[HIGH COURT OF AUSTRALIA.]

RADIO CORPORATION PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

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MELBOURNE, 1937, *Nov.* 4, 5.

1938, *Mar.* 7.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Customs—Regulations—Validity—Prohibited imports—Prohibition of importation without consent of Minister—Prohibition by reference to country of origin of goods—Customs Act 1901-1935 (*No.* 6 *of* 1901—*No.* 7 *of* 1935), *secs.* 52 (*g*), 56 *—Customs* (*Prohibited Imports*) *Regulations* (*S.R. No.* 152 *of* 1934; *No.* 69 *of* 1936).

Constitutional Law (*Cth.*)—*Delegation of legislative power—Act authorizing regulations to prohibit importation of goods.*

The *Customs Act* 1901-1935 provided, by sec. 52: "The following are prohibited imports . . . (*g*) All goods the importation of which may be prohibited by regulation," and, by sec. 56: "The power of prohibiting importation of goods shall authorize prohibition subject to any specified condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports."

Regulations made under the *Customs Act* prohibited the importation of specified goods unless the consent of the Minister was first obtained. The regulations also prohibited the importation of certain goods by reference to their country of origin.

Held:—

(1) By *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ., that no unconstitutional delegation of the legislative power of the Commonwealth Parliament was involved.

Baxter v. *Ah Way*, (1909) 8 C.L.R. 626, *Roche* v. *Kronheimer*, (1921) 29 C.L.R. 329, *Huddart Parker Ltd.* v. *The Commonwealth*, (1931) 44 C.L.R. 492, and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan*, (1931) 46 C.L.R. 73, applied.

(2) By *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ. (*Dixon* and *Evatt* JJ. dissenting), that the regulations were valid, and that the requirement of the consent of the Minister to the importation of goods was a "condition or restriction," within the meaning of sec. 56, which could validly be imposed.

(3) By *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ., that it was not sufficient to invalidate the regulations that (i.) the prohibited goods were specified by reference to their country of origin and not by reference to their physical character as ascertainable by inspection; (ii.) the Minister was authorized, in determining whether he could consent to the importation of particular goods, to consider the quantity of goods proposed to be imported irrespective of their quality, thus introducing a quota system by administrative action; (iii.) the purpose for which goods were to be used was adopted as a criterion for determining their prohibited character; (iv.) the importation was prohibited of goods which were included in the *Customs Tariffs* as being subject to duty.

DEMURRER.

This was a demurrer to a statement of claim in an action by Radio Corporation Pty. Ltd. against the Commonwealth of Australia, Thomas Walter White, the Minister of State for Trade and Customs, and the Comptroller-General of Customs.

The relevant portion of the statement of claim was in substance as follows:—

3. The plaintiff has for many years been importing goods into Australia manufactured in other countries, including the United States of America, such as parts of and accessories for wireless receivers, valves for wireless telephony, including rectifying valves, carbon manufactures of certain kinds, electric insulating paper and boards, steel sheets (plain) exclusively for the purpose of manufacturing wireless receiving sets.

4. By statutory rule No. 152 of 1934 made on 6th December 1934 the Governor-General in Council purported to make certain regulations under the *Customs Act* 1901-1934, termed *Customs (Prohibited Imports) Regulations*, under reg. 2 whereof it was provided that they should come into operation on 25th January 1935.

5. By reg. 4 of the regulations it was provided that "the importation of the goods specified in the second schedule to these regulations shall be prohibited unless the consent in writing of the Minister to the importation of the goods has first been obtained."

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6. By statutory rule No. 69 of 1936 made on 22nd May 1936 the Governor-General in Council purported to make further regulations under the *Customs Act* 1901-1935, termed *Amendment of the Customs (Prohibited Imports) Regulations*, which so far as material were as follows :—

" The second schedule to the *Customs (Prohibited Imports) Regulations* is amended by inserting after item 20 the following item :— Name or Description of Goods : Item No. 21.—The undermentioned goods produced or manufactured in any country not being : (*a*) a territory under the sovereignty of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the seas, Emperor of India ; (*b*) a territory under His Majesty's suzerainty protection or mandate ; (*c*) a territory of, or held under mandate by any of the British Dominions except such goods in respect of which evidence to the satisfaction of the Collector of Customs is furnished that they were in direct transit to Australia on or before the 23rd May 1936 :—Iron and steel plates and sheets (plain) ; Wireless receivers, parts thereof and accessories therefor ; Valves for wireless telegraphy and telephony, including rectifying valves ; Carbon manufactures of all kinds, including carbon blocks ; Electric insulating paper and boards."

7. Statutory Rules No. 152 of 1934 and No. 69 of 1936 are invalid so far as they apply to such goods, in that (*a*) in classes of goods set forth in the last preceding paragraph they do not prohibit the importation of certain or ascertainable goods or specify certain restrictions or conditions on the importation of such goods within the meaning of the *Customs Act* 1901-1935 ; (*b*) they are not authorized by the Act.

8. The regulations are invalid in that they purport to impose as a test of whether such goods or classes of goods are prohibited imports (*inter alia*) the country in which they are produced or manufactured.

9. The Minister (*a*) has from time to time consented to the importation of a proportion only of the quantity of goods required by the plaintiff and has refused to consent to the importation of goods in excess of such quantity ; (*b*) has refused to consent to the importation of certain other goods.

Wilbur Ham K.C. and *Lewis*, for the plaintiff.

Wilbur Ham K.C. Five essential parts of radio sets are prohibited because they come from America. The plaintiff requires these goods, and the Ministry had no power under the *Customs Act* to prohibit their importation. Sec. 52 (*g*) of the *Customs Act* 1901-1935 merely enables the Governor in Council to add to the list in secs. 51 and 52 of goods which the legislature says are prohibited. Sec. 56 can only operate as incidental to the power in sec. 52 (*g*), so that the power under sec. 52 (*g*) can be exercised either absolutely or subject to a condition. The items are too vaguely set out in the regulations. The diversion of trade or the encouragement of local industries is not proper to be carried out by regulations. *Baxter* v. *Ah Way* (1) shows the grounds on which sec. 52 (*g*) of the *Customs Act* was upheld. Sec. 52 (*g*) could not support these regulations, and, if it could, sec. 52 would then have to be construed as a limiting and not as an extending power. Sec. 52 (*g*) requires the goods to be specified in the regulation itself. Sec. 52 (*g*) and sec. 56 must be read together. There is no legislative authority for this regulation (*Swan Hill Corporation* v. *Bradbury* (2); *Melbourne Corporation* v. *Barry* (3)). Under reg. 4 of 1934 it would be possible to prohibit the importation of everything into the country. It is not sufficient to say that the regulations will be administered in such a way as to admit certain articles; the real purpose of the regulations must be considered. The goods themselves must be specified in the regulations in such a way as to enable traders to identify the goods by reference only to the regulations and to the goods. Any conditions imposed must be equally certain. In any case the matter cannot be left to the discretion of the Minister. The penal provisions against importing prohibited goods make it clear how necessary certainty is. The proper authority to exercise the discretion is the Governor in Council and not the Minister. A power of the magnitude contended for is not likely to have been granted at all, and if it were it should be construed within narrow limits (*Attorney-General* v. *Brown* (4)). Under sec. 52 (*g*)

(1) (1909) 8 C.L.R. 626, at pp. 636, 637, 641, 642.
(2) (1937) 56 C.L.R. 746.
(3) (1922) 31 C.L.R. 174, at p. 201.
(4) (1920) 1 K.B. 773.

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you could not have a condition, for example, that the goods should not be imported from Japan. The discretion granted by the regulations is absolute and uncontrolled. The regulations as framed are wide enough to admit discrimination as to persons, places and time. There is no general law as to the various subjects. These considerations show that the regulations are too wide to be brought under the power under which they are passed. All the arguments applicable to the earlier regulations are applicable to the later ones. In the second regulation the countries referred to are not named or ascertainable except under the Minister's discretion. The later regulation shows on its face an intention to implement a policy of trade diversion. *Melbourne Corporation* v. *Barry* (1) simply decides that the power to regulate does not include the power to prohibit, and decides nothing more. Nothing but the most express language could give the executive such a wide power as that contended for, which must include a power to prohibit the importation of all goods. This amounts to a power to dispense with the prohibition in individual cases, so that there is really no law on the subject at all. The discouragement of Australian trade with other countries could not have been intended by Parliament. This is not a by-law-making power such as was considered in *Country Roads Board* v. *Neale Ads Pty. Ltd.* (2). *Crowe* v. *The Commonwealth* (3) shows that, if on its proper construction the Act requires that the decision should be left to the board or to a Minister, then the regulation is good, but that it is not good if the Act requires that the regulation must itself supply the prohibition.

Lewis. Sec. 52 (*g*) only gives power to proclaim a list of goods. But sec. 56 gives power to add conditions, and such conditions must be "specified"; this is in effect a narrower power than that contained in the by-law cases. When sec. 52 (*g*) was amended by the substitution of regulation for proclamation, the legislature showed that it only intended to change the method and not to alter the power, as it left sec. 56 unamended. The disputed regulation purports, not to impose a condition or restriction, but to give a dispensing power. It is made under sec. 52 (*g*) and not under

(1) (1922) 31 C.L.R. 174.
(2) (1930) 43 C.L.R. 126.
(3) (1935) 54 C.L.R. 69.

sec. 56, and sec. 52 (*g*) gives a power to prohibit only. This power is exercised in reg. 3, but reg. 4 imposes no conditions or restrictions; such a dispensing power cannot be based on sec. 52 (*g*). The regulating power cannot be used inconsistently with the Act. A dispensing power is inconsistent with sec. 56. When you impose a requirement of the consent of a person you do not specify a condition. There is not a complete specification; the conditions of the consent are not defined. It is an abuse of terms to call a pure dispensing power a condition or a restriction.

Herring K.C. (with him *Sholl*), for the defendant. Under the trade and commerce power the Parliament has plenary powers to prohibit conditionally or unconditionally the importation of all goods from foreign countries. Part IV., Div. 1, of the *Customs Act* is an exercise of the trade and commerce power. The intention of Parliament in passing Div. 1 was to create a series of prohibitions, present and future. The nature of those specified is of such a diverse character as to show that it was not intended to confine the exclusion to goods which may be regarded as deleterious to the moral or physical welfare of the community; exclusions which may be regarded as beneficial to Australian industries, or calculated to promote the growth of new ones were also intended. The only limit is the trade and commerce power itself. The method adopted by the legislature to give effect to its intention is by legislating itself, and also by delegating portion of its legislative power to the Governor-General in Council. The legislative power so delegated is as wide as that of Parliament itself within the limits referred to above. There is nothing in the sections conferring the power to limit the extent of the power conferred. There is nothing in *Baxter* v. *Ah Way* (1) that is inconsistent with the above propositions, or alternatively, if there is, it is based on theories of non-delegation, of American origin, which have long been departed from in Australia. In the exercise of such delegated legislative power, the Governor-General in Council may validly prohibit the importation of any goods either conditionally or unconditionally, so long as he does not make provisions inconsistent with the express provisions of the statute itself. The

(1) (1909) 8 C.L.R. 626.

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legislative power so delegated includes the power to set up any factum which Parliament might have set up as the condition of admission, including the discretion of a third party, or the origin, destination or intended use of the goods. There is no uncertainty about the condition imposed by reg. 4. It is the regulation coupled with secs. 50 and 56 that legally controls the importation of goods, and not the action of the Minister. Given a regulation which sets up as a factum the consent of the Minister, the proper or improper granting or withholding of his consent is irrelevant in determining the validity of the regulation. If the method of the exercise of the Minister's discretion shows anything, it is the motive or policy actuating the making of the regulation. Motive or policy actuating the making of the regulation must be distinguished from the regulation's operative effect. A regulation made under the power will not be vitiated by the policy that led the Governor-General in Council to exercise the power. Its validity will depend upon whether or not the immediate operative effect falls within the scope of the power. In any event, there are the following procedural objections even if the plaintiffs are right :—(*a*) There is no right to an injunction against the Commonwealth. (*b*) There is no right to damages or an injunction against any of the defendants merely on the ground of the regulations being bad, and insisted on as a matter of administration, in the absence of any allegation of tortious interference with property. (*c*) No right of action is shown against the Comptroller-General in that it is not alleged that the notice required by sec. 221 of the *Customs Act* was given. [Counsel referred to *Lyons* v. *Smart* (1) ; *Whitfield* v. *Ohio* (2) ; *J. W. Hampton Jr. & Co.* v. *United States* (3) ; *Roche* v. *Kronheimer* (4) ; *Huddart Parker Ltd.* v. *The Commonwealth* (5) ; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (6) ; *Dignan* v. *Australian Steamships Pty. Ltd.* (7) ; *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (8).]

(1) (1908) 6 C.L.R. 143.
(2) (1936) 297 U.S. 431, at p. 439 ; 80 Law. Ed. 778, at p. 784.
(3) (1928) 276 U.S. 394 ; 72 Law. Ed. 624.
(4) (1921) 29 C.L.R. 329.
(5) (1931) 44 C.L.R. 492, at pp. 500, 501, 515, 516, 526, 527.
(6) (1931) 46 C.L.R. 73, at pp. 84, 85, 103, 104, 106, 107.
(7) (1931) 45 C.L.R. 188.
(8) (1908) 6 C.L.R. 469.

Wilbur Ham K.C., in reply. The power given by secs. 52 and 56 is expressly a power to prohibit goods, but the way in which it has been exercised is not to prohibit goods, but to limit or prohibit consignments of goods. These are not regulations prohibiting goods at all. The goods are intended to be admitted in certain quantities and from certain places. The prohibition is a false prohibition. It is really a positive permission to import a quota of things that are intended to be prohibited.

Cur. adv. vult.

1938, Mar. 7.

The following written judgments were delivered :—

LATHAM C.J. This is a demurrer to a statement of claim in which the plaintiff claims a declaration that certain regulations made under the *Customs Act* 1901-1935 are invalid, and other relief.

The plaintiff company is an importer of goods and claims that it has been hindered in its business because the Minister has refused, under the regulations, to consent to the importation of the quantity of articles which it is desired to obtain for business purposes. The Minister has consented only to the importation of a smaller quantity. The plaintiff's contention is that the regulations which purport to require the consent of the Minister before certain goods can be imported are invalid —so that the goods may lawfully be imported without any such consent. The plaintiff further contends that, even if the regulations are valid, they do not authorize the acts of the Minister in refusing consents on the grounds shown to have been taken into consideration by him. If the regulations are valid, and if they entitle the Minister to do what he did, the plaintiff has no cause of action, whatever political or business objections may be entertained or suggested to the policy which the regulations are designed to promote or to the manner in which they have been administered.

The *Customs Act*, sec. 52, provides as follows : " The following are prohibited imports . . . (*g*) All goods the importation of which may be prohibited by regulation."

The other classes of goods referred to in the section vary very greatly. They include copies of works which if made in the Commonwealth would infringe copyright, false money, blasphemous or

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indecent works or articles, goods manufactured or produced wholly or in part by prison labour, exhausted tea, substitutes for butter unless coloured and branded as described, goods which have a false suggestion of any Government guarantee or the like, and mineral oil and mineral goods unless imported under and subject to such restrictions as may be declared by proclamation. It is obvious that, except that they are all goods, these articles possess no common quality.

Sec. 56 provides that "the power of prohibiting importation of goods shall authorize prohibition subject to any specified condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports."

Statutory Rule No. 152 of 1934 prohibited the importation of the classes of goods referred to in three schedules. The importation of goods referred to in the first schedule was prohibited absolutely; of goods in the second schedule—unless the consent in writing of the Minister to the importation of the goods was first obtained; and of goods in the third schedule—unless the conditions and restrictions respectively specified in that schedule opposite to the description or name of those goods had been complied with. Statutory Rule No. 69 of 1936 amended the second schedule by inserting in the list of goods the importation of which is prohibited without the prior consent of the Minister certain specified goods produced or manufactured in any country outside the territories of the Crown, territories under His Majesty's suzerainty, protection or mandate, and territories held under a mandate by any of the British Dominions, with an exception as to goods in transit. The list of goods specified in this regulation includes goods which the plaintiffs use in their business, such as wireless receivers, parts thereof and accessories therefor, valves for wireless telegraphy and telephony, including rectifying valves, carbon manufactures, electric insulating paper and boards, and steel sheets. The goods of these classes which the plaintiff company have been importing are identified or specified in par. 3 of the statement of claim by the statement that they have been imported "exclusively for the purpose of manufacturing wireless receiving sets."

Sec. 52 (*g*), until an amendment which was made by Act No. 7 of 1934, sec. 4, provided that goods the importation of which was prohibited by proclamation should be prohibited imports. The prohibition must, under the Act as it now stands, be made by regulation, so that either House of Parliament has an opportunity of disallowing the prohibition (*Acts Interpretation Act* 1904-1934, secs. 10, 10A). It appears to me to be impossible now to argue that Parliament has no power to authorize the Governor-General by regulation to prohibit the importation of goods. The objection that legislation of such a character involved an unconstitutional delegation of the legislative power of the Commonwealth Parliament was dealt with and decisively rejected in *Baxter* v. *Ah Way* (1). The principle of *Baxter's Case* (1) has been applied in *Roche* v. *Kronheimer* (2), *Huddart Parker Ltd.* v. *The Commonwealth* (3) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4).

The first group of the legal objections made to the regulations was based upon the proposition that sec. 52 (*g*) and sec. 56 required the regulations to specify the goods by reference to the physical characteristics of the goods as ascertainable by inspection and without any reference to such a matter as their country of origin. It was also contended that a regulation could not authorize the Minister, in determining whether he could consent to the importation of particular goods, to consider the quantity of goods proposed to be imported irrespective of their quality, and so to introduce a quota system by administrative action. It was further argued that the purpose for which goods were intended to be used could not be adopted by regulation as a criterion for determining their prohibited character.

The *Customs Act* is a law with respect to taxation. It was suggested for the plaintiff, though not very definitely, that regulations under a taxation Act should be limited to the purpose of raising revenue. After *Osborne* v. *The Commonwealth* (5), it is difficult to contend that an Act relating to taxation is invalid because it is designed for the purpose of carrying out a policy of the Common-

(1) (1909) 8 C.L.R. 626.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 44 C.L.R. 492.
(4) (1931) 46 C.L.R. 73.
(5) (1911) 12 C.L.R. 321.

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wealth Parliament which affects matters which are themselves not directly within the legislative power of the Parliament. See particularly per *Barton* J. (1) and per *Isaacs* J. (2).

The Act is also, however, a law with respect to trade and commerce with other countries. It is argued that, if the Act is so regarded, regulations made under it are invalid if they permit the introduction into the question of determining what are prohibited imports considerations which are extraneous to such trade and commerce (Cf. *Victorian Railways Commissioners* v. *McCartney and Nicholson* (3)). But the object of customs legislation, including the *Customs Act*, is to obtain revenue and to control trade —both import trade and export trade. The import trade is controlled by such provisions as sec. 30 of the *Customs Act*, which provides that all imported goods shall be subject to the control of the customs from the time of importation until the time of home consumption or exportation to parts beyond the seas. The import trade is further controlled by the imposition of duties and of prohibitions imposed either directly by statute or by regulations made under statutory powers. The duties which are to be found in the customs tariff are conditioned by such matters as the country of origin of goods. The operation of the whole tariff, with its division into British preferential and general tariff, depends upon the country of origin of the goods imported. (See also *R.* v. *Barger* (4).) Further, the tariff contains many provisions distinguishing between goods, not merely according to their quality or intrinsic characteristics, but according to the purposes for which they are to be used. Again, the tariff in many of its items refers to departmental by-laws (that is, departmental decisions representing the opinion of the Minister administering the department) as the criterion which may determine the rate of duty applicable. In other cases the fact that goods are owned by a particular individual or imported for his use (for example, for the use of a State Governor or trade commissioner or consul) is adopted as a relevant discrimen. Further, articles imported for the use of certain institutions such as universities and other educational institutions may be admitted free, while the same goods

(1) (1911) 12 C.L.R., at pp. 344 et seq.
(2) (1911) 12 C.L.R., at pp. 361 et seq.
(3) (1935) 52 C.L.R. 383.
(4) (1908) 6 C.L.R. 41, at p. 68.

imported for other persons or institutions are dutiable. Indeed, any consideration of the tariff shows that many circumstances other than those which constitute the physical characteristics of the goods are regarded by Parliament as being relevant to the subject of trade and commerce.

It is probable that every Customs Act and customs tariff in every country of the world contains provisions requiring the consent of a Minister or other public authority as a condition of the importation of certain goods, and that that authority exercises the powers conferred so as to carry out the policy of a Government. Trade policy generally is concerned with determining both the character and the volume of imports from particular countries in relation to the policy of a Government. It appears to me to be impossible to support the proposition that such matters as those mentioned are extraneous to considerations of trade and commerce. Accordingly, in my opinion, the first set of objections to the regulations fails.

It was next argued that the words in sec. 52 (*g*) of the Act should be given an *ejusdem generis* interpretation. It is true that the word "other," upon which the application of the *ejusdem generis* rule generally depends, is absent from sec. 52 (*g*). The words are "all goods the importation of which may be prohibited" &c., not "all other goods the importation of which may be prohibited" &c. The argument, however, was advanced upon the authority of *Attorney-General* v. *Brown* (1), where *Sankey* J. considered the meaning of sec. 43 of the *Customs Consolidation Act* 1876 providing that "the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or Order in Council." Reference to the reasons for judgment shows that the decision was based upon a long legislative prior history and that the *ejusdem generis* doctrine was applied because of the history of the Act there under consideration, more especially when it was regarded as inaugurating a policy of free trade (See *Attorney-General* v. *Brown* (2)). There is no foundation for a similar argument in the present case. Counsel for the plaintiff was unable to suggest any common quality of the goods mentioned in the other paragraphs of sec. 52 which would make it possible to apply the *ejusdem generis* rule to par. *g*.

(1) (1920) 1 K.B. 773.

(2) (1920) 1 K.B., at p. 794.

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It was further contended that the regulations permitted discrimination between goods according to the time at which they were imported or the quantity of goods of that type already imported, and it was argued that it was quite irrelevant to trade and commerce to take into account the possible effect of the importation of goods upon Australian industries. It does not appear to me that this argument requires any detailed examination. Discrimination between different consignments of goods imported and between persons who import goods is a quite ordinary feature of customs legislation, as is shown by the references which I have given to the tariff. More particularly, customs legislation is frequently directed towards protection of local industries. It would, I think, be very strange to hold that, because the interests of local industries were taken into account by the Minister in determining whether or not he should permit certain goods to be imported, his action was not authorized by a regulation which provided that the importation of goods should be subject to his consent. It is not unlawful to use the trade and commerce and taxation powers for the purpose of giving effect to a protective policy (*R.* v. *Barger* (1)).

A particular attack was directed towards the provision requiring the consent of the Minister as a condition of importation. In the first place it was said that this was not really a condition or restriction such as is referred to in sec. 56, because the statutory rule distinguishes between second and third schedules referred to in the rule. The second schedule relates to goods which cannot be imported without the consent of the Minister, and the third schedule to goods which can be imported only if the conditions and restrictions specified in a separate column in the schedule have been complied with. Therefore, it was argued, the consent of the Minister could not be a " condition or restriction," because, if it were such, it would have appeared in the column in the third schedule and there would have been no second schedule. This argument would not have been available if the second schedule had happened to be drafted in such a form that it had a second column which contained a reference to the consent of the Minister and if the rule, instead of stating that

(1) (1908) 6 C.L.R., at pp. 66, 116.

the importation of the goods specified in the schedule was prohibited unless the consent of the Minister was obtained, had stated that the goods specified in the second schedule should not be imported unless the condition or restriction specified in the schedule opposite to the name or description of those goods (namely, the consent of the Minister) had been complied with. The objection is in my opinion purely verbal in character and has no foundation. The consent of the Minister is plainly prescribed as a condition of the importation of the goods in the second schedule.

More generally, however, it was urged that the provision relating to the consent of the Minister was invalid on grounds indicated in the judgments in *Melbourne Corporation* v. *Barry* (1). It was admitted that the importation of goods could be absolutely prohibited, and it could not be denied, in view of the express terms of sec. 56, that the importation of goods could be prohibited subject to a condition, but it was urged that no consent of any person could be regarded as a condition within the meaning of the word " condition " in sec. 56.

The decision of this court in *Country Roads Board* v. *Neale Ads Pty. Ltd.* (2) supplies an answer to this objection. In that case the court had to deal with a by-law relating to hoardings. Attention was directed to the nature of hoardings, which differed individually in character, in appearance, in location, and in relation to environment. The subject matter was such as to require and justify a degree of individual treatment which might not be necessary in other cases. Under a power to make a by-law prohibiting the erection and construction of hoardings on or near State highways the Country Roads Board had made a by-law prohibiting the erection of hoardings unless the consent of the board was given. The majority of the court said:—" Once it is realized that the power authorizes prohibition, complete or partial, conditional or unconditional, what reason is there for denying that the condition may be the consent, or licence, or approval of a person or a body ? The answer that there is none was given by the Divisional Court and approved by the Court of Appeal in *Williams* v. *Weston-super-Mare Urban District Council* (3), and we respectfully agree. The supposition or suggestion that the

(1) (1922) 31 C.L.R. 174.
(2) (1930) 43 C.L.R. 126.
(3) (1907) 98 L.T. 537; (1910) 103 L.T. 9.

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conditions or circumstances should be defined in which the consent, licence, or approval must be given can rest only upon some justification other than the words in which the power is conferred" (1).

The power was a power to make by-laws prohibiting the erection and construction of hoardings on or near State highways; the court held that the power authorized a conditional prohibition and that the subject matter was such that the condition might be "the consent or licence or approval of a person or body." In the present case sec. 52 of the *Customs Act* authorizes prohibition of imports; and sec. 56 expressly authorizes the imposition of conditions. If the subject matter is such as to require detailed supervision, the analogy with the *Country Roads Board Case* (2) is complete.

The regulation of trade (to which, as I have already said, the *Customs Act* is directed) is a matter which may require "a close supervision and a detailed direction of trade" (per *Dixon* J. in relation to control of export trade in *Crowe* v. *The Commonwealth* (3)). This principle appears to me to be equally and obviously applicable in the case of control of import trade. Thus the nature of the subject matter provides the same support for the specification of the consent of the Minister as a condition in the regulation under consideration as it did for a similar provision in the *Country Roads Board Case* (1).

In *Levingston* v. *Shire of Heidelberg* (4) *Hodges* J. said: "In determining whether this by-law is within the power or not and in construing the Act, I think we should look at the body which is entrusted with the power, and then at the power which is entrusted to that body, and then at the subject matter with which the body has to deal." This statement was examined and approved by my brother *Evatt* in *Swan Hill Corporation* v. *Bradbury* (5). In the present case it is proper to remember that the body which is entrusted with the power of making regulations is the Executive Government of the Commonwealth of Australia, that the power is a power which in its terms authorizes absolute prohibition or conditional prohibition, and that the subject matter is the day-to-day regulation of trade by the Executive Government under parliamentary authority and control. It is also, in this latter connection, not unimportant again

(1) (1930) 43 C.L.R., at p. 135.
(2) (1930) 43 C.L.R. 126.
(3) (1935) 54 C.L.R. 69, at p. 89.
(4) (1917) V.L.R. 263, at p. 275; 38 A.L.T. 163, at p. 168.
(5) (1937) 56 C.L.R. 746, at p. 766.

to remember that the *Customs Act* and the customs tariff contain a large number of provisions authorizing the Minister or departmental officers to act according to their discretion, or making it a condition of the importation of goods that they or the Minister shall be satisfied as to the character of the goods or the purpose for which they are imported, or, more generally, that the determination shall be made by what is called a departmental by-law, that is to say, by an administrative decision taken from time to time as circumstances appear to require according to the discretion of the Minister or officer concerned. This legislation shows that, in the opinion of Parliament, the regulation of trade and commerce may properly involve the exercise of discretion in individual cases. I am of opinion that the provision requiring the consent of the Minister is valid.

It has been strongly urged that certain correspondence (which was allowed to be read because it was referred to in the statement of claim) showed that the regulations were made for the purposes of "trade diversion," that is, for the purpose of determining the places from which import trade should come to Australia and the volume of such trade. I should have thought that there could be no subject more directly connected than this with the subject of trade and commerce between Australia and other countries. But it is not necessary to examine this question, because it is well settled that the motives of any legislative act do not affect its validity. For authority I refer only to the recent decisions of *Huddart Parker Ltd.* v. *The Commonwealth* (1), per *Dixon* J., and *Victorian Stevedoring and General Contracting Co. and Meakes* v. *Dignan* (2), per *Gavan Duffy* C.J. and *Starke* J. (3), and more definitely per *Rich* J. (4), per *Dixon* J. (5) and per *Evatt* J (6). Further, for the reasons which I have given, the place of origin of goods is a circumstance which can properly be taken into consideration by the Minister in determining whether or not he will consent to the importation of any particular goods.

A further objection to the regulations was that a prohibition of the importation of any goods which are referred to in the tariff is

(1) (1931) 44 C.L.R., at pp. 515, 516.
(2) (1931) 46 C.L.R. 73.
(3) (1931) 46 C.L.R., at pp. 84, 85.
(4) (1931) 46 C.L.R., at pp. 86, 87.
(5) (1931) 46 C.L.R., at pp. 100, 103, 104.
(6) (1931) 46 C.L.R., at pp. 125 et seq.

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inconsistent with the tariff itself. The argument was that if the customs tariff imposes a duty on goods it means that every person has a right to import the goods upon paying the duty. The answer is that the tariff contains no such provision. The tariff simply provides that duties of customs shall be imposed and charged and collected on goods according to the duties specified in the schedule. It provides that any person who imports goods must pay the duty, if any, imposed by the tariff. It does not confer upon any person a right to import goods. The object of sec. 52 (*g*) of the *Customs Act* is evidently to confer upon the Executive Government a power of prohibiting the importation of goods the importation of which would otherwise be permissible. Upon any other view the provision would be meaningless.

As I am of opinion that the regulations are valid and that what the Minister has done was authorized by the regulations, it is not necessary for me to consider other points raised by the demurrer.

In my opinion the demurrer should be allowed and judgment in the action should be given for the defendants with costs of the demurrer and of the action.

RICH J. I agree with the Chief Justice in his conclusion that the demurrer should be allowed.

STARKE J. I am in agreement with the opinion of the Chief Justice, which I have had an opportunity of considering, and I have nothing to add.

DIXON AND EVATT JJ. Under nine heads sec. 52 of the *Customs Act* 1901-1935 states what shall be prohibited imports. Of these heads eight contain descriptions of the goods which may not be imported. But one of them, the seventh in order, simply says: "All goods the importation of which may be prohibited by regulation." The section was part of the statute as it was enacted in 1901 and has undergone very little change. The word "regulation," however, in the paragraph in question is a substitution for the word "proclamation," which stood in the original enactment. The amendment was made in 1934. Its evident purpose was to bring

under the operation of sec. 10 of the *Acts Interpretation Act* 1904-1934 the instrument by which the Executive exercised the authority to prohibit the importation of goods. That section directs, among other things, that regulations shall be laid before each House of the Parliament, and it enables either House by resolution to disallow them. Thus, the change from "proclamation" to "regulation" was not made with a view of increasing the scope or altering the nature of the power reposed in the Executive, but rather in order to place the exercise of the power under a more immediate parliamentary control.

The importation of prohibited imports is forbidden under penalty by sec. 50, and, by sec. 229, they are liable to forfeiture. The latter section draws a distinction between goods the importation of which is prohibited by regulation and other prohibited imports. Forfeiture of those prohibited under regulation is not authorized if they have been shipped in ignorance of the proclamation and before the expiration of a reasonable time for obtaining at the port of shipment knowledge of the prohibition, while the section exposes other prohibited imports to forfeiture in any event. The purpose of making the distinction is apparent. It is to ensure that exporters of goods to Australia shall not forfeit the goods unless they have had a reasonable opportunity of learning that the goods are prohibited imports.

The power conferred upon the Executive of prohibiting imports is not limited to an unconditional specification of the goods prohibited. A somewhat illogically expressed provision deals with the imposition of conditions. It is contained in sec. 56 and is as follows: "The power of prohibiting importation of goods shall authorize prohibition subject to any specified condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports." The form of this section appears to be illogical because it purports to authorize a prohibition subject to a restriction. No doubt what it intends to subject to the restriction is not the prohibition but importation of the goods. This would be made clear enough perhaps by the ensuing statement that goods imported contrary to the restriction shall be prohibited imports, were it not that in each of the two parts of the sentence the word "condition" is included. To subject a prohibition to a condition

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is perfectly logical. But it means that the prohibition is not absolute but is alleviated or qualified by conditions upon fulfilment of which the goods will be free. Non-fulfilment of the conditions leaves the importation prohibited. In such circumstances it is not accurate to say the importation is contrary to the conditions: it is contrary to the prohibition. The distinction, however, between permitting a thing upon compliance with conditions and prohibiting it subject to conditions, though implying different prima facie rules or presumptions, is one rather of formal expression than of substance, and it is, therefore, easy to speak of a contravention of conditions in the latter case, where it is inaccurate to do so, as well as in the former, where it is accurate. In substance, what sec. 56 means is that the power to prohibit importation shall not be limited to simple prohibition, but shall extend to the imposition upon importation of conditions and restrictions on non-compliance with which the goods shall become prohibited.

In sec. 56 a not unimportant restraint upon or qualification of the power of the Executive to impose conditions and restrictions on the importation of goods is expressed in a single word. The conditions or restrictions must be "specified." This clearly means specified in the regulation itself.

The question upon which, we think, the demurrer turns is whether, under the provisions the general nature of which we have described, the Executive had power to make a regulation providing that the importation of certain goods, defined according to their nature, if produced or manufactured in a country outside British jurisdiction should be prohibited unless the consent of the Minister for Trade and Customs to the importation of the goods is first obtained. The provision thus summarized is not contained in a single regulation. It is the result of the operation upon the *Customs (Prohibited Imports) Regulations* (Statutory Rules 1934 No. 152) of an amendment made in May 1936 (Statutory Rules 1936 No. 69). The fourth clause of the regulations of 1934 provided that the importation of the goods specified in the second schedule should be prohibited unless the consent in writing of the Minister to the importation of the goods had first been obtained. The amendment of May 1936 introduced into the second schedule a long catalogue of goods of which it is

enough to mention five classes, in all of which the plaintiff company alleges that it trades. They are: "Iron and steel plates and sheets (plain)"; "Wireless receivers, parts thereof and accessories therefor"; "Valves for wireless telegraphy and telephony including rectifying valves"; "Carbon manufactures of all kinds including carbon blocks" and "Electric insulating paper and boards." As will be seen, these are descriptions of goods depending either upon their nature or upon that and the use for which they are adapted. No doubt the descriptions are wide, but they are capable of what we may call objective ascertainment upon inspection of the goods. But the catalogue is preceded by a limitation which depends, not on the nature of the goods, but upon the place where they were produced or manufactured: "The undermentioned goods produced or manufactured in any country not being," stated briefly, under the King's sovereignty, suzerainty, protection, or mandate, or under the mandate of a British Dominion. No narrow or restrictive interpretation of the power which these regulations confer upon the Minister will suffice to sustain the course which he has taken under them. For, according to the allegations which must be taken as correct for the purposes of the demurrer, the Minister has exercised a full discretion to let in or keep out particular consignments to particular importers; he has been guided by the purpose of diverting trade in accordance with government policy, and subject thereto he has paid regard to the needs of the particular trader and to the local and other sources whence they may be supplied. But, in any case, except on artificial grounds for the purpose of saving the validity of the regulations, we do not think that a restrictive interpretation could be placed upon the Minister's discretionary power of consenting to importation. The regulation is so expressed as to leave him with a complete discretion, and it does not define the purpose or grounds of its exercise. It is plain from the length and nature of the catalogue contained in the second schedule that the object of the regulations was to invest the Minister with a power of administrative control over the importation from foreign countries of large classes of goods and to enable him to exercise that control by the allowance or disallowance of applications for his written consent in respect of specific shipments or consignments.

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Can anyone believe that in 1901 the Parliament intended to transfer or delegate to the Executive such a large measure of its authority to regulate foreign trade with this country ? We have since that time undergone experiences as well as changes of constitutional practice which may make such a delegation appear less remarkable than it would to those responsible for the enactment. This consideration ought not to lead us to restrict the operation of the provision, if the fair meaning of its language extends far enough to include the use which has been made of the power it gives. But, on the other hand, it would be a mistake to read into indefinite or ambiguous expressions a meaning which they would not possess for those unfamiliar with exigencies that have been felt only as the result of later conditions. We have the advantage of opinions given in 1909 by members of this court as to the scope of the provision conferring upon the Executive power to proclaim goods as prohibited imports. In *Baxter* v. *Ah Way* (1) the validity of the provision was attacked unsuccessfully on the ground that it amounted to a delegation of legislative power, and in support of the attack it was said that the Executive might under the power go to any lengths in forbidding the importation of goods. To this *Griffith* C.J. said in the course of the argument :—" You admit that a law may be conditional on the ascertainment of some fact, and that some authority may be appointed to decide the question of fact . . . Does not the section merely prohibit the importation of such goods as the Governor-General in Council thinks it expedient to exclude ? " (2). *Isaacs* J. added : " Do not the rest of the sub-sections indicate the kind of goods to be prohibited, i.e., goods injurious to the community, leaving it to the Executive to bring within the prohibition any goods which may in the future turn out to be injurious " ? (2). In his judgment *O'Connor* J. said that the section specified a number of imports which it declared were prohibited. " But in that list it leaves a blank to be filled up by proclamation of the Governor-General in Council, to be filled up as the Governor-General and the Executive Council may think fit in any contingency that may hereafter arise " (3). A little afterwards he says : " The whole of the law, therefore, which operates in the case

(1) (1909) 8 C.L.R. 626. (2) (1909) 8 C.L.R., at p. 630.
(3) (1909) 8 C.L.R., at p. 636.

of prohibited imports is to be found in the statute itself except the naming of the article to which these provisions are to apply" (1). *Isaacs* J. in his judgment said:—"The sub-section referred to empowers the Governor-General to prohibit goods by proclamation, and read with sec. 56 enables him to do so subject to conditions or restrictions. But nothing more. The proclamation stands *per se* as a mere notification to the world that specified goods are prohibited. The proclamation is a mere fact. That fact, however, has certain consequences prescribed by the Parliament itself" (2). These observations do not fix upon the provision any definite construction or meaning, but they do appear to us to show a conception of the scope and purpose of the power inconsistent with that now claimed for it.

In considering the extent of the power, the course of legislative policy is material (Cf. *Attorney-General* v. *Brown* (3)). In 1901 the tariff was the means adopted by Parliament for affecting imports, and we believe that the means employed has always been a tariff and this has included the distinction between importations from British and those from foreign countries. It is a matter we ought not to leave out of account when we are asked to hold that the legislature at the same time conferred upon the Executive a power enabling the control of the course of inward trade by the exercise of a ministerial discretion in allowing or refusing to allow the importation of goods shipment by shipment. But upon the text of the provisions we have discussed and independently of any extrinsic considerations we should be of opinion that the power did not authorize the regulation now in question. The power is reposed in the Governor-General in Council (See sec. 270 and *Acts Interpretation Act* 1901-1932, sec. 17 (*f*)). That is to say, it is reposed in the Governor-General acting with the advice of the Federal Executive Council comprising the King's Ministers of State for the Commonwealth (See Constitution, secs. 62, 63 and 64, and *Acts Interpretation Act* 1901-1932, sec. 17 (*g*)). A power given thus to the Executive to prohibit the importation of goods subject to any specified condition ought not, in our opinion, to be construed as a

(1) (1909) 8 C.L.R., at p. 636. (2) (1909) 8 C.L.R., at p. 641.
(3) (1920) 1 K.B., at p. 795.

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power to prohibit importation unless the Minister of State concerned gives his prior consent to the importation. Under our system of government the Minister of State is not merely a member of the Executive Council upon whose advice the power to prohibit is exercisable ; he is that member through whom in matters of customs the Executive Government acts. The reservation of the so-called dispensing power amounts to a reservation to the Executive Government itself, which enables it to deal with the importation of the goods by particular order or direction instead of by uniform rule.

In municipal by-laws a power to regulate a subject of local health or police may justify control by particular or piecemeal direction or consent. But when a power affecting the inward trade of an entire country is vested in the central government very different considerations govern its interpretation. A power to prohibit importations subject to specified conditions would not, we think, be naturally understood as directed to the general regulation of trade in selected commodities. It would be read as authorizing the imposition of an embargo upon special classes of goods, but subject to qualifications or exceptions set out in the prohibition, compliance with which was independent of the mere will of the Executive Government. It may be conceded that the requirement of consent may without any misuse of language be called a " condition " and that to state anything may be described as specifying it. But the expression occurs in a provision by which an executive power of supplementing a list of prohibited imports is extended to conditional prohibition, that is, to prohibiting the goods so added to the list " subject to a specified condition." In such a context and upon such a subject, we think the meaning conveyed is that the will of the Executive must be stated in advance by defining the conditions which will entitle the importer to enter the goods.

The conditions which the regulation may impose, no doubt, include any requirement in relation to the state or quality of the goods or the doing of an act by the importer. Possibly they may include a condition that the goods shall be produced in a particular country, though this we doubt. But, in any case, a description of the goods according to their nature seems necessary. And, in our opinion, the

condition or restriction imposed upon their importation cannot be the mere will of the Executive Government.

We think the demurrer should be overruled.

McTIERNAN J. In my opinion the demurrer should be allowed. I agree with the reasons of the Chief Justice.

Demurrer allowed with costs. Judgment in action for defendants with costs.

Solicitors for the plaintiff, *Herman & Coltman.*

Solicitor for the defendants, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

H. D. W.