and property of the company shall be applied solely towards its objects, and that no portion thereof shall be paid or transferred directly or

(1) (1940) 63 C.L.R. 278, at p. 308. (2) (1947) 74 C.L.R. 508, at p. 528.

indirectly by way of dividend, bonus, or otherwise howsoever by way of profit, to the members of the company. If there is any surplus on a winding up, it is not to be distributed among the members of the company, but is to be paid to the Minister of State for Labour and National Service to be applied by him in such manner as he may direct. The articles provide that every director is to be appointed by the Minister by writing under his hand and is to hold office on the terms specified in the instrument of appointment. A director is to cease to hold office upon being required in writing by the Minister to resign. The accounts of the company are to be audited by the Commonwealth Auditor-General. The company is to take steps to wind up its affairs upon receiving a written notice from the Minister that such a course is, in his opinion, necessary or desirable.

The lease of the Brooklyn Hostel was never assigned by the Commonwealth to the company, nor was any sub-lease to the company executed, nor was any property of the Commonwealth ever transferred to the company. But on 20th November 1951 a contract in writing was made between the Commonwealth and the company, the terms of which are of great importance. The instrument recited that it was intended that the company should "assume responsibility for managing and conducting the hostels . . . now being managed and conducted by the Commonwealth through the Department of Labour & National Service" and also those in course of completion which would on completion have been managed and conducted by the Commonwealth through the Department. It then provided (by cl. 1) that the company should undertake the management and control of such of the hostels as should from time to time be specified by the Minister and should maintain standards of accommodation and service not inferior to those existing at the time of the specification. Clause 2 provided that the Commonwealth should make available to the company by way of loan such funds as should be appropriated by Parliament for the purpose. Clause 3 provided for the employment by the company of officers and employees "now engaged by the Department in the administration management and control of the hostels". Clause 5 provided that the company should, when requested, undertake on behalf of the Department the work of locating sites for and equipping hostels the management and control of which would on completion be undertaken by the company. Clause 6 provided that the company would, on being informed of any accommodation required, ensure that satisfactory arrangements were made for such accommodation. Clause 7 provided that the company would

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comply with any directions of the Minister as to " the policy to be adopted by the company in carrying out its undertaking as to the management and control of the hostels ". By cl. 8 the company, *inter alia*, undertook (a) to maintain the hostels and the property of the Commonwealth comprised therein in good repair and condition, (b) to furnish information required by the Minister, (c) to permit the Minister or any person nominated by him to inspect " any of the premises under the management or control of the company," (g) not to alter the scales of charges from time to time approved by the Minister for accommodation and facilities provided in the hostels, (h) to supervise, when requested, the erection and equipping " of hostels the management and control of which will on completion be transferred to the company ", (i) to close down any hostel " under its management or control " on being requested in writing by the Minister so to do. Clause 9 provided that nothing contained in the instrument should be deemed to confer on the company any right title or interest in any of the real and personal property of the Commonwealth comprised in the hostels. Clause 10 provided that, upon the company undertaking the management and control of hostels specified by the Minister, the benefit of all contracts entered into by the Commonwealth and then existing for the supply of goods and services and the conduct of facilities in connection with the hostels should by force of the agreement thereupon be assigned to the company, which would discharge all obligations and liabilities of the Commonwealth in connection with all such contracts.

The Minister for Labour and National Service at a later date " specified ", in accordance with cl. 1 of the contract, a number of hostels, including the Brooklyn Hostel, as hostels of which the company was to undertake the management and control. The date of " taking over " was 27th January 1952, although the " specification " was not formally made until 19th February 1952. It was made by a letter of that date to the chairman of directors of the company, in which the Minister specified the named hostels " as those which I desire the company to manage and control from the date from which I am advised the company will be ready to take over from the Department, viz. 27th January 1952 ".

On 18th January 1952 a notice was exhibited on notice boards at the Brooklyn Hostel, which commenced : " Residents are hereby informed that in connection with the change over of hostels from the Department of Labour and National Service to the Commonwealth Hostels Ltd. a stocktake of all equipment in every room of the hostel has to take place in the next few days ". The notice

proceeded to give certain information about the " stocktake ", and to invite the co-operation of the residents. It was signed " H. G. H. Beeren, Manager, Nos. 3 and 4 Hostel ". It came to the knowledge of the defendant Bogle.

On 16th April 1952 the notice which announced the increased charges was exhibited on notice boards at the Brooklyn Hostel. The notice was headed " Commonwealth Hostels Ltd.". It stated that an increase in hostel tariff charges for adults would apply from Sunday 27th April 1952. It then proceeded to announce " the new rates which have been approved by the Commonwealth Government ". It was signed " C. R. Thomas, General Manager ". It came to the knowledge of the defendant, who, as has been seen, paid the increased charges for the first three weeks after 27th April.

Only two other facts need, I think, be stated. The first is that the payments made by the defendant, after the " taking over " by the plaintiff company, are stated in the case to have been made to the company, and receipts stamped with the stamps required by the *Stamps Act* 1946 (Vict.) were given therefor in the name of the company. The second is that the defendant was not at any material time aware of the existence of the contract of 20th November 1951 between the Commonwealth and the company.

The object or objects of the Commonwealth Government in incorporating the company and placing in its hands the conduct and management of the hostels can, on the material before us, only be matter for conjecture. Whatever may have been the practical purpose sought to be achieved, it is with the legal effect of what was done, and with that alone, that the Court is concerned. And the important question is whether the company was substituted for the Commonwealth as the party contracting with the defendant in respect of the provision of accommodation and other facilities at the Brooklyn Hostel. In other words, the question is whether a novation took place. If it did, the company is the proper plaintiff. If it did not, the Commonwealth is the proper plaintiff. The question is largely a question of inference from facts proved or admitted. But the case stated expressly states that the parties are unable to adduce further evidence beyond that of which the effect is set out in the case. On that material I do not think that any other conclusion is open than that the company took the place of the Commonwealth as the contracting party with the immigrant boarders or lodgers at the Brooklyn Hostel, and that a novation did take place.

The general effect of the contract of November 1951 is, I think, that in relation to the hostels " taken over " the company is to

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be substituted for the Department of Labour and National Service —in other words, for the Commonwealth—in relation to hostel accommodation and in relation to persons accommodated in hostels. It was argued that the essence of the agreement was that the company was to "manage" the hostels and that as "manager" it became a mere "servant" or "agent" of the Commonwealth. The argument is not without force, but a little reflection, I think, reveals it as savouring of unreality. It is not difficult to conceive purposes which might be served by the substitution of a new corporate entity for the Commonwealth as the person responsible for the conduct of the hostels, but it seems impossible to conceive any rational purpose that could be served by the interposition of a corporate "manager" between the Commonwealth and the individual managers and servants who must of necessity be employed. There is no reality about the conception of the new corporation as a fellow servant of the Commonwealth with the individual servants employed. In any case the agreement expressly provides (cl. 3) that employees hitherto employed by the Department are to become employees of the company. It is clearly contemplated that the staffs required for running the hostels shall be engaged and paid by the company. The company covenants with the Commonwealth to maintain the hostels and the property of the Commonwealth therein, and to make any necessary replacements (cl. 8 (a)). In respect of funds provided by the Commonwealth for the company the relation of the Commonwealth and the company is to be that of borrower and lender (cll. 2, 8 (d)). It is to provide accommodation when required (cl. 7) and to maintain existing standards of accommodation (cl. 1). The provision in cl. 8 (g) that scales of charges are not to be altered without the approval of the Minister clearly contemplates that, in the absence of such a provision, the company could make such charges as it thought fit. Clause 10 expressly provides for the transfer from the Commonwealth to the company of relevant contracts. It may be that, on its true construction, this clause does not in terms include the benefit of existing contracts by residents to pay for their accommodation. But that it was intended that the benefit of such contracts should be included is made plain by the fact that, after the date of the "taking over", payments for accommodation were made by residents to the company, which gave receipts in its own name stamped in accordance with the *Stamps Act* of the State.

A novation is, of course, a tripartite affair, and the agreement of November 1951 affects the position only as between the Commonwealth and the company. But the "change over of hostels from

the Department of Labour and National Service to the Commonwealth Hostels Ltd." was announced to residents of the Brooklyn Hostel on 18th January 1952, and they were informed that " in connection with the change over " a " stocktake " of all equipment in every room would be made. This notification came to the knowledge of the plaintiff, and he thereafter made his payments to the company, which acknowledged them in the manner indicated above. These facts compel the conclusion that a novation took place.

The position now reached is that, as from 26th January 1952, the contract with respect to the accommodation of the defendant at the Brooklyn Hostel is a contract between the company of the one part and the defendant of the other part. In other words, the company, and not the Commonwealth, is the proper plaintiff. The remaining question is whether the Victorian price-fixing orders on which the defendant relies apply to the company.

The *Prices Regulation Act* 1948-1951 came into force by proclamation on 20th September 1948. Section 4 provided that declarations and orders made under the *National Security* (*Prices*) *Regulations* (which ceased to operate of their own force on 19th September 1948) should have the force of law in Victoria until repealed or amended under the Act. By virtue of this section there was in force in Victoria on 27th January 1952 a declaration of the provision of board and lodging as a " declared service " under the regulations, and a *Prices Regulation Order* (No. 2426) made under the regulations on 8th February 1946 with respect to the provision of board and lodging. This order, by virtue of a declaration made on 9th December 1947 under the regulations, did not apply to the services supplied or carried on " by State or semi-governmental or local governing bodies ". (The exemption was not confined to the provision of board and lodging : it extended to all services supplied by the " bodies " mentioned). *Prices Regulation Order* No. 2426 (Cth.) remained in force in Victoria until 21st July 1952, when it was superseded by *Prices Regulation Order* No. 436 (Vict.) made under the State Act. Clause 5 of *Prices Regulation Order* No. 2426 would, if applicable to the plaintiff company, render illegal the increase in the charge for accommodation to the defendant and his wife and child announced by the company on 16th April 1952.

The first argument submitted for the plaintiff company was that it was exempted from the operation of *Prices Regulation Order* No. 2426 because it was a " semi-governmental body ". It is extremely difficult to attach any precise meaning to this expression. The expression " State bodies " is equally obscure.

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The remaining expression, " local governing bodies ", creates, of course, no difficulty. It seems to me to be unnecessary for present purposes to assign any meaning to the relevant expression. I am disposed to think that, in its context, it contemplates bodies exercising some degree of governmental power. But, in any case, it comes between a reference to State organisations and a reference to bodies which are the creatures of State laws, and I would read it as referring exclusively to bodies which have some sort of relation or " semi-relation " to a State and as having no reference to the Commonwealth or any Commonwealth " bodies ". When the order was in force under the *National Security Act* 1939-1946, the reference would, of course, be to any State. When it ceased to operate under that Act and became an expression of the will of the Parliament of Victoria, it may be that it should be regarded as referring to Victoria only.

The other argument for the plaintiff company was that it was exempt from order No. 2426 by reason of the relation of the company to the Crown in right of the Commonwealth. The matter was treated for the most part as a question of construction. The defendant's counsel referred to s. 37 (2) (*e*) of the *Prices Regulation Act*, which provides that nothing in Pt. III of the Act shall prevent any transaction to which the State or the Commonwealth is a party. Part III relates to transactions in land. It is Pt. II of the Act that relates to the fixing of prices for goods and services, and Pt. II contains no such provision as s. 37 (2) (*e*). It was said, therefore, that Pt. II ought to be construed as applying to the State and to the Commonwealth. By way of answer to this argument the company relied on the rule that the Crown is not bound by statute unless an intention to bind it appears expressly or by clear implication. It said further that it stood in a particular relation to the Crown—that is, of course, the Crown in right of the Commonwealth—and it relied on what it called " the shield of the Crown ".

I have already stated my opinion that a State has no power to bind the Commonwealth by such legislation as that which is contained in the *Prices Regulation Act*. And I would frame the final question arising on this case stated by asking :—is the company's relation to the Commonwealth such as to identify it with the Commonwealth and place it constitutionally in the same position as the Commonwealth with regard to the application of the *Prices Regulation Act* ? If we must employ metaphors, it would be more appropriate to speak of the " shield of the Commonwealth ", though I would not, of course, deny the relevance of the numerous authorities dealing with what has been called the " shield of the Crown ".

I do not think it necessary to discuss at any length the question raised by the company's contention, because it seems to me impossible to say that the company is the Commonwealth, or is entitled, by reason of any relation which it has with the Commonwealth, to claim immunity from the provisions of the Victorian Act. In such cases as *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (1); *Victorian Railways Commissioners* v. *Herbert* (2) and *Rural Bank of New South Wales* v. *Hayes* (3) a statutory corporation is involved, and the question must turn partly on the effect of the incorporating statute and partly on the construction of the statute from which exemption is claimed, though other matters may also be material. In such cases as *Marks* v. *Forests Commission* (4) we have a statutory corporation claiming to share the immunity of the Crown at common law from liability in tort. I must say that, with the greatest respect to the learned judge who decided it, I cannot think that that case was rightly decided. But, however this may be, in the present case we have no incorporating statute in which implications may be found. Here we have simply a company formed in the ordinary way under the *Companies Act* of the State, and functioning as such within the legal system of the State. On its face the *Prices Regulation Act* obviously applies to every such company which supplies board and lodging for reward, and there is no other statute to construe. It sues in its own right as a party to a contract a person who has contracted with it. The contract alleged is one which is made illegal by the State Act. What reason can there be for saying that the statute is inapplicable? The company is not the Crown in right of the Commonwealth. It has no right to sue on behalf of the Crown in right of the Commonwealth. It seems to me sufficient to paraphrase what I said in *Rural Bank of New South Wales* v. *Hayes* (5), and to say that the Act does not affect rights of the Commonwealth, but the rights asserted by the company in these proceedings are simply *not* rights of the Commonwealth. It is said that the company was formed at the instance of the Commonwealth, that the Commonwealth through the Minister is in a position under the articles to control the company, and that the ultimate financial interest is that of the Commonwealth. But none of these things can affect the legal character of the company as a person suing in the courts. If the company were a company limited by shares, it could make no difference that the Commonwealth held ninety-nine per cent of

(1) (1946) 73 C.L.R. 70.
(2) (1949) V.L.R. 211.
(3) (1951) 84 C.L.R. 140.
(4) (1936) V.L.R. 344.
(5) (1951) 84 C.L.R., at p. 153.

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the shares. It is said (with perhaps more force) that the company is in possession and control of property of the Commonwealth, and that its activities are activities in which the Commonwealth, in the course of the exercise of the immigration power, is vitally interested. But again I am unable to regard these matters as affecting in any way the legal nature of the company. Having been incorporated under the Companies Acts of the State, it seems to me that it must be subject to the Companies Acts and all other State legislation which in terms applies to such companies. It may be that the Commonwealth Parliament could, under s. 51 (xxvii.) and (xxxix.) of the Constitution, enact legislation conferring immunities on the company and prevailing over State legislation by virtue of s. 109. But no such question need be considered, because no such legislation has been enacted.

I ought to mention in conclusion the case of *Roberts* v. *Ahern* (1), which might be thought to lend support to the argument of the company. In *Pirrie* v. *McFarlane* (2), *Higgins* J. included *Roberts* v. *Ahern* (1) in a list of cases which he regarded as highly dubious since the *Engineers' Case* (3). In *West* v. *Commissioner of Taxation (N.S.W.)* (4), *Evatt* J. quotes this passage (including the reference to *Roberts* v. *Ahern* (1), as illustrating the "numerous and startling applications" of the general doctrine of immunity of instrumentalities before it was overthrown. *Roberts* v. *Ahern* (1) is indeed, I think, to be regarded as representing an extreme application of that overthrown doctrine.

I think that the Commonwealth is properly made a party to the action, and that this Court therefore has jurisdiction under s. 75 (iii.) of the Constitution. Having such jurisdiction, it can give effect to the rights of the parties as found by it, and can give judgment for any party accordingly.

The questions asked by the case stated are as follows :—

1. Is it open to me on the facts and documents aforesaid to find that the payments which the defendant became liable to make for the accommodation and other benefits provided as abovementioned during the period from 18th May 1952 to 13th September 1952, both inclusive, were payments—(a) of rent, within the meaning of the *Landlord and Tenant Act* 1948 (Vict.), or (b) for a declared service, within the meaning of the *Prices Regulation Act* 1948-1951 (Vict.) ?

(1) (1904) 1 C.L.R. 406.
(2) (1925) 36 C.L.R. 170, at p. 213.
(3) (1920) 28 C.L.R. 129.
(4) (1937) 56 C.L.R. 657, at pp. 696-697.

2. If question 1 (a) be answered, yes, and I find that the said payments were payments of rent within the meaning of the said *Landlord and Tenant Act* 1948, was the amount thereof affected in any and what manner by the operation of that Act ?

3. If question 1 (b) be answered, yes, and I find that the said payments were payments for a declared service within the meaning of the said *Prices Regulation Act* 1948-1951, was the amount thereof affected in any and what manner by the operation of that Act and the declarations and orders mentioned in par. 34 of this case or any of them ?

4. Is it open to me on the facts and documents aforesaid to hold that the amount of the payments which the defendant became liable to make in respect of the said period was affected in any and what manner by the operation of s. 35 of the said *Prices Regulation Act* ?

5. Has the defendant's knowledge or belief as to the nature or extent of the relationship between the plaintiff the Commonwealth of Australia and the plaintiff company at any time any and what materiality to the question whether either of the plaintiffs is entitled to judgment in this action ?

6. If, having regard to the answers to the preceding questions, the defendant is liable to pay in respect of the said period an amount in excess of that which he has already paid, is the excess amount owed to the plaintiff the Commonwealth of Australia or to the plaintiff company ?

7. If the excess amount is owed to the plaintiff company, has this Court jurisdiction to give judgment for the plaintiff company in this action ?

These questions should, in my opinion, be answered as follows :—

1. (a) No.
   (b) Yes.

2. It is unnecessary to answer this question.

3. The effect of the *Prices Regulation Act* 1948-1951 is to make illegal any contract by the defendant to pay to the plaintiff company the amounts claimed. The case does not disclose any relevant contract between the defendant and the plaintiff Commonwealth.

4. No.

5. No.

6. See answer to question 3.

7. The Court has jurisdiction in the action.

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Commonwealth and Commonwealth Hostels Ltd. v. *Clark*: In this case the defendant is a resident of a hostel known as the Finsbury Hostel in the State of South Australia. The land on which this hostel stands is held by the Commonwealth under a lease. The plaintiff company was on 31st January 1952 registered under Pt. XII of the *Companies Act* 1934-1939 (S.A.) as a company incorporated in Victoria and carrying on business in South Australia. The Finsbury Hostel, which was originally opened by the Commonwealth on 20th December 1949, was among the hostels "specified" by the Minister for Labour and National Service as a hostel the management and control of which was to be taken over by the company as from 27th January 1952.

The defendant and his wife commenced to live at the Finsbury Hostel on 16th April 1952. From that date up to 26th April 1952 he was charged and paid in respect of himself and his wife £5 13s. 0d. per week. On or about 18th April 1952 he was notified that the charge would be increased, for the week commencing 27th April 1952 and thereafter, to £6 17s. 0d. per week. The defendant refused to pay, and has never paid, the increased rate. The claim made in the action is for the difference between the amount of the increased charge notified to the defendant and the amount actually paid by him in respect of the period from 27th April 1952 to 6th September 1952. The writ was issued on 18th September 1952.

The facts of this case differ in two respects from the facts in *Commonwealth and Commonwealth Hostels Ltd.* v. *Bogle* and *Commonwealth and Commonwealth Hostels Ltd.* v. *Boreham*. In the first place, the defendant in this case, unlike the defendants in the other two cases, did not make any payment at the increased rate which was demanded as from 27th April 1952. Whereas both Bogle and Boreham continued to reside at their respective hostels and paid the increased charge for the first three weeks, Clark, though continuing to reside at the Finsbury Hostel, has at all times refused to pay at a rate higher than that which he was charged when he went to live there on 16th April. The second difference is this. Whereas both Bogle and Boreham originally went into residence at a time when their respective hostels were under the administration of the Department of Labour and National Service, Clark went into residence at the Finsbury Hostel at a time after the company had taken over the management and control of that hostel.

With questions raised by the first matter of difference the case stated by *Kitto* J. is not concerned—or at any rate not directly concerned. The difference, however, may render the questions

asked by the case stated academic for the time being. The claim of either plaintiff, in each of these cases, must rest on contract. Unless contracts can be established whereby the respective defendants promised to pay whatever reasonable charge might from time to time be fixed by the Commonwealth or the company, it will be necessary for the plaintiffs to prove in each case a contract whereby the defendant promised to pay the increased charge. In the cases of Bogle and Boreham it may well be right to infer the making of such a contract from the remaining in occupation plus the making of payments at the increased rate. But Clark, though he remained in occupation, made no payments at the increased rate, and his mere remaining in occupation seems quite equivocal. It is quite consistent with his saying :—" I will not pay, or promise to pay, at the increased rate. I realise that, if I do not, you may give me a week's notice and then turn me out, but I intend to stay here, and pay under our existing contract, until you do turn me out ". There would seem to be no reason why he should not say this. The mere unilateral announcement that the charges are to be increased would operate not as a rescission of an existing contract but as an offer to make a new contract. The well known principle of *Davenport* v. *The Queen* (1) would seem to be incapable of application to such a case. That principle rests on election : see *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (2). Here the position would seem simply to be that an offer is being refused by Clark, the offeror being left to its rights under the existing contract if it chooses to exercise them. It seems proper to draw attention to these matters, but, as I have said, they do not arise on the case stated.

The second difference between the case of Clark on the one hand and the cases of Bogle and Boreham on the other hand is a matter which might affect the answers to the questions in the case stated, but, in the view which I take, does not. The view which I take in the cases of Bogle and Boreham is that the original contracts were between the Commonwealth and the respective defendants, but that in each case there was a novation discharging those contracts and substituting the company for the Commonwealth as the party contracting with the defendant. In those cases the original contract was made before the company took over the management and control of the hostels : in Bogle's case it was made before the incorporation of the company. In this case of Clark the original contract was made after the company had taken over

(1) (1877) 3 App. Cas. 115.

(2) (1920) 28 C.L.R. 305, at pp. 324, 325.

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the management and control of the Finsbury Hostel. That original contract was, in my opinion, a contract between the defendant and the company. My reasons for this conclusion will appear from what I have said in *Bogle's Case*.

The effect of the relevant price-fixing legislation in force at the material time in South Australia is the same as that of the corresponding New South Wales legislation.

The questions asked by the case stated are the same as those asked in *Boreham's Case*, and they should, in my opinion be answered in the same way.

The Commonwealth and Commonwealth Hostels Ltd. v. *Boreham*: In this case the defendant is a resident of a hostel known as the Bunnerong Hostel in the State of New South Wales. The plaintiff company was on 30th January 1952 registered under Pt. VI of the *Companies Act* 1936-1940 (N.S.W.) as a company incorporated in Victoria and carrying on business in New South Wales. The Bunnerong Hostel, which was originally opened by the Commonwealth on 1st April 1950, was among the hostels "specified" by the Minister for Labour and National Service as a hostel the management and control of which was to be taken over by the company as from 27th January 1952.

The defendant commenced to live with his wife and two children at the Bunnerong Hostel on 16th October 1951. From that date up to 26th April 1952 he was charged and paid in respect of himself and his family £9 1s. 6d. per week. On or about 18th April 1952 he was notified that the charge would be increased for the week commencing 27th April 1952 and thereafter to £10 10s. 6d. per week. For the week commencing 6th July 1952 and subsequent weeks the charge was reduced to £10 0s. 0d. per week, the reason being that the defendant's wife ceased to be in employment. The defendant paid the increased charge for the three weeks ending on 17th May 1952, and thereafter refused to pay at a rate higher than the old rate. The claim made in the action is for the difference between the amount of the increased charges notified to the defendant and the amount actually paid by him in respect of the period from 18th May 1952 to 20th September 1952. The writ was issued on 1st October 1952.

The facts of this case are indistinguishable from those in the case of *Commonwealth and Commonwealth Hostels Ltd.* v. *Bogle*, in which I have already expressed my views, and the effect of the relevant price-fixing legislation is precisely the same, except that

the *Prices Regulation Act* 1948-1949 (N.S.W.) contains no provision corresponding to s. 35 of the Victorian Act.

The questions asked by the case stated are as follows :—

1. Is it open to me on the facts and documents aforesaid to find that the payments which the defendant became liable to make for the accommodation and other benefits provided as abovementioned during the period from 20th April 1952 to 20th September 1952, both inclusive, were payments—

(a) of rent, within the meaning of the *Landlord and Tenant (Amendment) Act*, 1948-1951 (N.S.W.), or

(b) for a declared service, within the meaning of *Prices Regulation Act* 1948-1949 (N.S.W.) ?

2. If question 1 (a) be answered, yes, and I find that the said payments were payments of rent within the meaning of the said *Landlord and Tenant (Amendment) Act* 1948, as amended was the amount thereof affected in any and what manner by the operation of that Act ?

3. If question 1 (b) be answered, yes, and I find that the said payments were payments for a declared service within the meaning of the said *Prices Regulation Act* 1948, as amended, was the amount thereof affected in any and what manner by the operation of that Act and the declaration and orders made thereunder or any of them ?

4. Has the defendant's knowledge or belief as to the nature or extent of the relationship between the plaintiff the Commonwealth of Australia and the plaintiff company at any time any and what materiality to the question whether either of the plaintiffs is entitled to judgment in this action ?

5. If, having regard to the answers to the preceding questions, the defendant is liable to pay in respect of the said period a sum in excess of that which he has already paid, is the excess amount owed to the plaintiff the Commonwealth of Australia or to the plaintiff company ?

6. If the said excess amount is owed to the plaintiff company, has this Court jurisdiction to give judgment for the plaintiff company in this action ?

These questions should be answered as follows :—

1. (a) No.

(b) Yes.

2. It is unnecessary to answer this question.

3. The effect of the *Prices Regulation Act* 1948 is to make illegal any contract by the defendant to pay to the plaintiff company the

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amounts claimed. The case does not disclose any relevant contract between the defendant and the plaintiff Commonwealth.

4. No.

5. See answer to question 3.

6. The Court has jurisdiction in the action.

KITTO J. In these cases I am of opinion that the questions should be answered in the manner proposed by *Fullagar* J. and for the reasons he has stated.

TAYLOR J. In *Boreham's Case* the Commonwealth of Australia and Commonwealth Hostels Ltd. sues the defendant Boreham to recover the sum of £40 9s. 6d. being the balance of moneys alleged in the writ to be owing for board and lodging supplied to the defendant, his wife and two children at the Bunnerong Hostel, a hostel which was established to provide temporary accommodation for immigrants.

The hostel, which comprises a number of buildings, is situated at Bunnerong near Sydney on land leased to the Commonwealth and was, during the period in respect of which the claim is made, controlled and managed by Commonwealth Hostels Ltd., a company incorporated on 13th September 1951 under the *Companies Act* 1938 (Vict.) and registered in New South Wales as a foreign company. The hostel was established some considerable time before the incorporation of the company and, for a time, it was controlled and managed by the Commonwealth through officers of the Department of Labour and National Service. It was during this period that the defendant and his family first came to the hostel and their occupation of quarters at the hostel continued until after the control and management thereof was assumed by the company. There is no dispute that during the period in respect of which the claim is made the defendant and his family were provided with " board and lodging " as alleged.

The dispute between the parties has arisen out of the circumstance that on 18th April 1952 written notice was given to the defendant that the charge for accommodation and the benefits provided for himself, his wife and children would be increased as from 27th April 1952. The defendant paid the increased charge for three weeks from the last-mentioned date, but these payments were made by the defendant and other occupants of the hostel " under protest until such time as our legal officers instruct us to discontinue payment or until the increase is removed ". After the expiration of the period of three weeks the defendant refused and

continued to refuse to pay the amount of the increase, and it is in respect of the total sum so involved that this action is brought.

The facts concerning the claim have been agreed upon by the parties and, upon those facts as set forth in a case stated, the following questions are raised by *Kitto* J. for the opinion of this Court :

1. Is it open to me on the facts and documents aforesaid to find that the payments which the defendant became liable to make for the accommodation and other benefits provided as above-mentioned during the period from 20th April 1952 to 20th September 1952, both inclusive, were payments—(a) of rent, within the meaning of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1951 (N.S.W.), or (b) for a declared service, within the meaning of the *Prices Regulation Act* 1948-1949 (N.S.W.) ?

2. If question 1 (a) be answered, yes, and I find that the said payments were payments of rent within the meaning of the said *Landlord and Tenant* (*Amendment*) *Act* 1948, as amended, was the amount thereof affected in any and what manner by the operation of that Act?

3. If question 1 (b) be answered, yes, and I find that the said payments were payments for a declared service within the meaning of the said *Prices Regulation Act* 1948, as amended, is the amount thereof affected in any and what manner by the operation of that Act and the declaration and orders made thereunder or any of them ?

4. Has the defendant's knowledge or belief as to the nature or extent of the relationship between the plaintiff the Commonwealth of Australia and the plaintiff company at any time any and what materiality to the question whether either of the plaintiffs is entitled to judgment in this action ?

5. If, having regard to the answers to the preceding questions, the defendant is liable to pay in respect of the said period a sum in excess of that which he has already paid, is the excess amount owed to the plaintiff the Commonwealth of Australia or to the plaintiff company ?

6. If the said excess amount is owed to the plaintiff company, has this Court jurisdiction to give judgment for the plaintiff company in this action ?

At the outset it should be stated that the parties, by their counsel at the hearing, were in agreement that the facts clearly showed that the defendant never at any time became a tenant to either the Commonwealth or the company and that the payments from time to time made by the defendant were not in the nature

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of rent. I have no doubt that this is the correct conclusion on the facts and questions 1. (a) and 2. should be answered accordingly.

The substance of the remaining questions makes it quite clear that the initial question for consideration in this case is whether the defendant agreed to make payments at the increased rate and, if so, whether the Commonwealth or the company was the other contracting party. If there was no such agreement on the part of the defendant the claim of the plaintiffs must fail at the outset whilst it is a matter of considerable importance in relation to some of the questions whether, if such an agreement was made, the Commonwealth was contractually entitled and bound.

In spite of the statement contained in the case that the defendant "did not verbally or in writing agree to pay the increased charge for accommodation", I have no doubt that the defendant did, by his conduct, agree to make such payments. It is perhaps unnecessary to say that contracts may arise not only from express words, but also from the conduct of parties, and in this case the defendant's conduct must be taken unequivocally to indicate his agreement to pay the increased charges. He received notice on 18th April 1952 that the charges would be increased as from 27th April; he and his family remained in the hostel after the latter date and continued to do so during the period in respect of which the claim is made and for an initial period of three weeks he made payments at the increased rate. It is true that these payments were made under protest, as previously mentioned, and with this aspect of the matter I shall deal presently, but apart from this circumstance the defendant's actions could lead to no conclusion other than that he was agreeable to the new terms. What then was the effect of making the payments under protest? Is it open to a person in the circumstances in which the plaintiff found himself to say "I shall remain in occupation and I shall pay the increased charges but I shall pay them under protest and that will indicate that I am not agreeing to make these increased payments?" In my opinion, he is not. The words "under protest" have no precise legal significance, except where they are given some special meaning by statute or by agreement and, in the circumstances of this case, could mean no more than that the defendant, though agreeing to pay the increased charges, did not wish to be taken as abandoning any existing material right. No doubt the defendant had in mind the provisions of the *Landlord and Tenant (Amendment) Act* 1948-1951 (N.S.W.) and the *Prices Regulation Act* 1948-1949 (N.S.W.). His conduct cannot, in my opinion, give rise to the inference that he was not, otherwise, assenting to a variation of

the charges, for it would be a strange thing if a lodger whilst agreeing after reasonable notice to pay at an increased rate and though doing so under protest, could reserve the right to claim at some later or even remote stage that he had never so agreed. Perhaps the point may be more clearly stated by saying that where one or two parties of a contract enters into it, "under protest", he nevertheless makes a binding contract. The case of *Smith* v. *William Charlick Ltd.* (1) is clear authority for the proposition that a payment of money made under protest cannot be said to be an involuntary payment, except in special circumstances which are not present in this case. No doubt the defendant made the increased payments during the first three weeks of the relevant period in order that he might be allowed to remain in occupation of his quarters. The payments were not involuntary in any legal sense and, in my opinion, the only effect of paying under protest was to indicate an intention not to abandon any rights, extraneous to the contract, which might afford him protection against, or some relief from, his newly assumed obligation.

These observations leave untouched the question whether this new obligation was assumed under a contract made with the Commonwealth or with the company, but, in my opinion, there can be little, if any, doubt that the company was the other contracting party. It was argued on behalf of the plaintiffs that the defendant originally made his agreement for accommodation with the Commonwealth and that, notwithstanding the subsequent assumption by the company of the management and control of the hostel pursuant to the agreement between it and the Commonwealth on 20th November 1951 the original agreement between the defendant and the Commonwealth relating to the former's accommodation subsisted, though with some modifications, at all relevant times. In my opinion, this view is not open on the evidence. Although it may be said that the company undertook the management and control of the hostel on behalf of the Commonwealth and therefore, in a general sense, that it acted on behalf of the Commonwealth, it is clear that in the performance of its functions of management and control it acted as a principal in relation to persons with whom it contracted. The agreement of 21st November 1951 makes it clear that such a course was intended and the evidence does not suggest that when the company entered into contracts it did so otherwise than in the capacity of a principal. On the contrary, the facts in the case and the relevant documents make it quite clear that the company acted as a principal on such occasions. I have no

(1) (1924) 34 C.L.R. 38.

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doubt that the original contract for accommodation made between the defendant and the Commonwealth was novated shortly after the assumption by the company of the management and control of the hostel or at the very latest when the company and the defendant with the assent of the Commonwealth made their agreement with respect to accommodation at the increased charges. Accordingly, the action, if maintainable, is maintainable at the suit of the company alone.

Whether or not it is maintainable at all depends upon the answers to a number of problems which arise in relation to the *Prices Regulation Act* 1948-1949 (N.S.W.) and declarations and orders thereunder. It was contended by counsel for the defendant that the rights of the defendant under the agreement for accommodation were, in the language of s. 3 (1) of the Act, rights under an agreement for the provision of lodging and therefore constituted " a service " within the meaning of that Act. Further, it was said, a service of this nature was a " declared service " pursuant to *Prices Declaration* No. 82 (N.S.W.) made under the Act on 10th October 1951 and maximum rates for such a service had been fixed either by *Prices Regulation Order* No. 190 (N.S.W.) or *Prices Regulation Order* No. 259 (N.S.W.). Both of these orders were made before the charges for accommodation at the hostel were increased and since such increased charges were in excess of the maximum rates so fixed the plaintiff company, it was claimed, was not entitled to recover. The first answer made by the company to this line of defence was that it represented the Crown in right of the Commonwealth and that the *Prices Regulation Act* 1948-1949 (N.S.W.) does not and did not at any material time bind the Crown in that right. Secondly, it was said that *Prices Declaration* No. 82 (N.S.W.) excludes from the category of services declared by it services which are supplied or carried on by " a State or semi-governmental or local governing body " and the company even if it does not in a strict legal sense, represent the Crown was at all material times a semi-governmental body. It was further argued that if upon its true construction the Act does purport to bind the Crown in right of the Commonwealth it exceeds the limits of the legislative power of the State.

The Act does not purport expressly to bind the Crown and, as far as I can see, there is nothing in the Act giving rise to any implication that this was the intention of the legislature. On the contrary its provisions seem to me to be intended to regulate rights as between " subject and subject " (cf. *Minister for Works (W.A.)*

v. *Gulson* (1) per *Starke* J.), and the whole history and purpose of the wartime and post-war legislation with respect to price fixing, both Commonwealth and State, clearly supports this view. In *Gulson's Case* (2) *Rich* J. expressed the view that " the Crown in all its capacities is prima facie not bound by a statute made in any part of the Empire unless this is provided for expressly or by necessary implication " (3). This view was expressed after a consideration of *Williams* v. *Howarth* (4); *Theodore* v. *Duncan* (5) and *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (6). The observations of *Williams* J. in *Gulson's Case* (2) indicate quite clearly that he accepted the same view which, again, is implicit in the reasons of *Starke* J. The latter accepted as a rule of construction " that the Crown is not bound by a statute unless specially named or included by necessary implication despite the distinction taken in *R.* v. *Sutton* (7) between the Crown in right of the States " (1). Having accepted the existence of the rule of construction *Starke* J. proceeded to examine the legislation in order to see if it contained any indication of contrary intention, and added that general words were not enough to give such an indication. In my opinion the rule, as stated by *Rich* J. in *Gulson's Case* (2) must now be taken to be the true rule.

As I have already said, there are no indications in the *Prices Regulation Act* that it was the intention of the legislature to bind the Crown; on the contrary, its provisions tend to the opposite conclusion. But this conclusion cannot assist in the solution of the present case unless it should also be held that the company in a strict legal sense, represents the Crown and is therefore entitled to the same privileges and immunities as the Crown itself. Its relationship to the Executive Government is substantially determined by the agreement of 21st November 1951 and it is, I think, material to indicate the general purport and effect of that agreement. Before doing so, however, it is desirable to make some reference to the memorandum and articles of association of the company. Whilst its objects specify that the company was established to provide, acquire, take over, establish, equip, maintain, conduct, control, manage or supervise hostels housing and other forms of accommodation in Australia for the accommodation of migrants, members of the Defence Forces of the Commonwealth and their dependants, persons in the service of the Commonwealth

(1) (1944) 69 C.L.R. 338, at p. 358.
(2) (1944) 69 C.L.R. 338.
(3) (1944) 69 C.L.R., at p. 356.
(4) (1905) A.C. 551.
(5) (1919) A.C. 696.
(6) (1940) 63 C.L.R. 278.
(7) (1908) 5 C.L.R. 789.

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and persons engaged upon work for the Commonwealth for whom the Minister of State for Labour and National Service requests the company to provide accommodation, the company is authorized to engage in many other activities. Clause 5 of the memorandum contains a provision prohibiting the payment of any part of its income or property by way of dividend, bonus or otherwise howsoever by way of profit to the members of the company, and cl. 6 provides that if upon the winding up or dissolution of the company there remains after the satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed amongst the members of the company but shall be paid or transferred to the Minister and shall be applied in such a manner as he may direct. Article 31 gives to the Minister the right to appoint the directors of the company and, pursuant to arts. 33 and 39 (e), the power to remove directors summarily is also vested in the Minister. Article 55 provides that the accounts of the company shall be audited by the Commonwealth Auditor-General. The agreement recites the registration of the company with the object of providing in Australia hostels housing and other forms of accommodation in Australia for the accommodation of the classes of persons specified in the object to which I have referred and also recites that the memorandum of the company has been so framed as to preclude the company from paying or transferring any portion of its income or property directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to members of the company. After reciting the intention of the parties that the company shall assume responsibility for managing and conducting the hostels, housing and other forms of accommodation and ancillary services then being managed and conducted by the Commonwealth through the Department of Labour and National Service, the agreement proceeds to specify the terms upon which this is to be done.

By the agreement the company undertakes the management and control of such of the hostels as are from time to time specified by the Minister. Clause 4 provides that the Minister may at any time after consultation with the board of directors direct the type, characteristics and standard of the accommodation and facilities to be provided and the company undertakes to ensure that satisfactory arrangements will be made for the accommodation of the number and classes of persons notified to it. Further, the company undertakes to maintain the hostels and the property of the Commonwealth comprised therein in good repair ; to permit the Minister or any person nominated by him to inspect the premises

at all reasonable times; to proceed to close down the hostel or other form of accommodation as soon as is reasonably practicable after being so requested in writing by the Minister; and not to alter the scales of charges from time to time approved by the Minister for accommodation and facilities provided in the hostels. Nothing in the agreement is to be deemed to confer on the company any right, title or interest in any of the real or personal property of the Commonwealth comprised in the hostels, whilst cl. 2 provides that the Commonwealth will make available by way of loan to the company upon such terms as may be determined by the Minister such funds as are appropriated by Parliament for the purpose. A number of other terms of the agreement make it quite clear that the company is subject to almost continuous supervision and direction by the Minister or officers appointed by him for that purpose.

In *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (1) *Latham* C.J., after discussing the tests which had been proposed and applied from time to time for the purpose of determining whether a person or a body is entitled to the privileges and immunities of the Crown went on to say: "But if a board is a body independent of the Government with discretionary powers of its own, so that it is not a mere agent of the Government, then such a body does not represent the Crown. This was the criterion which was applied in *Fox* v. *Government of Newfoundland* (2) and by this Court in *Repatriation Commission* v. *Kirkland* (3). See also *Ex parte Graham*; *Re Forestry Commission* (4). The question was put in the following form in *Roper* v. *Public Works Commissioners* (5)—whether the persons in question were acting as servants of the Crown or merely as a statutory body invested with public rights, duties and liabilities like the trustees of a public dock or public park. Were they Government servants doing the work of the Government? In *Metropolitan Meat Industry Board* v. *Sheedy* (6), their Lordships of the Privy Council described the Board there under consideration as 'a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs'" (7). *Repatriation Commission* v. *Kirkland* (3) was a case which presented special features and it was held that the Repatriation Commission represented the Crown in the strict legal

(1) (1946) 73 C.L.R. 70.
(2) (1898) A.C. 667.
(3) (1923) 32 C.L.R. 1.
(4) (1945) 45 S.R. (N.S.W.) 379; 63 W.N. 29.
(5) (1915) 1 K.B. 45, at p. 52.
(6) (1927) A.C. 899, at p. 905.
(7) (1946) 73 C.L.R., at p. 76.

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sense. This conclusion was based on the ultimate view that it was " a corporation to which is handed over the administration of what is really a Government department " (per *Knox* C.J. and *Starke* J. (1)); that " the functions of the Repatriation Commission have been expressly made functions of the Executive Government in the strict sense " (per *Higgins* J. (2)) and that Parliament had " simply created a very special department for a very special purpose, and for convenience has 'vested' the property in that department " (per *Rich* J. (3)). But none of these observations could have any application to the facts of the present case. It is true that the company's functions were for a time performed by a department of the Executive Government, but this does not constitute those functions when performed by the company functions of the Government, nor does the existence in the Minister of a power to control and direct the company's activities, or the fact that it may, to a considerable extent be dependent upon loans from public revenue, make such a conclusion possible. The plain fact is that it is a body with an independent existence and that it has a substantial measure of independent discretion in the performance of its functions and those functions are not characteristically functions of Government. I have no doubt that the company does not represent the Crown in any legal sense and that it is not entitled to the privileges and immunities of the Crown.

Since the company is, therefore, bound by the provisions of the *Prices Regulation Act* 1948-1949 (N.S.W.) the rights to which the defendant was entitled under his agreement for accommodation constituted " a service " within the meaning of that Act and it was a " declared service " unless it was a service supplied by a " State or semi-governmental or local governing body ". The expression " semi-governmental " body has caused me considerable difficulty. It is not a technical term and it is impossible to give any precise meaning to it. It was argued, however, that its application is limited to bodies having an association only with one or more of the States and that it has no application to bodies, having only an association with the Commonwealth. There is real difficulty in determining what is meant by the expression " semi-governmental ". No doubt, it is possible to say that a body which represents the Crown in the strict sense is not *semi*-governmental; it is governmental. This proposition may lead to the very general conclusion that a semi-governmental body is a body which, whilst

(1) (1923) 32 C.L.R., at p. 8.
(2) (1923) 32 C.L.R., at p. 15.
(3) (1923) 32 C.L.R., at p. 21.

not legally representative of the Crown, has some definite and substantial connection with it in the performance of its functions. But not every such body could be said to be a semi-governmental body, because the characterisation of the body as such would, to some extent, be dependent upon the nature of the functions performed by it, and the mere existence of some contractual relation between such a body and the government would not be sufficient to invest it with this character. However, it is, I think, unnecessary to attempt to give any precise meaning to the term because it is clear that the defendant's first submission on this point is correct. The expression appears to have originated in some of the legislation passed in 1942 to refer from the States to the Parliament of the Commonwealth power to make laws with respect to certain subject matters. In New South Wales the relevant Act referred to the Parliament of the Commonwealth, *inter alia*, " profiteering and prices (but not including prices or rates charged by State or semi-governmental or local governing bodies for goods or services) ". It is of interest to note that although power was referred to the Commonwealth Parliament in this limited form the *National Security* (*Prices*) *Regulations* continued to operate in their original form. But by subsequent declarations under those regulations there was omitted from the declaration of services, those services " supplied or carried on by State or semi-governmental or local governing bodies ". The form of one of the earlier declarations made under the *National Security* (*Prices*) *Regulations* appears in the report of the *Victorian Chamber of Manufactures* v. *Commonwealth* (1), and it is notable that the first of these declarations excepted services supplied or carried on " by any State of the Commonwealth or any authority constituted by or under any State Act " and also those " supplied or carried on by any Local Government Authority established for any locality by or under any State Act relating to any local government ". The exception in *Prices Declaration* No. 82 (N.S.W.) of services supplied or carried on by any " State or semi-governmental or local governing body " must, I think, in the circumstances be taken to refer to bodies which, though not in the strict sense representative of the Crown, have some real and substantial relationship to the Government of New South Wales.

The question then arises whether the relevant prices regulation orders in New South Wales operated to fix a lower rate for " board and lodging " than that which the company seeks to charge with respect to the relevant period. So far as I can see the only

(1) (1943) 67 C.L.R. 335.

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point which arises on this matter arises under cl. 4 of *Prices Regulation Order* No. 190 (N.S.W.). This paragraph purports to fix and declare the maximum rate at which any person may supply any board and/or lodging which is not of substantially the same kind as board and/or lodging supplied by that person on the prescribed date, to be such rate as, after application by that person, is fixed by the commissioner by notice in writing to such person, or, until such rate has been fixed by such notice as aforesaid, the rates in the order thereinafter specified. "Prescribed date" means in relation to the supply by any person of any kind of board and/or lodging 1st March 1949, or if substantially the same kind of board and/or lodging was not supplied by that person on that date, the last preceding date upon which substantially the same kind of board and/or lodging was supplied by that person. Clause 4 appears to be the relevant provision in this case and if this paragraph does not operate to fix a rate for the service supplied to the defendant, then the company would be entitled to charge at the increased rate. Counsel for the company argued that this clause did not so operate because its operation was confined to those cases where a person had supplied board and/or lodging of some kind on the prescribed date, but of a character which was not substantially the same as that supplied at the date of the promulgation of the order. In my view, cl. 4 is not limited in its operation to persons who supplied board and lodging on the prescribed date. It applies to any person supplying board and lodging which corresponds with the description "not substantially the same kind as board and/or lodging supplied by that person on the prescribed date". I understand the clause to fix a maximum rate with respect to any board and lodging which is not substantially the same kind as *any* board or lodging supplied by that person on the prescribed date. In the result, therefore, I am of the opinion that cl. 4 did operate to fix a maximum rate for the board and lodging supplied to the plaintiff and that the company was not entitled to charge at a rate in excess of that prescribed.

Questions not dissimilar to those which arise in *Boreham's Case*, also arise in *Bogle's Case* and *Clark's Case*, and I find myself in general agreement with the reasons of my brother *Fullagar* which I had an opportunity of considering after setting out my own views on the questions which arise in *Boreham's Case*. In the circumstances, it is sufficient for me to say that I entirely agree that the questions asked in all three cases should be answered as proposed by *Fullagar* J.

Commonwealth of Australia and Commonwealth Hostels Ltd. v. *Bogle*—

Questions answered—

1 (*a*) *No.*
(*b*) *Yes.*
2. *Unnecessary to answer.*
3. *The effect of the Prices Regulation Act* 1948 *is to make illegal any contract by the defendant to pay to the plaintiff company the amounts claimed. The case does not disclose any relevant contract between the defendant and the plaintiff Commonwealth.*
4. *No.*
5. *No.*
6. *See answer to question* 3.
7. *The Court has jurisdiction in the action.*

Case remitted to Kitto J. Costs of case stated to be dealt with by Kitto J.

Commonwealth of Australia and Commonwealth Hostels Ltd. v. *Clark*; *Commonwealth of Australia and Commonwealth Hostels Ltd.* v. *Boreham*:—

Questions answered:—

1. (*a*) *No.*
(*b*) *Yes.*
2. *Unnecessary to answer.*
3. *The effect of the Prices Regulation Act* 1948 *is to make illegal any contract by the defendant to pay to the plaintiff company the amounts claimed. The case does not disclose any relevant contract between the defendant and the plaintiff Commonwealth.*
4. *No.*
5. *See answer to question* 3.
6. *The Court has jurisdiction in the action.*

Case remitted to Kitto J. Costs of case stated to be dealt with by Kitto J.

Solicitor for the plaintiffs, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitor for the defendant Bogle, *C. Ralph*, Melbourne.

Solicitor for the defendant Clark, *D. A. Dunstan*, Adelaide.

Solicitor for the defendant Boreham, *H. Rich*, Sydney.

J. B.