[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL FOR VICTORIA (AT THE RELATION OF THE VICTORIAN CHAMBER OF MANUFACTURES) . . } PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

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MELBOURNE *Feb.* 19-22, 25; *May* 23.

Gavan Duffy C.J., Rich, Starke, Evatt and McTiernan JJ.

Constitutional Law (Cth.)—Power of Executive—Clothing factory—Establishment and operation—Established for "manufacture of naval and military equipment and uniforms"—Manufacture of uniforms for other purposes—Executive power to carry on factory—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (VI.), (XXXIX.), 61, 68, 75 (III.), 81—*Defence Act* 1903-1932 (*No.* 20 *of* 1903—*No.* 50 *of* 1932), *sec.* 63 (1) (*da*), (*db*), (*f*).*

High Court—Jurisdiction—Commonwealth a party—"Matter"—Attorney-General of State—Action to restrain ultra vires Commonwealth act—Power of State Attorney-General to sue.

The Commonwealth Government established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and uniforms for postal employees. In time of peace, the operations of the factory included the supply of uniforms for other departments of the Commonwealth and also for State officers and for employees in various public utilities and institutions in the State and for some private persons. The Governor-General deemed such peace time operations of the factory necessary for the efficient defence of the Commonwealth inasmuch as the maintenance intact of the trained complement of the factory would assist it in meeting war time demands. In an action by the Attorney-General for Victoria, *ex relatione*, for

* The *Defence Act* 1903-1932 provides:—"63. (1) The Governor-General may . . . (*da*) Establish and maintain factories for the manufacture of naval and military equipment and uniforms; (*db*) Authorize the employment of persons in a civil capacity for any purpose in connexion with the Defence Force, or in any factory established in pursuance of this Act; . . . (*f*) Subject to the provisions of this Act do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State."

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a declaration that such operation of the factory was *ultra vires* the Commonwealth, and for an injunction :—

Held :—

(1) By *Gavan Duffy* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the operation of the factory for such purposes was authorized by the *Defence Act*, and was within the defence power of the Commonwealth Legislature.

The Commonwealth v. *Australian Commonwealth Shipping Board*, (1926) 39 C.L.R. 1, distinguished.

(2) By the whole Court, that the Attorney-General of a State has a sufficient title to invoke a provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents, and that the action was properly brought in the name of the State Attorney-General.

Attorney-General (*N.S.W.*) v. *Brewery Employees Union of New South Wales*, (1908) 6 C.L.R. 469, approved.

TRIAL of action referred to Full Court.

The Attorney-General for the State of Victoria, at the relation of the Victorian Chamber of Manufactures, brought an action in the High Court against the Commonwealth of Australia. The statement of claim was substantially as follows :—

1. The Victorian Chamber of Manufactures, the above-named relator, is a company duly incorporated in the State of Victoria in accordance with the provisions of the Victorian *Companies Act* 1915 as a company limited by guarantee. 2. The Commonwealth *Defence Act* 1903-1932 purports to authorize the Governor-General to establish and maintain factories for the manufacture of naval and military equipment and uniforms. 3. The Governor-General purporting to act under such authority has established and operated a clothing factory in Melbourne known as and hereinafter referred to as the Commonwealth Clothing Factory. 4. In the course of such operation, naval and military equipment and uniforms have been manufactured at the Commonwealth Clothing Factory and in addition thereto clothing has been manufactured and supplied to Commonwealth Government departments other than the department of Defence, and the business has been carried on of manufacturing and supplying clothing to the Government departments of the State of Victoria, municipal bodies constituted in the said State under its laws relating

to local government, and to other public utilities operating in the State and to other persons. 5. The business so carried on at the Commonwealth Clothing Factory has been carried on with and at the risk of the public funds of the Commonwealth to the prejudice (*inter alios*) of the public of Victoria. 6. The business so carried on at the Commonwealth Clothing Factory has been carried on in competition with the businesses of such members of the public of Victoria as have engaged in like business, including members of the above-named relator to the prejudice of (*inter alios*) the public and the members. 7. The carrying on of such business at the Commonwealth Clothing Factory is beyond the powers of the Governor-General under the Commonwealth *Defence Act* 1903-1932, or alternatively is beyond such powers in so far as clothing and uniforms have been made and supplied for purposes other than naval or military purposes or alternatively for departments of the Commonwealth. 8. If the Commonwealth *Defence Act* 1903-1932 should be construed as conferring on the Governor-General power to carry on such business, it is unauthorized by the Constitution, and is wholly *ultra vires* and void, or alternatively it is *ultra vires* in so far as it should be construed as conferring power to make and supply clothing and uniforms for purposes other than naval or military purposes, or alternatively to persons or bodies other than departments of the Commonwealth.

And the plaintiff claims :—

1. A declaration that the carrying on of such business at the Commonwealth Clothing Factory, or alternatively in so far as the making and supplying of clothing and uniforms for purposes other than naval or military purposes, or alternatively for persons or bodies other than departments of the Commonwealth is concerned, is beyond the powers of the Governor-General under the Commonwealth *Defence Act* 1903-1932 or at all. 2. Alternatively, a declaration that the Commonwealth *Defence Act* 1903-1932 in so far as it should be construed to authorize the carrying on of such business at the Commonwealth Clothing Factory, or alternatively in so far as it should be construed to authorize the carrying on of a business of making and supplying clothing and uniforms for purposes other than naval or military purposes or for persons or bodies other than

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departments of the Commonwealth is beyond the powers of the Constitution. 3. An injunction restraining the Governor-General, his servants and agents, or the defendant its servants and agents, from carrying on such business at the Commonwealth Clothing Factory. 4. That the plaintiff may have such further or other relief as the nature of the case may require, and that all necessary orders and directions may be made and given. 5. That the defendant may be ordered to provide for the costs of this suit.

By pars. 1 and 2 of its defence the defendant admitted pars. 1 and 2 of the statement of claim, and by pars. 3, 4, 7 and 8 did not admit or deny pars. 3, 4, 7 and 8 of the statement of claim. Otherwise the defence was in substance as follows :—5. It admits that the Commonwealth Clothing Factory was established with moneys appropriated according to law from the public funds of the Commonwealth, and that up to the year 1919 the factory was wholly or partly maintained by means of moneys so appropriated. Save as aforesaid it denies each and every allegation contained in par. 5 of the statement of claim. 6. It denies that the Commonwealth Clothing Factory has been carried on to the prejudice of the public of Victoria or of the members of the relator. It does not admit any of the other allegations contained in par. 6 of the statement of claim. 9. The said Commonwealth Clothing Factory was established by the Governor-General in the year 1911. From the date of the establishment thereof naval and military uniforms and equipment have been manufactured at the factory. Since the year 1913 clothing has been manufactured at the factory and supplied to Commonwealth Government departments other than the department of Defence. Since the year 1919 a comparatively small quantity of clothing has been manufactured at the factory and supplied to Government departments of the State of Victoria, to municipal corporations constituted in the State and to other public bodies constituted in the State. 10. In and since the year 1919 it has been deemed by the Governor-General to be necessary and desirable for the efficient defence and protection of the Commonwealth to maintain the Commonwealth Clothing Factory with such plant operating and such skilled staff employed as to enable it to be readily and quickly placed in full production in the event of war. Such of the

acts and things alleged in pars. 3 and 4 of the statement of claim as have in fact been done (if any) have been done for the purpose of so maintaining the Commonwealth Clothing Factory. 11. Such of the acts and things alleged in pars. 3 and 4 of the statement of claim as have in fact been done (if any) have been done publicly over a long period of years, and the delay and acquiescence of the plaintiff and his predecessors in office and of the relator have disentitled the plaintiff and the relator to the relief claimed in this action. 12. The Government of the State of Victoria has been itself a party to many of the acts and things alleged in pars. 3 and 4 of the statement of claim. 13. Neither the plaintiff nor the relator has or is alleged by the statement of claim to have sufficient interest in the matters alleged to maintain this action. 14. There is no power in this Court to grant the relief claimed against the Commonwealth in this action. 15. No facts are alleged in the statement of claim which would, if true, entitle the plaintiff or the relator to the relief claimed in this action.

The plaintiff joined issue on the defence. The following mutual admissions of fact were agreed upon by the parties:—

1. The above-named relator The Victorian Chamber of Manufactures (hereinafter called "the relator") is a company incorporated in the State of Victoria under the provisions of the *Companies Act* 1915 of the said State as a company limited by guarantee. (A copy of the memorandum and articles of association of the relator was exhibited hereto.) 2. The members of the relator corporation include many persons and companies who carry on in Victoria the business of manufacturing clothing. Such members and other Victorian manufacturers are and have at all times material been engaged in manufacturing most of the classes of clothing referred to in par. 32 hereof. 3. The Governor-General of the Commonwealth in the year 1911 established a clothing factory in Melbourne known as the Commonwealth Government Clothing Factory (hereinafter referred to as "the clothing factory"). 4. The clothing factory was established as a result of the presentation of a report of a committee representing the Defence and Postmaster-General's departments of the Commonwealth of Australia which had been appointed in 1909, and which in such report recommended the establishment of a factory to

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manufacture and supply clothing to fulfil the requirements of both departments. 5. In February 1911 a manager of the clothing factory was engaged, and an agreement relating to his employment was signed by him and by the Minister of Defence on behalf of the Commonwealth. Also a site for the clothing factory was selected and acquired at Miles Street, South Melbourne, at the rear of the Victoria Barracks. By the month of November 1911 the clothing factory was ready to start operations, and a few cutters were at that time engaged. By the month of January 1912 the clothing factory was in full operation. Because of the inauguration about this time of the system of universal military training of Citizen Forces, there was from the outset a heavy demand on the clothing factory for military clothing. 6. Because of this demand for military clothing, the operations of the clothing factory during the year 1912 and the first half of the year 1913 were confined to the manufacture and supply of naval and military equipment and clothing, but in the financial year beginning on 1st July 1913 the clothing factory was able to undertake, and did undertake and execute, orders for the Postmaster-General's department. 7. From the beginning of the operations of the clothing factory it was found by comparison of factory costs with the prices paid to contractors for garments similar to those manufactured and supplied by the clothing factory that there was a substantial saving to the Commonwealth from the establishment of the clothing factory. 8. Upon the outbreak of war in 1914 immense quantities of clothing and equipment were needed to meet the requirements of the naval and military forces of the Commonwealth, and in consequence there was a great increase in the output of the clothing factory. 9. At the outbreak of war the contract prices for soldiers' jackets purchased from the trade ranged up to 25s. each. As the result of information and experience gained from the operations at the clothing factory, the price was fixed at 19s. per garment for all such jackets purchased from the trade. Actually the price paid by the Defence department to the clothing factory for such jackets was 18s. and 3d. per jacket, and this price included an allowance of 9 per cent for profit. A similar position existed in relation to all other military garments during the time of the war. 10. Up to the end of the financial year beginning on 1st July

1918, the clothing factory supplied only requirements of the Defence and other departments of the Commonwealth, but thereafter orders for articles were accepted from State departments and services and from State organizations of a public or semi-public character, in cases where the manufacture of such articles would not require the installation or acquisition of additional machinery and such manufacture could be profitably carried on. This policy was up to the end of the financial year 1929-1930 applied only to tramway and municipal bodies and other public utilities (apart from small orders in the financial years 1923-1924 and 1928-1929), but after the end of the financial year 1929-1930 was extended to orders from the other organizations and persons mentioned in sub-pars. (*d*) and (*e*) of par. 30 hereunder. 11. The policy aforesaid was adopted because, the war having ended, the demand for naval and military clothing was very greatly reduced, and it was deemed by the Governor-General to be undesirable to reduce the plant and staff of the clothing factory to dimensions sufficient to deal only with the peace-time demand for naval and military clothing and clothing for other departments of the Commonwealth. 12. There is, in normal times, a substantial amount of unemployment in the clothing manufacturing industry. 13. Before the establishment of the clothing factory, almost the whole of the Victorian requirements of departments, services, bodies and persons such as are referred to in par. 30 hereof were supplied by Victorian manufacturers. 14. Exhibited hereto was a statement showing the value of goods supplied by the clothing factory to the Defence department, to other Commonwealth departments, to Government departments of the State of Victoria, to tramway and municipal bodies in Victoria and other public utilities, and to other organizations and persons respectively in each financial year from the inauguration of the clothing factory up to and including the financial year ending on 30th June 1933. 15. A further statement exhibited hereto showed orders received from departments of the Commonwealth other than the department of Defence and Government departments of the State of Victoria and other bodies and persons respectively in the financial year ended 30th June 1933 and in the period from 1st July 1933 to 31st March 1934.

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16. The financial affairs of the clothing factory have been conducted in manner set out in pars. 17 to 21 (both inclusive) hereof. 17. On or about 21st August 1911 the Treasurer of the Commonwealth approved of the establishment of a trust fund under the title of "clothing factory account," the purposes of such account being defined as "payment of salaries, wages, and other expenses in connection with the manufacture of clothing." 18. The Commonwealth *Appropriation Act* for the financial year beginning on 1st July 1911 and ending on 30th June 1912 and each *Appropriation Act* of the Commonwealth for each subsequent financial year up to and including the financial year ending on 30th June 1930 contained votes for the erection, equipment or maintenance of the clothing factory. Since the end of the financial year ending on 30th June 1917, the Parliament of the Commonwealth has not voted any public moneys for buildings and works or for plant or for upkeep of the clothing factory, and since the end of the financial year ending on 30th June 1930 no public moneys whatever have been voted by the Parliament of the Commonwealth in respect of the clothing factory. 19. A statement exhibited hereto showed the amounts voted by the Parliament of the Commonwealth in each financial year in respect of the clothing factory, and shows also the number of persons employed at the clothing factory at the end of each financial year. The whole of each amount so voted would not necessarily be expended during the financial year for which it was voted, and a further statement exhibited hereto showed the actual expenditure of public moneys in every year in respect of the clothing factory since its inception. Such further statement included all expenditure of any kind of public moneys in respect of the clothing factory, including salaries and wages of staff and employees, expenditure on land and buildings, plant and materials, and on repairs such as painting, and on maintenance such as power supply, gas and water, but it did not include the expenditure made out of earnings of the clothing factory referred to hereunder. The statement also showed the amount of moneys transferred to the Treasury department at the close of each financial year in cash, such moneys in effect representing surplus money accumulated by the clothing factory during the year and not required any longer. 20. The clothing factory ceased to be a charge on the public

funds of the Commonwealth in the financial year commencing on 1st July 1919, even after allowance has been made for payment of interest on moneys advanced to the clothing factory out of public funds of the Commonwealth, and from that time onwards the clothing factory has been kept up, maintained and carried on entirely out of its own earnings. The clothing factory has continued to pay interest to the Treasury on money it has been using, although that money since the financial year beginning on 1st July 1919 represents its own earnings. 21. The moneys which the clothing factory is using out of accumulated profits retained by the clothing factory are represented by land, buildings, plant, stock, debtors and cash to the amount of approximately £56,000. 22. The net financial result of the operation of the clothing factory as on 30th June 1933 after accumulating the whole of the financial transactions over the period since its inauguration is summarized hereunder :—

Actual expenditure of public moneys	£111,190
Transferred to the Treasury department of the Commonwealth in cash	£415,797
Cash payments to the said Treasury department in excess of actual expenditure of public moneys	£304,607

23. A statement exhibited hereto showed the profit or loss made by the clothing factory in each financial year since its inauguration. 24. The clothing factory does not pay any income tax or land tax or municipal rates. It does not pay ordinary rates to the Melbourne and Metropolitan Board of Works, but by agreement with the Board payments are made as follows :—All water consumed according to meter readings is paid for at the rate of 1s. per 1,000 gallons, less an allowance of £2 per annum for water included in the sanitary charge. Sanitary charges and charges for water for fire service are paid on the basis of the factory being assessed at an annual value of £300, a charge of 1s. in the £ being made on that valuation. Sales tax is paid by the clothing factory on all sales which would be subject to sales tax if made by a private trader. Except in the case of goods supplied to Commonwealth departments, the price charged is sufficient to cover land and income taxes and rates if these were payable. 25. The procedure adopted in connection with the revenue and

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expenditure of the clothing factory is as follows :—All receipts and expenditure of moneys having relation to its transactions are entered in the trust fund " Clothing Factory Account " referred to in par. 17 hereof. The clothing factory is financed by means of an advance held at the Treasury department of the Commonwealth. When the clothing factory expends moneys on wages or materials or services, a voucher covering such moneys is passed through the Treasury department which thereupon pays the account and debits the clothing factory. Interest on such moneys is thereupon immediately charged to the clothing factory. When the clothing factory supplies goods, an account is rendered against the customer, and on receipt of the customer's cheque such cheque is paid into the Commonwealth Public Account in the Commonwealth Bank of Australia, and the Treasurer is immediately notified accordingly. The current account of the clothing factory at the said Treasury department is credited and interest thereupon ceases to be payable on the amount of such cheque. Interest is actually calculated on the daily balance of the Treasury account against the clothing factory. 26. The charges made for goods manufactured at the clothing factory are based upon the actual expenditure of the clothing factory on wages and materials necessary to satisfy the order, plus a percentage charge to cover all overhead expenses, including payment of the interest previously referred to and also a charge to cover depreciation of buildings and plant. 27. The requirements of Commonwealth departments are supplied at a little above cost price, while a moderate profit is sought in transactions with State Government departments and public and semi-public bodies. The profits of recent years are particularly low, because extensive repairs to the clothing factory were undertaken in those years, the moneys expended on such repairs being provided out of earnings of the clothing factory. 28. The methods adopted in obtaining orders from customers other than departments of the Commonwealth are described hereunder. (*a*) In the case of State Government departments, the clothing factory submits a tender on the prescribed form, and in due course the clothing factory is notified by the State department whether or not its tender is accepted. If its tender is accepted, the clothing factory is not required to enter into a contract. (*b*) In the case of the Victorian

Railways department and the Melbourne and Metropolitan Tramways Board, the clothing factory submits a tender on the prescribed form, and in due course the clothing factory is notified whether or not its tender is accepted. If its tender is accepted by the Victorian Railways department, the manager of the clothing factory is invited to sign a contract embodying the tender. (*c*) In the case of other parties, a quotation is given by the clothing factory, and an order is given if the quotation is satisfactory. In many cases falling within (*a*) and (*b*) above in which the clothing factory obtains the order, other Victorian manufacturers, including members of the relator, have submitted unsuccessful tenders to the department or body concerned. 29. The financial affairs of the clothing factory are recorded in the same manner as in the case of commercial businesses. Exhibited hereto was a copy of the balance-sheets and accounts of the clothing factory for the financial years 1929-1930 to 1932-1933 both inclusive, and of the report of the Munitions Supply Board for the financial years 1929-1930 and 1930-1931 (this being the last report which has to date been printed). The clothing factory was, during the period covered by the report, working to the full capacity of the staff actually employed and the plant actually used, but substantially below the maximum capacity of the premises and all the plant. The meaning of the phrase " nucleus basis " as applied to the other factories mentioned in the report is that in the latter different sections of the plant would be utilized for different purposes from time to time, but no section of the plant would be working all the year round. Thus, for example, the staff would be engaged at one period in the year on the manufacture of a particular explosive with one set of plant, and at another period the same staff would be engaged on the manufacture of another explosive with a different set of plant. 30. The departments and services of the Commonwealth, Government departments and services of the State of Victoria and other public and semi-public bodies to whom goods have been supplied by the clothing factory are set out hereunder :—(*a*) Persons and public bodies to whom naval and military uniforms and equipment have been supplied :—The Naval Board, for the Royal Australian Navy and the Auxiliary Naval Forces; the Military Board, for the Australian Military Forces; the Air Board, for the

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Royal Australian Air Force and the Citizen Air Force; officers and other ranks of the Naval, Military and Air Forces; the Administration of the Mandated Territory of New Guinea. (*b*) Commonwealth Government departments and services other than the department of Defence to which clothing has been supplied: Governor-General's Staff, Postmaster-General's department, department of Trade and Customs, department of Health, Commonwealth Government Line of Steamers, Commonwealth railways, Commonwealth police, Commonwealth lighthouse services, Commonwealth Government factories, Commonwealth Bank. (*c*) Government departments and services of the State of Victoria to which clothing has been supplied:—Victorian railways, Penal establishments, Victorian police, Hospitals for insane, Children's Welfare department, Aborigines department, Agricultural Department, State Dental Centre, Victorian Health Department, Veterinary Research Department. (*d*) Other public and semi-public bodies of the State of Victoria and other institutions and bodies to which clothing has been supplied:—Melbourne and Metropolitan Tramways Board, Melbourne City Council, Ballarat and Bendigo Tramways Board, Metropolitan Fire Brigade, State Electricity Commission. (*e*) Other institutions and bodies and persons including the following:—Melbourne Aquarium, Zoological Gardens, Boy Scouts Association, Sea Cadet Corps, Victorian Civil Ambulance, St. John Ambulance Association, Lost Dogs' Home, Royal Automobile Club of Victoria, Commonwealth Oil Refineries. In addition there have been a very few purchases by individual persons. 31. The total of purchases by "individual persons" would not in any year exceed £100 in value. Typical examples are as follows:—Officers of sea-going vessels (usually members of the Naval Reserve), individual returned soldiers not now serving, individual members of the Boy Scouts' Association, livery for servants of his Excellency the Governor-General, members of the Melbourne Walking Club (khaki shirts and shorts), drivers of the Lost Dogs' Home, individual members of ambulance associations. 32. The classes of clothing manufactured to the order of the departments, bodies and institutions referred to in par. 30 hereof include coats, trousers, vests, overcoats, hats, caps, helmets, badges and insignia in uniform patterns appropriate to the purposes of the

ordering party; sports, gymnastic and recreational clothing for the Defence Forces; pyjamas, shorts, underwear and hospital clothing for members of the Defence forces; bedding and bed-linen for similar purposes and linen for use in the Commonwealth offices; civilian clothing for inmates of Victorian State institutions such as hospitals for insane and aborigines' homes and for persons in the care of the State, such as aborigines and boarded-out children; civilian clothing for cadets of the Royal Naval and Military Colleges; overall clothing for postal, health, dental and laboratory officials, and Commonwealth factory employees; clothing for natives in the Pacific Islands; tents and canvas goods for Naval, Military and Air forces and Postal and Commonwealth departments; mail-bags for the Postal Department; the manufacture of anything composed of materials of a textile nature required by the Commonwealth departments. 33. The plant in use and in reserve in the clothing factory was shown by a summary which was set out. The plant is similar to that in use in many private manufacturing establishments in Victoria. 34. The staff employed and considered by the department of Defence to be necessary to maintain the clothing factory in efficient operation with economical administration was set out and totalled 89. In addition, there are nearly 200 employees engaged as patent machinists (for special types of machines) and machinists and finishers on coats, vests and trousers. A large proportion of the total staff has been employed in the clothing factory for years, and has become expert in the production of uniform clothing. Included is a number of juniors in training. 35. Annual reports of the clothing factory have been printed and presented to Parliament, and members of the public are at liberty to inspect copies of such reports. Copies of such reports are also supplied on application to any member of the public without charge. Tenders submitted by the clothing factory to the Tender Board of the State of Victoria are, when accepted, publicly notified in the *Government Gazette* of Victoria. 36. The plaintiff and the defendant in this action, for the purposes of this action only, hereby mutually admit the several facts respectively above specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this action, provided that these admissions are made for the purposes of this action only,

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and are not admissions to be used against either the plaintiff or the defendant on any other occasion, or by anyone other than the plaintiff and the defendant. 37. It is agreed that the Court shall on the trial of this action be at liberty to draw inferences of fact from the foregoing statements.

Starke J. ordered that the matter be argued before the Full Court on the pleadings, mutual admissions and Statutory Rule No. 210 of 1926.

Ellis and *Smith*, for the plaintiff. Sec. 63 of the *Defence Act* enables factories to be established for the purpose of defence. It is trading in Victoria outside the Commonwealth area that is complained of. The supplying of naval and military uniforms and Commonwealth department uniforms is not attacked. Any act done by the defendant outside that is *ultra vires* and void. It is a question of the construction of the *Defence Act*. If the Act is construed in the way the defendant contends, it is *ultra vires*, or if not, an unlawful executive act has invaded the State area. The admissions do not support par. 10 of the defence, which says that it is necessary for the defence powers. The trading has been carried on without any reference to defence at all. The factory was properly established at its inception, but was carried on in excess of power. Factories are to be maintained for the manufacture of naval and military uniforms and are to be limited to that purpose (*Defence Act* 1903-1932, sec. 63 (1) (*da*) and (*f*)). Sub-sec. (*f*) does not extend a power which has been expressly limited in the same section, namely, for the manufacture of naval and military uniforms. Sub-sec. (*f*) is not a legislative provision for defence, but relates only to matters deemed by the Governor-General to be necessary or desirable for defence. There is no legislative power which justifies this extra-Commonwealth trading (the Constitution, secs. 51 (VI.), (XXXIX.), 52 (II.), 68, 69, 70, 114, 119). The question is : Is trading in Victoria so closely connected with the defence power that it is, in effect, carrying out such power, or is it so remote that no reasonable person could say it was so connected ? The latter is the correct conclusion to be drawn in the present case.

[EVATT J. referred to the *Acts Interpretation Act* 1901-1932, sec. 15A; *Pirrie* v. *McFarlane* (1); *Toronto Electric Commissioners* v. *Snider* (2); *Mackay* v. *Attorney-General for British Columbia* (3).

[STARKE J. referred to *Attorney-General* (*Ex relatione Miles*) v. *Shire of Frankston and Hastings* (4).]

The Statutory Regulations now dealing with this factory are contained in the Munitions Supply Regulations, Statutory Rules 1926, No. 210, rr. 1, 4, 5, 17. Maintaining a trained staff of clothing manufacturers has no real connection with military efficiency (*The Commonwealth* v. *Australian Commonwealth Shipping Board* (5); *Farey* v. *Burvett* (6)). The connection between national efficiency in time of war and the carrying on of the clothing factory as a going concern is too remote (*Dundee Harbour Trustees* v. *D. & J. Nicol* (7)).

Denchar v. *Gas Light and Coke Co.* (8) sets up a standard by which the acts in question can be judged. This is both an excess of Commonwealth power and an invasion of State power. There is no real and substantial relation between the acts complained of and the exercise of the defence power (*Huddart Parker Ltd.* v. *The Commonwealth* (9)). If the Commonwealth can exercise the powers it is here exercising, there can be no means of preventing it from invading all spheres of trading activity. The onus is on the Crown in right of the Commonwealth to show that it can trade, not on the plaintiff to show that it can not. The prerogative in Australia is not in any way the same as the prerogative in England. If the *Defence Act* authorizes the establishment of a factory and authorizes the making of articles for naval and military equipment, and if the articles are made for some other purpose, the exercise of the power is bad. The purpose for which this power is given is so much a part of the power that any variation from that purpose renders the whole exercise of the power invalid. Sec. 63 (*da*) limits the purpose for which the factory can be established; trading outside those limits renders the exercise of the power invalid (*Municipal Council of*

(1) (1925) 36 C.L.R. 170.
(2) (1925) A.C. 396.
(3) (1922) 1 A.C. 457.
(4) (1935) V.L.R. 5.
(5) (1926) 39 C.L.R. 1, at p. 8.
(6) (1916) 21 C.L.R. 433, at p. 441.
(7) (1915) A.C. 550, at pp. 556, 561, 567.
(8) (1925) A.C. 691, at pp. 695, 699.
(9) (1931) 44 C.L.R. 492.

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Sydney v. *Campbell* (1); *Jones* v. *Metropolitan Meat Industry Board* (2); *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (*Wool Tops Case*) (3); *The Stockport Waterworks Co.* v. *Mayor &c. of Manchester* (4)). The Attorney-General of a State may sue to restrain an *ultra vires* act of the Commonwealth within the territory of that State, or an act affecting the citizens of that State. This is a case of an invasion of the State area, and, consequently, the Attorney-General can sue. On the other hand, if the breach of a Commonwealth statute does not involve an invasion of the State area, the Attorney-General of a State may not be able to complain of the breach of the Federal law. It depends on the nature of the breach whether the Attorney-General for a State can sue. If the act infringes the area reserved to the State he would have the right to sue.

Sir Edward Mitchell K.C., and *Latham* K.C. (with them *Fullagar* K.C.), for the defendant. Statutory Rule No. 210 of 1926 makes specific provision for what has been done here. No Order in Council exists or is requisite under sec. 63 (*f*) of the *Defence Act* (*The Commonwealth* v. *Colonial Ammunition Co.* (5); *Mackay* v. *Attorney-General for British Columbia* (6)). *Auckland Harbour Board* v. *The King* (7) is not applicable because of sec. 7 of the *Defence Act*, and sec. 6 of the *Naval Defence Act* 1910-1912. Parliament has evinced a determination that nothing under the Act should make the Commonwealth liable, and generally that Parliament should retain control over the administration (*Attorney-General* (*N.S.W.*) v. *Brewery Employes Union of New South Wales* (*Union Label Case*) (8); *D'Emden* v. *Pedder* (9), affirmed in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (10)). Sec. 68 of the Constitution vests in the Governor-General the command in chief of the naval and military forces of the Commonwealth. Sec. 62 provides for a Federal executive council to advise the Governor-General. Secs. 68 and 62 must be read together (*Anson, Law and Custom of the*

(1) (1925) A.C. 338.
(2) (1925) 37 C.L.R. 252.
(3) (1922) 31 C.L.R. 421.
(4) (1863) 7 L.T. N.S. 545.
(5) (1924) 34 C.L.R. 198, at p. 224.
(6) (1922) 1 A.C. 457.
(7) (1924) A.C. 318.
(8) (1908) 6 C.L.R. 469.
(9) (1904) 1 C.L.R. 91.
(10) (1920) 28 C.L.R. 129, at pp. 154, 156.

Constitution, 3rd ed. (1908), vol. II., pp. xviii., xix.). Sec. 68 creates an analogous position to that existing in England. That section gives the Governor-General the prerogative power as commander in chief (*Quick & Garran, the Annotated Constitution of the Australian Commonwealth* (1901), p. 713; *Anson, ibid.*, vol. II., p. 206). There are at least twelve recognizable functions similar to those exercised by the Commander-in-chief in England. The Governor-General as Commander-in-chief under sec. 68 had power to exercise executive functions sufficient to control the clothing factory. Some executive power is given to the Governor-General, and that cannot be taken away by the legislature. If the executive power is exercised and is challenged, it can be justified under any power which exists (*New South Wales* v. *The Commonwealth* [*No.* 1] (1)). This clothing factory was established under the *Defence Act*, and is conducted under statutory regulations. The powers of the Governor-General as Commander-in-chief can be ascertained by reference to the powers of the Commander-in-chief in England. The Governor-General as Commander-in-chief has to act constitutionally. The powers of the Commander-in-chief in England are stated in *Halsbury, Laws of England*, 1st ed. (1909), vol. VI., pp. 418, 419; *Anson, Law and Custom of the Constitution*, 3rd ed. (1908), vol. II., p. 205; *Oxford English Dictionary*, vol. II., p. 669). When the factory is established under sec. 63 (*da*), sub-sec. (*db*) gives power to do the acts here complained of. The factory having been validly established under the *Defence Act* is validly carried on under the executive power. No power is given under the *Judiciary Act* to grant an injunction against the Commonwealth such as is given under that Act against a State. There is a distinction in the Constitution between the Governor-General in Council and the Governor-General. It is as Commander-in-chief under sec. 68 that the control of forces outside the territorial limits of the Commonwealth is derived (*Kingston* v. *Gadd* (2); *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (3); *Macleod* v. *Attorney-General for New South Wales* (4); *Attorney-General for Canada* v. *Cain* (5); the *Defence Acts* 1903, No. 20, sec.

(1) (1331) 46 C.L.R. 155.
(2) (1901) 27 V.L.R. 417.
(3) (1903) A.C. 471.
(4) (1891) A.C. 455.
(5) (1906) A.C. 542.

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48, 1904, No. 12; 1917, No. 36, sec. 3, 44, 120A; *Army Act* 1881, 44 & 45 Vict. c. 58, sec. 189.

Latham K.C. The facts show that it was a proper exercise of authority for the purpose of keeping an efficient staff (*Audit Act* 1901-1926, secs. 60, 61, 62A). If there is a permitted activity, the extent of the staff is determined by possible military necessity. It cannot be said that the activities of this factory have no conceivable connection with defence matters. It is necessary to keep the minimum staff in work if they are to maintain their efficiency. If that be so, there is authority for the making of the uniforms, and the only matter that comes in question is the disposal of the uniforms when made. In the judgment of the person in control this was the only method which could be followed to keep the factory efficient. If it is necessary to employ a certain number of men to run an efficient factory, and if that number of men can supply more than the number of uniforms required, the Commonwealth is entitled to keep the men in employment by making garments which are sold to the public. On the evidence the position is that the Government adopts the opinion of its advisers that the maintenance of the factory at its present extent was necessary for efficiency. That is a matter for the Government and not for the Court. The factory then had to be kept at work. Then the goods having been produced must be disposed of. This is not a case of tort or breach of contract, and it is not alleged that there is any interference with the right of any individual in the community. Where a right is infringed or threatened the Courts may interfere, but there is no such suggestion in this case. There is no rule that a State Attorney-General has a duty or a right to see that Commonwealth officers observe Commonwealth statutes. Where there is a wrong the law will enforce a remedy, but there is no wrong in this case (*Attorney-General (N.S.W.)* v. *Brewery Employes Union of New South Wales* (*Union Label Case*) (1)). The effect of sec. 15A of the *Acts Interpretation Act* is that Federal statutes should be read down so as to be within the power conferred. In the *Union Label Case* (2), the majority of the Court founded their judgment on the ground, amongst others, that the legislation was

(1) (1908) 6 C.L.R. 469.

(2) (1908) 6 C.L.R., at pp. 497-500, 519.

beyond the powers of the Commonwealth, and there were persons injured who were represented by the Attorney-General. The Attorney-General for the State has no authority to maintain this action, as he has no interest in the subject matter of the dispute (*Union Label Case* (1)). That case is distinguishable, but if it is not it should be reversed. Under sec. 75 (III.) of the Constitution, the High Court has jurisdiction "in all matters" "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party." This is not a "matter" within the meaning of that section as interpreted by the Court (*South Australia* v. *Victoria* (2)). There is no violation of any positive law (*The Commonwealth* v. *New South Wales* (3)). The plaintiff alleges no right in this action, and the whole proceeding is outside legal conception. No State legislative, executive or judicial power has been infringed, and, therefore, there is no matter which can be brought up by any Attorney-General. There is power under Order IV., r. 1 to make a declaration in a matter which is properly brought, but the Court has a discretion whether it will make a declaration or grant an injunction (*Rules of the Supreme Court* (Eng.), Order XXV., r. 5; *Dysart (Earl)* v. *Hammerton & Co.* (4), approved on this point in *Hammerton* v. *Dysart (Earl)* (5)). The Government of Victoria has been dealing with the clothing factory in articles not made for the Commonwealth forces. Where the State of Victoria has been leading us on, it cannot be heard to complain of acts in which it is taking part itself. The Commonwealth Government is entitled to do what it is doing: if not, there is no legal remedy, but only a political one. Secs. 33 and 63 of the *Defence Act* are very wide and general. The Governor in Council has power to make regulations to establish the factory, and also to carry it on (*The Commonwealth* v. *Colonial Ammunition Co.* (6)). Sec. 63 does not require an Order in Council.

[STARKE J. referred to *New South Wales* v. *Bardolph* (7).]

The Commonwealth v. *Australian Commonwealth Shipping Board* (8), being in the form of a dilemma, is not a binding authority on

(1) (1908) 6 C.L.R., at pp. 498, 550, 552.
(2) (1911) 12 C.L.R. 667.
(3) (1923) 32 C.L.R. 200, at p. 204.
(4) (1914) 1 Ch. 822, at p. 838.
(5) (1916) 1 A.C. 57, at pp. 64, 65.
(6) (1924) 34 C.L.R., at pp. 219 *et seq.*
(7) *Ante*, p. 455.
(8) (1926) 39 C.L.R. 1.

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the constitutional point. When the express terms of the Constitution are looked at, it will be found that there was the requisite power in the executive government of the Commonwealth. This is a different position from that of the Shipping Board. The definition of the powers of the Commonwealth Parliament does not limit the executive powers of the Commonwealth at all (Constitution, secs. 3, 7, 9, 10, 51, 52). The legislative power depends on a specific grant of power, so with the judicial power, but the executive power is assumed, and it is for those who allege prohibitions to find them; therefore, it can do what it is not forbidden to do. This is recognized by secs. 61, 62, 69 and 70 of the Constitution. In fact the first Commandant claimed to be responsible only to the Governor-General personally, and it was necessary to amend the *Defence Act* by substituting the present sec. 28 constituting the Council of Defence and the Military Board.

[EVATT J. referred to *New South Wales* v. *The Commonwealth* (1).]

The obligation created by sec. 119 of the Constitution to protect the States from invasion attached before there was any Federal legislation or any *Defence Act*.

[EVATT J. referred to *Bonanza Creek Gold Mining Co.* v. *The King* (2).]

The Government obtains the power over external affairs under sec. 61 of the Constitution. Its powers are not limited by the mention of Federal powers in sec. 51 (XXIX.). The execution and maintenance of the Constitution is a very wide matter (*The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (*Wool Tops Case*) (3)).

[STARKE J. referred to *Attorney-General for Dominion of Canada* v. *Attorney-General for Province of Ontario* (4).]

There must be an appropriation, but that is the only control (*Kidman* v. *The Commonwealth* (5)). Secs. 81 and 83 of the Constitution are an effective grant of legislative power in regard to finance (*Salmond* on *Jurisprudence*, 8th ed. (1930), pp. 139, 248 *et seq.*); *Coomber* v. *Justices of Berks* (6)). There is no obligation on the

(1) (1915) 20 C.L.R. 54.
(2) (1916) 1 A.C. 566, at p. 580.
(3) (1922) 31 C.L.R., at pp. 431, 437.
(4) (1898) App. Cas. 247.
(5) (1925) 37 C.L.R. 233.
(6) (1883) 9 App. Cas. 61.

executive to prove affirmatively that there is a power, as there is in the case of the legislature and the judiciary. If a State Government were to open a business and money were required, the operation would be lawful, because there is nothing to prohibit this being done. The same is the position with the Commonwealth. The whole war prerogative is vested in the Commonwealth (Constitution, secs. 114, 119, and see also secs. 53, 54, 56, 82, 83, 87, 89 and 93). Where it is desired to prevent Parliament appropriating money, it is done as in sec. 116 in the case of religion. Otherwise the matter rests on political sanctions (*Massachusetts* v. *Mellon*; *Frothingham* v. *Mellon* (1); *Anderson* v. *The Commonwealth* (2)). The matter is only justiciable in this Court if there is an infringement of a legal right, but there is here no damage to any individual (*The Report of the Royal Commission on the Constitution* (1929), p. 137).

Ellis and *Smith*, in reply. First, there is no executive power outside sec. 63 of the *Defence Act* to warrant the carrying on of the factory. On the decided cases this point is concluded against the Commonwealth. The words " extends to " in sec. 61 of the Constitution mark the outside limitation of the power conferred as the ultimate bound of that power. The words " maintenance of this Constitution " in sec. 61 refer to the respective rights and duties of the States and the Commonwealth as laid down in the Constitution. In sec. 81 the words " the purposes of the Commonwealth " do not cover this position. The Commonwealth is defined in clause 6 of the covering clauses. If the powers of the Commonwealth are to be read as widely as is contended for, the powers of the States will be relegated to a very subordinate position (*The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (*Wool Tops Case*) (3); *R.* v. *Kidman* (4); *The Commonwealth* v. *Colonial Ammunition Co.* (5); *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (6)). The prerogative has been curtailed by sec. 63 of the *Defence Act* (*Attorney-General* v. *De Keyser's Royal Hotel* (7)). Secondly, the plaintiff has a right

(1) (1923) 262 U.S. 447, at pp. 479, 480, 484, 485, 488.
(2) (1932) 47 C.L.R. 50, at p. 52.
(3) (1922) 31 C.L.R., at pp. 431, 432, 441, 453, 454, 462.
(4) (1915) 20 C.L.R. 425, at pp. 440, 441.
(5) (1924) 34 C.L.R., at pp. 210, 222.
(6) (1918) 25 C.L.R., at pp. 54, 55.
(7) (1920) A.C. 508, at p. 526.

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to sue and is interested in the relief claimed. Any State Attorney-General has a right to come to Court to complain of the intrusion of the Commonwealth into the State sphere. No State income or land tax is paid by this factory, and, therefore, the State Attorney-General may sue. The State can establish a factory which may conflict with this commercial enterprise. The Constitution makes provision for this Court having control of such matters as this. In case of an encroachment of Commonwealth legislation, the High Court has power to interfere (*Union Label Case* (1); *Williams* v. *Attorney-General for New South Wales* (2); *The Commonwealth* v. *Queensland* (3)). The last case puts unauthorized executive action on the same footing as unauthorized legislative action, and shows that the remedy for both is the same. This encroachment on State power is a tort (*The Commonwealth* v. *New South Wales* (4); *Victoria* v. *The Commonwealth* (5); *R.* v. *Turner; Ex parte Marine Board of Hobart*; *Tasmania* v. *The Commonwealth* (6); *Anderson* v. *The Commonwealth* (7); *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (8); *London County Council* v. *Attorney-General* (9); *Judiciary Act* 1903-1933, sec. 30).

Smith. This was a legislative trespass, and the Attorney-General for Victoria can sue (*Victoria* v. *The Commonwealth* (5); *R.* v. *Turner*; *Ex parte Marine Board of Hobart*; *Tasmania* v. *The Commonwealth* (6); *Ex parte Walsh and Johnson*; *In re Yates* (10); *Australian Railways Union* v. *Victorian Railways Commissioners* (11); *Huddart Parker Ltd.* v. *The Commonwealth* (12)). At all events this was a purported usurpation of authority which gives the Attorney-General for Victoria, in this case, a right of action.

Cur. adv. vult.

(1) (1908) 6 C.L.R., at p. 557.
(2) (1913) 16 C.L.R. 404, at pp. 414, 430, 431.
(3) (1920) 29 C.L.R., at pp. 4, 7, 11, 12.
(4) (1923) 32 C.L.R., at p. 205.
(5) (1926) 38 C.L.R. 399.
(6) (1927) 39 C.L.R. 411.
(7) (1932) 47 C.L.R., at p. 52.
(8) (1914) A.C. 237.
(9) (1902) A.C. 165.
(10) (1925) 37 C.L.R. 36.
(11) (1930) 44 C.L.R. 319.
(12) (1931) 44 C.L.R. 492, at p. 512.

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The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. All questions of law and fact arising in this action have been remitted to the Full Court for determination.

The Attorney-General for the State of Victoria sues the Commonwealth of Australia at the relation of the Victorian Chamber of Manufactures. As finally elucidated during the hearing, the plaintiff's complaint is that, although the Commonwealth Clothing Factory (situated in Melbourne, Victoria) is lawfully operating under sec. 63 (1) (*da*) of the *Defence Act* "for the manufacture of naval and military equipment and uniforms," the Commonwealth has not restricted its operations to such purposes, but, as alleged in par. 4 of the statement of claim, "clothing has been manufactured and supplied to Commonwealth Government Departments other than the Department of Defence and the business has been carried on of manufacturing and supplying clothing to the Government Departments of the State of Victoria, Municipal Bodies constituted in the said State under its laws relating to local government and to other public utilities operating in the State and to other persons."

The plaintiff alleges that these additional operations of the factory are not authorized by sec. 63 (1) (*da*) of the *Defence Act*, nor by sec. 63 (1) (*f*) thereof; and that, if and so far as such provisions purport to authorize the operations, they are *ultra vires* the Parliament of the Commonwealth, the relevant power of which is to legislate in respect of the "naval and military defence of the Commonwealth and of the several States." The plaintiff claims an appropriate declaration and injunction.

In the main, the defendant relies upon the contention that the additional operations of the clothing factory are authorized by the *Defence Act* (sec. 63 (1) (*f*)), and that such operations are within the power of the Parliament. It is also contended that the executive power of the Commonwealth Executive under sec. 61, and the special position of the Governor-General under sec. 68 as Commander-in-chief of the naval and military forces of the Commonwealth, of themselves constitute a sufficient authority to do what has been done. Objection is made to the plaintiff's title to sue for relief, and it is also said that, in any event, the Court should, in its discretion,

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refrain from giving any relief owing to the fact that the practices now objected to have been continued for a long time with the knowledge, and, in many cases, for the express benefit, of the State of Victoria. It is finally contended that the High Court has no jurisdiction to hear and determine the action.

This last objection should first be dealt with. The Constitution itself vests jurisdiction in the High Court in all matters in which the Commonwealth is a party (sec. 75 (iii.)). It was argued that there is no " matter " before the Court. But the claim of the plaintiff, like the defence of the defendant, is based entirely upon legal grounds, dependent upon the meaning and application of the Constitution, and of Commonwealth legislation. It is nothing to the point that the statement of claim may be demurrable, or that the defendant can produce a good answer in law to the claim, and that in the end the appropriate order of the Court should result in the dismissal of the action. A " matter " is none the less such because the defendant is entitled to succeed in resisting a plaintiff's claim, and we hold that the Court has jurisdiction.

Any objection based upon the plaintiff's title to sue necessarily disappears if it is held that the additional operations of the clothing factory are within the authority committed to the Governor-General by sec. 63 (1) (*da*) and sec. 63 (1) (*f*) of the *Defence Act*; for, in that event, the case of the Attorney-General of Victoria is resolved into a claim that, on a true interpretation of the statute, the provisions of the Constitution itself have not been observed. In our opinion, it must now be taken as established that the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents (*Attorney-General (N.S.W.)* v. *Brewery Employees Union of New South Wales* (1)).

In the present case, we are of opinion that a sufficient statutory warrant is to be found for all the operations of the clothing factory. By sec. 63 (1) (*da*) and sec. 63 (1) (*f*) the Governor-General is empowered, not only to " establish and maintain factories for the manufacture of naval and military equipment and uniforms," but

(1) (1908) 6 C.L.R. 469.

also, subject to the provisions of the Act, to " do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State." It appears that the Governor-General established the clothing factory at Melbourne as long ago as 1911. During the war of 1914-1918, " immense quantities of clothing and equipment were required to meet the requirements of the naval and military forces of the Commonwealth, and in consequence there was a great increase in the output of the clothing factory."

A changed policy was adopted at the end of the war when " orders for articles were accepted from State Departments and Services and from State organizations of a public or semi-public character in cases where the manufacture of such articles would not require the installation or acquisition of additional machinery and such manufacture could be profitably carried on."

The reason for the changed policy was that " the war having ended, the demand for naval and military clothing was very greatly reduced, and it was deemed by the Governor-General to be undesirable to reduce the plant and staff of the clothing factory to dimensions sufficient to deal only with the peace-time demand for naval and military clothing and clothing for other departments of the Commonwealth."

It need only be added that:—(1) The classes of clothing manufactured for other than immediate military and naval purposes are, for the most part, of a " uniform " character, appropriate to the purpose of the ordering party. (2) The bodies making use of the factory in this way include the Victorian railway and police services and other departments of State, the Melbourne Tramways Board, the Melbourne City Council, the Boy Scouts and Sea Cadets, and the Ambulance organizations. (3) The purchases by individual persons have been very few, not exceeding in value £100 in any year, and including, for instance, officers of sea-going vessels, usually members of the Naval Reserve. (4) A large proportion of the total staff has been employed in the factory for years, and has become expert in the production of uniform clothing.

Although no formal Order in Council was made for the purpose of authenticating the judgment and opinion of the Governor-General,

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we think it is clear that the Governor-General deemed it necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory, so as to be prepared to meet the demands which would inevitably be made upon the factory in the event of war. Therefore, the operations complained of by the plaintiff, so far as they are not authorized by sec. 63 (1) (*da*) of the *Defence Act*, are authorized by sec. 63 (1) (*f*) thereof.

This brings us to the question whether the legislative power in respect of defence is a sufficient warrant for the legislation so construed and so applied to the facts. It is obvious that the maintenance of a factory to make naval and military equipment is within the field of legislative power. The method of its internal organization in time of peace is largely a matter for determination by those to whom is entrusted the sole responsibility for the conduct of naval and military defence. In particular, the retention of all members of a specially trained and specially efficient staff might well be considered necessary, and it might well be thought that the policy involved in such retention could not be effectively carried out unless that staff was fully engaged. Consequently, the sales of clothing to bodies outside the regular naval and military forces are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm. In such a matter, much must be left to the discretion of the Governor-General and the responsible Ministers.

In these circumstances, we hold that the objections of the plaintiff, as far as they are based on the Constitution, should fail. The plaintiff relied upon the case of *The Commonwealth* v. *Australian Commonwealth Shipping Board* (1), where this Court held that an agreement made between the Australian Commonwealth Shipping Board and the Municipal Council of Sydney was beyond the powers of the former body. The *Commonwealth Shipping Act* 1923 had provided for the establishment of a shipping line under a board of directors called the " Australian Commonwealth Shipping Board," and made it a body corporate. The Board's general authority was defined by sec. 10 (*a*) of the Act as being " to carry on the general business of

(1) (1926) 39 C.L.R. 1.

a shipowner, and any business incidental thereto." The Board was also given power to carry out in respect of Cockatoo and Schnapper Islands "the business of manufacturer, engineer, dock-owner, shipbuilder and repairer, and any other business incidental thereto or to the said works and establishments" (sec. 14 (4)). The Board's agreement with the Municipal Council of Sydney was to supply, erect and maintain six turbo-alternator sets for the Council's power house at Bunnerong, the price agreed to being £666,605.

The case was determined upon demurrer, the Board alleging no facts tending to explain the relation, if any, between the carrying out of the contract and the Board's business either as shipowner under sec. 10 (*a*) or as engineer under sec. 14 (4). The Attorney-General of the Commonwealth granted his fiat to the relator, the New South Wales Chamber of Manufactures, with the sole object of determining whether the statutory power of the Board had been exceeded, and, otherwise than by the relator, the Commonwealth itself was not represented at the hearing of the demurrer. As the Board was not an organ of the Executive Government itself, the executive power of the Commonwealth was not relevant to the question in dispute. The decision does not contain a complete definition of the limits of the defence power, and the statement of the majority of the Court in relation to the defence power that "extensive as is that power, still it does not authorize the establishment of businesses for the purpose of trade and wholly unconnected with any purpose of naval or military defence" (1), does not assist the present plaintiff, because the purpose of naval and military defence has been impressed upon the operations of the clothing factory from the very commencement.

It follows that the action of the plaintiff fails and should be dismissed. It becomes unnecessary to enter upon a consideration either of the particular argument resting upon the executive authority conferred upon the Governor-General by secs. 61 and 68 of the Constitution, or of the grave question involved in the argument that sec. 81 of the Constitution itself enables the Commonwealth to appropriate moneys for any purpose deemed sufficient by the Commonwealth, quite irrespective of its relation to the legislative and executive

(1) (1926) 39 C.L.R., at p. 9.

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authority conferred upon Commonwealth organs by other sections of the Constitution.

The action should be dismissed with costs.

RICH J. This is a relator's action brought in the original jurisdiction of this Court in the name of the Attorney-General for the State of Victoria against the Commonwealth. The purpose of the proceeding is to obtain a declaration that in carrying on a clothing factory established by the Commonwealth, the making or supplying of uniforms and clothing is beyond the powers of the Executive in so far as persons outside the Commonwealth services are supplied. The clothing factory was established primarily for the purpose of supplying soldiers' and sailors' uniforms, and uniforms required in the civil services of the Commonwealth. The relator's contention is that, in the course of the operations, the factory cannot without an excess of power, supply the requirements of the States or of municipalities, or of other persons or bodies. The relator, the Victorian Chamber of Manufactures, obtained a fiat from the Attorney-General for the State of Victoria for the present proceedings, which arise, no doubt, out of a desire to suppress the competition of the factory, such as it is. An objection is taken on behalf of the Commonwealth that the action is incompetent, because the matters complained of afford no ground of action, even if the operations of the factory were to the extent alleged beyond the powers of the Commonwealth. In considering this objection, the fact that it is a relator's action is immaterial. When the Attorney-General's fiat has been obtained, the action in his name is as competent or incompetent as if it were brought *ex officio* by him. The question, therefore, is whether, assuming *ultra vires*, the Attorney-General of a State can maintain an action against the Commonwealth to obtain a declaration and consequential relief against the Commonwealth's *ultra vires* activity. In my opinion he can. To a great extent the question is settled by *Attorney-General (N.S.W.)* v. *Brewery Employes Union of New South Wales* (1) and *Tasmania* v. *Victoria* (2). In my own judgment (*ante*, p. 171) I said:—"In a matter of public right the Attorney-General sues

(1) (1908) 6 C.L.R. 469. (2) *Ante*, p.. 157.

on behalf of the public. There is no reason why his right to do so should be confined to matters of exclusively domestic concern. On the contrary, there is every reason in a Federal system that this principle should be applied to allow him to maintain proceedings to vindicate the rights conferred upon his public by a provision of the Constitution." If the Commonwealth Executive is engaged in trading operations in competition with the citizens of a State so that the public of the State are affected by acts of the Executive, and it appears that in so trading the Commonwealth is acting without any legal warrant because under the Federal system such activities could only be carried on by the State if the Crown is to pursue them at all, I think these principles apply. In the case supposed the citizens of the State are affected as such because the power exercisable in reference to them only by the State Government is assumed by the Federal Government. The Attorney-General of the State may properly represent them just as he would represent them in a unitary system if a statutory corporation exceeded its powers by a similar course of action. It was next said that even so the facts of the present case presented no matter within the meaning of the word as used in sec. 75 of the Constitution. This argument again assumed, as of course it must do, that the complaint of *ultra vires* is well founded. It is based upon the notion that the operations of the clothing factory can violate no right, that no one can have a claim of right to prevent them. Even if this were correct the argument would in my opinion involve a confusion, because whether a question amounts to a matter does not depend upon the legal plausibility of a claim of right made, but upon the making of it. When the Attorney-General of a State at the instance of relators claims to restrain the Federal Government from continuing a course of action it has adopted, it seems odd to say that the claim, because misconceived, is not a matter. If the Court did not agree that it was misconceived and acceded to the claim, it could hardly be said that it acted without jurisdiction. The real question in the case is whether the Commonwealth Executive is acting beyond its powers. It cannot be doubted that under the Constitution the legislative power of Parliament enables it to authorize the Executive to establish and conduct a clothing factory to supply all the needs of the Commonwealth Government, whether

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Naval and Military or Civil. As at present advised I am not prepared to accede to the argument that, without legislative power, the Commonwealth Executive can enter into business operations simply because it is a juristic entity, and in conducting business is not exercising governmental power over the subject. In the present case the factory was established pursuant to legislation of the Parliament, namely, secs. 63 and 64 of the *Defence Act*. These provisions do not, it need hardly be said, exceed the defence power. But how far does it extend ? It must be construed subject to the Constitution (see sec. 15A *Acts Interpretation Act* 1901-1933). So construed, does it extend to the use of the factory for requirements which are not strictly naval, military, civil or otherwise departmental ? I have no doubt that to fulfil these requirements must be the primary purpose of the factory. But it must be remembered that they are of a fluctuating character. All things naval and military have the possibility of war in view, and the nature of the factory cannot be determined by peace-time requirements. A doctrine exists in the case of trading corporations that, when for the purpose of their undertakings they must control property, premises or appliances, it is within their incidental powers to utilise them for purposes akin to and not inconsistent with the primary purpose of the corporation, and thus avoid the ill consequences of their being left vacant, idle and unemployed. (See *Brice* on *Ultra Vires*, 3rd ed. (1893), p. 135 ; *Simpson* v. *Westminster Palace Hotel Co.* (1).) The question how far this doctrine is to be pushed in relation to corporations is one of degree, and has excited some difference of opinion (*Forrest* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (2), and on appeal (3)). It illustrates an application of the general doctrine that things may be done which are fairly incidental or conducive to the purpose for which a power is enjoyed. On the whole I think we may apply it to the peculiar situation in which the Commonwealth Clothing Factory stands. The case was ordered to be argued before us on the pleadings, mutual admissions and exhibits thereto, and on the Commonwealth Statutory Rule No. 210 of 1926. It might, perhaps, have been more satisfactory if, for the purpose of our decision, the facts had been

(1) (1860) H.L. Cas. 712 ; 11 E.R. 608.
(2) (1861) 30 Beav. 40 ; 54 E.R. 803.
(3) (1861) 4 De G.F. & J. 126 ; 45 E.R. 1131.

investigated in detail on the trial of the action. In all cases where incidental powers are relied upon there is a danger of the cart being harnessed before the horse. In the present case, however, so far as I can see, there is no inversion of the main and incidental power, and the supply to outsiders is of a minor character, and subsidiary to the main purpose of keeping a factory in going order for naval and military purposes on a scale adequate for actual and potential demand. In my opinion the action should be dismissed upon the ground that in substance the complaint is ill-founded.

STARKE J. In 1911 the Commonwealth established a clothing factory in Melbourne, which is known as the Commonwealth Government Clothing Factory. The factory was originally established for the supply of uniforms and canvas goods for the Defence Forces of the Commonwealth. Its operations were gradually extended, and now cover the supply of uniforms and other goods to various departments and services of the Commonwealth, such as the Postmaster-General's Department, the Department of Trade and Customs, and the Railway and Police Departments. The outbreak of war in 1914 led to a great increase in the output of the clothing factory to meet the requirements of the naval and military forces of the Commonwealth. These extraordinary requirements ceased with the termination of the war in 1918. But it was deemed undesirable to reduce the plant and staff of the factory to dimensions sufficient to deal only with peace-time demands for naval and military clothing and clothing for other departments of the Commonwealth, so it began, in the financial year 1919-1920, to accept contracts and orders for clothing and other goods from the State of Victoria for services such as the Railways, the Police and Penal Departments, various public utilities of the State such as the Tramways and Fire Brigade Boards, the municipality of Melbourne, and institutions such as the Aquarium and Ambulance Service, and also from a few private persons.

The Parliament of the Commonwealth made various appropriations of public moneys for the establishment and upkeep of the clothing factory, but since June 1917 the factory has been entirely self-supporting, and its profits have been sufficient to refund to the

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Commonwealth the whole, or if not the whole, practically the whole of the moneys provided for its establishment and maintenance.

The present action is brought by the Attorney-General of the State of Victoria on the relation of the Victorian Chamber of Manufactures for a declaration that the business carried on in the clothing factory, or alternatively that the making and/or supplying of clothing and uniforms for purposes other than naval and military purposes or alternatively for persons or bodies other than departments of the Commonwealth, is beyond the powers of the Commonwealth, and also for a declaration that the Commonwealth *Defence Act* 1903-1932, in so far as it authorizes the carrying on of the clothing factory or in so far as it authorizes the carrying on of the business of making and/or supplying clothing for purposes other than naval and military purposes or for persons or bodies other than the departments of the Commonwealth, is beyond the powers of the Constitution, and for ancillary relief.

The jurisdiction of this Court to entertain such an action at the suit of a competent plaintiff is, I think, well settled (Constitution, sec. 75 (iii.); *The Commonwealth* v. *New South Wales* (1); compare, in the United States, *Monaco* v. *Missippi* (2)). But is the State of Victoria, or the Attorney-General of the State, a competent plaintiff? In my opinion, the answer must be in the affirmative. Acts are alleged which, it is contended, are beyond the powers of the Commonwealth and usurp the functions of the State (*Tasmania* v. *Victoria* (3)). It is said that, while the Commonwealth in establishing the clothing factory was clearly authorized by the *Defence Act* 1903-1932, sec. 63 (1) (*da*), yet the extension of its operations to the manufacture of clothing and other equipment for various departments and services of the Commonwealth other than naval and military equipment is beyond the powers of the Commonwealth. But I cannot assent to this contention. The supply of uniforms and clothing to the various departments and services of the Commonwealth is incidental to the administration of the various departments of State under the control and management of the Commonwealth, and to services

(1) (1923) 32 C.L.R. 200.

(2) (1934) 292 U.S. 313; 78 Law Ed. 1282.

(3) *Ante*, p. 157.

rendered by the Commonwealth under and pursuant to the powers and authorities contained in the Constitution. There is nothing unlawful in the Commonwealth using an organization established under a law of the Commonwealth for any lawful purpose of the Commonwealth. If a factory be established under the *Defence Act* 1903-1932 for the manufacture of naval and military uniforms, what is there to prevent that factory being used for other legitimate purposes of the Commonwealth ? The factory in the present case is not organized as a corporation with limited and defined powers. The occasion for its establishment was the manufacture of naval and military uniforms, but there is nothing in the Constitution, or in any principle of law, that renders the use of that organization for purposes within the limits of the powers and functions of the Commonwealth unlawful or in contravention of the Constitution or any law of the Commonwealth. The distribution of the costs of manufacture to the different departments and services may well be matter of internal management and arrangement, but that involves nothing illegal.

The Attorney-General for the State of Victoria is on firmer ground, however, when he contends that the Constitution does not warrant the Commonwealth launching out on the general business of manufacturing clothing and other goods for the States, or for public bodies constituted under the laws of the States, or for private individuals. The provisions of sec. 51 of the Constitution contain no such power in express terms. But it is claimed that sec. 63 (*f*) of the *Defence Act* 1903-1932 does authorize such an extension of operations. It provides that the Governor-General may, subject to the provisions of the Act, do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or any State. This means the Governor-General acting in a constitutional manner, that is with the advice of the Executive Council (*Acts Interpretation Act* 1901-1932, sec. 17). It may be inferred from the mutual admissions of the parties that the Governor-General deemed it desirable so to extend the operations of the factory, but it is conceded that no formal Order in Council has been passed sanctioning the extension. The existence of such an order is not, I think, essential, if the operations have in fact been sanctioned by

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the Governor-General. It must be remembered that the legislative powers of the Commonwealth are enumerated, and their limits cannot be transcended. In the last resort it is for the Courts to determine whether the legislative and executive acts of the Commonwealth are within the powers conferred by the Constitution. The *Defence Act* doubtless gives the Governor-General the widest discretion. But, while his decisions are entitled to the highest respect, the Act cannot be taken to mean that the Governor-General may do whatever he thinks proper, whether within the constitutional power of the Commonwealth or not. Such a construction would defeat the Act, and could only be adopted in cases where the language compelled that result. (See *Acts Interpretation Act* 1930, No. 23, sec. 3.) The exercise of the Governor-General's discretion must be confined within the constitutional power of the Commonwealth. But it is not for the Courts to determine whether the matters and things deemed necessary or desirable by the Governor-General are or are not appropriate for the constitutional object: all that the Courts have to consider is whether the means selected have some real and substantial relation to that object, or are calculated in some appreciable degree to advance it (*Farey* v. *Burvett* (1)). The legislative powers of the Commonwealth confer upon it no authority whatever to establish and maintain clothing factories for purposes other than those contained in its enumerated or constitutional powers. It may be desirable to do so from the point of view of efficiency and economy, but constitutional warrant is still lacking. There is no relation between establishing and maintaining a clothing factory for Commonwealth purposes, and extending its operations to purposes wholly beyond the constitutional power of the Commonwealth (*The Commonwealth* v. *Australian Commonwealth Shipping Board* (2)).

It was sought to justify the extended operations of the factory by reference to the executive power of the Commonwealth (Constitution, sec. 61) ; the command of the naval and military forces (Constitution, sec. 68) ; and the power of the Commonwealth to appropriate money for the purposes of the Commonwealth (Constitution, sec. 81).

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

(2) (1926) 39 C.L.R. 1.

The executive power of the Commonwealth extends to the maintenance of the Constitution and of the laws of the Commonwealth. It may well be that the executive power " is co-extensive with the responsibility and power of the Commonwealth " and not limited " to matters connected with departments actually transferred or matters upon which the Commonwealth has power to make laws and has made laws " (cf. *Berriedale Keith, Responsible Government in the Dominions*, 1st ed. (1912), vol. II., p. 809). But there is nothing in the Constitution, or in any law of the Commonwealth, which enables the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes. No executive power to do so is expressed, and such a power cannot be implied from anything found in the Constitution or from the establishment of a clothing factory under the Defence power (*The Commonwealth* v. *Australian Commonwealth Shipping Board* (1)).

The command of the naval and military forces is titular. It may, in the absence of statutory provisions, justify orders regulating the navy and the army and providing for their equipment and so forth. But the command cannot and does not warrant the doing of acts which transcend the constitutional power of the Commonwealth.

Lastly, the provisions of sec. 81 of the Constitution are called in aid: " All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution." This provision is relied upon as an independent source of power. Thus, in the United States of America " it will be found that the public moneys of the United States have been devoted to a great variety of purposes, many of which have no relation to the exercise of the specific powers vested by the Constitution in the National Government; they have been, to mention only a few instances, in aid of road-building, education, agriculture and relief, at home and abroad, of sufferers on account of fires, floods, earthquakes, &c." (*Willoughby* on *The Constitution of the United States*, 2nd ed. (1929), vol. I., p. 103). The Constitution of the United States enables Congress " to lay and collect taxes,

(1) (1926) 39 C.L.R. 1.

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duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States" (Art. 1, sec. VIII., cl. 1). "Hence it is that, though Congress has not a general legislative power to provide that the Federal Government may do everything, whether by way of regulation or direct control and operation, which may conceivably secure the common defence and promote the general welfare of the United States, it nevertheless has a general power to appropriate the public moneys of the United States for these purposes" (*Willoughby, ibid.*, p. 98). "But this, it may be predicted," he adds (*ibid.*, p. 105), "will be as far as the Courts will permit Congress to go. In other words, they will not admit that, because Congress has the power to lend Federal financial aid to projects which concern the general welfare of the United States, even though these projects have no relation to the matters enumerated in the Constitution as within Federal control, therefore, Congress may authorize the Federal Government, through its own agencies to carry out these non-enumerated projects." The provision in the Constitution of Australia is not identical with that in the Constitution of the United States; indeed, in sec. 96, express provision is made for giving financial assistance to any State on such terms and conditions as the Parliament thinks fit. (See *Victoria* v. *The Commonwealth* (1).) Further, it should be observed that sec. 83 provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law—which I take to mean in accordance with law. The power to appropriate moneys "for the purposes of the Commonwealth" does not, in my opinion, enable the Commonwealth to appropriate such moneys to any purposes it thinks fit, but restricts that power to the subjects assigned to, or departments or matters placed under the control of the Federal Government by the Constitution. No constitutional warrant, therefore, for the extension of the operations of the clothing factory to general business purposes can be found in the appropriation power.

It was suggested during the argument that clothing manufactured for the supply of services or persons other than services or persons

(1) (1926) 38 C.L.R. 399.

under the control or in the employ of the Commonwealth, must nevertheless remain the property of the Commonwealth, and consequently might be treated as surplus stock in the disposition of the Commonwealth. The argument is, to my mind, untenable. The property may remain in the Commonwealth, but the manufacture of clothing for purposes other than those allowed by the Constitution does not establish any right so to do, or permit the disposition of such clothing in a manner not allowed by the Constitution. By such means all constitutional checks might be avoided and the position of the States under the Constitution gravely compromised.

A declaration should be made that it is beyond the powers of the Commonwealth under the Constitution to carry on the business of manufacturing clothing for or supplying clothing to the States or to public utilities established under the laws of the States, or to private bodies or persons.

Action dismissed with costs.

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

Solicitor for the defendant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.