will remain divergent from the present English law upon the point.
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DEFENCE POWER—TENSION SHORT OF WAR: *MARCUS CLARK & CO. LTD.* v. *THE COMMONWEALTH*

Our modern age has thrown into confusion many of the conventional, clear-cut distinction between war and peace. In *Marcus Clark & Co. Ltd.* v. *The Commonwealth*[1] this has been illustrated in a different sphere — the scope of the defence power under the Australian Constitution[2]. This is not the first case in which the defence power has been considered in the context of an international situation that was not war nor yet profound peace[3]. It did, however, establish for the first time beyond doubt the importance for the application of the defence power of another special set of circumstances, a period of extreme international tension.

The Capital Issues regulations[4], which were the subject of challenge in this case, were a relatively mild form of economic control. Briefly, they make all borrowing by both companies and individuals, above a certain amount and otherwise than from banks, pastoral companies, building societies and co-operative societies, subject to the consent of the Treasurer. Similarly, consent has to be obtained for all loans of capital by companies above the same amount. Regulation 17 (i) states that the Treasurer's consent is not to be refused "except for purposes of or in relation to defence preparations". Further provisions of the Regulations[5] set up machinery whereby an application can be made to a court for an order directing the Treasurer to state his reasons for his refusal of consent.

In this case Marcus Clark & Co. Ltd. had applied for consent to borrow £100,000 on security and to an increase in its issued capital. This application was refused, and, after an order had been made directing the Treasurer to state the reasons for his refusal, a long statement was furnished setting out a list of the matters on which his decision had been based. The present action was for a declaration that the Defence Preparations Act 1951[6] and the Capital Issues regulations were *ultra vires* or alternatively that consent had been wrongly refused.

The nature of the defence power had been amply discussed by the High Court in the previous twelve years[7] and there was a substantial amount of agreement on the test to be applied. The general view of the Court was that the connection between the regulation proposed and the purpose of defence must be

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[1] *Marcus Clark & Co. Ltd.* v. *The Commonwealth* (1952) A.L.R. 821.

[2] The primary source of legislative power is s. 51 (vi) of the Constitution, which provides that the Commonwealth Parliament may make laws with respect to—"The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." Note also s. 51 (xxix).

[3] A series of cases after the 2nd World War recognise a special "post-war" application of the defence power in relation to the control of exceptional war-caused conditions and the resettlement of ex-servicemen. See especially *Dawson* v. *The Commonwealth* (1946) 73 C.L.R. 157 and *The King* v. *Foster* (1949) 79 C.L.R. 43. For an analytical survey of the decisions see R. Else-Mitchell, "Transitional and Post-War Powers in the Commonwealth of Australia" (1947) 25 *Can. Bar Rev.* 854 & (1950) 28 *Can. Bar Rev.* 408.

[4] 1951 Stat. Rules No. 84. Defence Preparations (Capital Issues) Regulations.

[5] *Id.* Regs. 17 (iii), (iv), (v), (vi) & (vii).

[6] Defence Preparations Act (Cwlth.), No. 20 of 1951.

[7] Note especially: *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373; *Victoria* v. *The Commonwealth* (1942) 66 C.L.R. 488; *Dawson* v. *The Commonwealth* (1946) 73 C.L.R. 157; *Hume* v. *Higgins* (1949) 78 C.L.R. 116; *The King* v. *Foster* (1949) 79 C.L.R. 43; *The Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1. Amongst the literature on the topic note especially: B. Sugerman & W. J. Dignam, "The Defence Power and Total War" (1943) 17 *A.L.J.* 207; G. Sawer, "The Defence Power of the Commonwealth in Time of War" (1946) 20 *A.L.J.* 295; G. Sawer, "The Transitional Defence Power of the Commonwealth" (1949) 23 *A.L.J.* 255; D. I. Menzies, "The Defence Power" in "Essays on the Australian Constitution" (edited R. Else-Mitchell, 1952); G. Sawer, "Defence Power of the Commonwealth in Time of Peace" 1953 *Res Judicatae* 214.

capable of being seen "with reasonable clearness"[8]. Webb, J., it is true, applied the principle that once the Court is satisfied that there is a real possibility of war, then any legislation, "conceivably even incidentally related to defence"[9], will be a valid exercise of the defence power. However, the remaining Justices subjected both the background of fact and the measure itself to the degree of judicial scrutiny that the "reasonably related to defence" test implies. Such a principle inevitably involves predominantly practical considerations. As the Chief Justice put it, "the subject of dispute wears somewhat the appearance of a question of fact . . . in the end the question is reduced to one of degree."[10].

Undoubtedly, one of the most important facts on which the varying ambit of the defence power depends is the international situation. And at the outset here a question of vital constitutional importance arises. Who is to determine the exigency of the danger — executive or judiciary? In the *Marcus Clark Case*[11] the High Court reached a compromise solution between the two extreme views. An international emergency is a notorious fact; but any statement by the Executive will be treated "with respect". Evidence pure and simple is not generally relevant, but it may be where it is sought to link domestic matters with the international situation[12].

The pleadings in the case were somewhat unusual. For in its Statement of Defence the Commonwealth incorporated the long statement made by the Treasurer in response to the original direction of the Court under Regulation 17. This was undoubtedly relevant to the question of the particular refusal to the issue of capital by the Company. As an expression of Executive opinion, on the other hand, it could hardly be said to be conclusive on the question of the validity of the Regulations themselves. The plaintiffs demurred to this Statement of Defence and it was in this way that the case came before the High Court.

This being so, there was no direct "evidence" of the state of international relations existing at the time. The Treasurer's statement was something less than an affirmation of fact. It pointed out that "the Government . . . has formed the conclusion . . . that there is an unmistakable danger of the occurrence of a general war, involving the Commonwealth of Australia, and the threat thereof is such that Australia must be prepared for possible mobilisation for hostilities by the end of 1953"[13] It then referred to the inflationary situation in Australia and concluded that capital issues control was a "most effective" means of facilitating the diversion of resources to defence industries.

Dixon, J., thought[14] that this "argumentative" way of stating the defence's case weakened its clarity and force. Nevertheless, it is quite clear that the existing *extreme tension* in international affairs was the central factor in the majority's decision upholding the validity of the Regulations. There was certainly enough material before the Court to justify such a conclusion. The Preamble to the Defence Preparations Act[14a] recited the existence of a state of international emergency which necessitated "preparations for defence to an extent and to a degree of urgency not hitherto necessary except in time of war". And quite apart from the Treasurer's statement "it was notorious, and a matter to be judicially noticed, that there was and had been some time considerable inter-

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[8] *Per* Kitto, J. (1952) A.L.R. 855. *Per* Dixon, J., *id.* at 830: "As it seems to me there is little or no question concerning the nature and scope of the (defence) power or the principles governing its application. . . . It does not appear to be denied that measures that tend *or might reasonably be thought to be conducive* to such an end are within the power provided that the tendency to the end is not tenuous, speculative or remote." This is entirely different from the "reasonably necessary" test.

[9] *Id.* at 847 quoting Isaacs, J., in *Farey* v. *Burvett* (1916) 21 C.L.R. 433 at 455.

[10] *Id.* at 830.

[11] (1952) A.L.R. 821.

[12] For instance, *Sloan* v. *Pollard* (1947) 75 C.L.R. 445, where evidence was admitted that restriction of the supply of cream to the Australian market would contribute to the export of butter to Great Britain.

[13] Demurrer Book, p. 9. A summary of the Treasurer's statement is contained in Fullagar, J.'s, judgment, (1952) A.L.R. at 852-53.

[14] *Id.* at 825.

[14a] No. 20 of 1951.

national tension and a distinct possibility of war among the Great Powers in the near future, and the probability that if war occurred it would be world-wide and release forces of destruction of a kind and to an extent not previously employed"[15].

It was precisely on their view of the international situation that the dissenting judges (Williams, J., and Kitto, J.) differed from that of the majority. Williams, J., said "it could not be said in August, 1951, that there was an 'immediate apprehension of war' "[16]. Kitto, J., also emphasised the same point: "But the fact remains that since it is the danger of war and not war itself which is upon us, the facet of defence which presents itself as a subject for legislative and executive attention is preparation for war and not the immediate conduct of war."[17]

The other question of "fact" which was in dispute was the nature and purpose of the Capital Issues controls. Dixon, J., spent some time examining the past use of such controls and concluded that they were a recognised means of facilitating the diversion of economic resources of a country to the armed services and defence industries. This meant that their use "might reasonably be thought conducive" to defence purposes in the situation Australia found herself in at that time[18]. This was the view of the majority of the Court. Williams, J., and Kitto, J., dissenting, thought that (such was the width of these regulations) to uphold them would be equivalent to saying that "in these days it is primarily for defence that the national economy exists"[19], and they did not feel this to be so in the then existing situation.

The decision in the *Capital Issues Case*[20] has been generally considered as putting a narrow interpretation on the decision in *Australian Communist Party* v. *The Commonwealth*[21].

It may well turn out, however, that it is the more recent case which is of temporary operation. Be this as it may, there are at least three major grounds on which the decisions can be distinguished.

In the *Communist Party Case*[22] the Court was asked to deal with the issue of validity devolved from any evidence other than the notorious facts of which the Court could take judicial notice. For some reason there was no authoritative statement of the Executive as to the gravity of the international situation and no evidence was adduced to reinforce the recitals of the Preamble[23]. In the present case there was the thirty-page statement of the Treasurer[24].

Again, the Communist Party Dissolution Act, 1950[25], made no provision for review of executive decisions. A question that must be faced is whether that Act would have been held valid had it contained a provision similar to Regulation 17 of the Capital Issues Regulations. The Chief Justice attached considerable importance to the machinery for review set up by this section. Is it fair to say that he fell into a draftsman's trap[26]? Certainly a statement, furnished under Regulation 17, cannot conclusively determine the validity of the Regula-

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[15] *Id. per* Webb, J., at 845. [16] *Id.* at 842. [17] *Id.* at 855.
[18] *Id. per* Dixon, J., at 829-30. [19] *Id. per* Kitto, J., at 857. [20] (1952) A.L.R. 821.
[21] (1951) 83 C.L.R. 1.
[22] *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1.
[23] Some of which were extraordinarily wide. For example, Paragraph 5 of the Preamble states: "And whereas the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature . . . "
[24] It is as well to remember that such a statement is also a political document. In this instance, members of the Opposition party were quick to seize on the references to the state of inflation existing in the Australian economy. Such considerations are a powerful guarantee of the "honesty" of Executive statements prepared primarily for court proceedings!
[25] No. 16 of 1950.
[26] Professor Sawer in his article "Defence Power of the Commonwealth in Time of Peace" (1953) *Res Judicatae* 214 esp. at 221-23 examines this question in some detail. The opinion he there expresses is that Reg. 17 is merely a draftsman's device. It provides some test of the *bona fides* of the Treasurer but does not make the grounds of his refusal of consent subject to judicial scrutiny.

tions themselves. Yet it is difficult to escape the conclusion that in the *Communist Party Case*[27] the High Court considered that the Executive was usurping a truly judicial function[28]. Or, to put this in another way, it is the Court's function, not the Executive's, to decide whether any specific measure can be said to be reasonably related to defence[29].

Another ground for distinguishing the two cases was the different nature of the measures proposed in each case. The Communist Party Dissolution Act[30] envisaged a drastic interference with liberties over which the Courts have traditionally regarded themselves as guardians. The Capital Issues Regulations imposed a light control of private investment.

There is no need to conceal the part played by such admittedly pragmatic considerations. Decisions as to the "proximity" between any legislative measure and defence must always be matters of degree and dependent on a shifting background of fact. The doctrine of a lapse of an enactment because of a change in events is unknown in English law. But this does not preclude its acceptance in a federal system where validity depends on the scope of a purposive power. Indeed, as the present Chief Justice recognised in a lengthy judgment in *Hume* v. *Higgins*[31], the concept is a necessary concomitant of the defence power. "If a power authorises measures only to meet facts, the measure cannot outlast the facts as operative law."[32] Despite the width of the economic controls upheld, the *Capital Issues Case*[33] should not be regarded as opening a "back door" towards a unitary form of government. In *Marcus Clark* v. *The Commonwealth*[34] the decision was firmly based on the existence of extreme tension in international affairs. It follows, therefore, that every relaxation of such tension will gradually eat away the legal foundation on which Commonwealth Capital Issues control rests. The Defence Preparations Act[35] and the regulations authorised under it are due to come to an end on December 31, 1953. Present indications are that the Defence Preparations Act[36] will be re-enacted and the Capital Issues Regulations renewed, albeit in a modified form. If the present lessening of international tension continues, it may well be that the legal basis for such renewal has ceased to exist.

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Nevertheless, it must be remembered that judicial review is here a constitutional power and exercised independently of the Defence Preparations Act, and that the Capital Issues Regulations, Reg. 17 provides a convenient means whereby the relevant facts can be placed before the Court. It enables the Court to consider the facts of each particular case; it pushes the decision on constitutional validity back to the facts of each particular refusal of consent. By so doing it preserves the validity of the regulations themselves.

It would seem the granting of an unhampered discretion will only be justified at the height of a war.

[27] (1951) 83 C.L.R. 1.

[28] "Unlike the law held invalid in *The Australian Communist Party* v. *The Commonwealth*, this case does afford objective tests by which its connection or want of connection with the defence power may be ascertained." *Per* Dixon, J., (1952) A.L.R. at 828.

[29] The force of this is to be seen in the fact that in *R. B. Davies Ltd.* v. *The Commonwealth*, a case which was heard with *Marcus Clark & Co. Ltd.* v. *The Commonwealth*, a trial was directed to determine whether the consent had been properly refused. The trial was never heard but consent was later granted.

[30] No. 16 of 1950. [31] *Hume* v. *Higgins* (1949) 78 C.L.R. 116.

[32] Dixon, J., in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1945) 71 C.L.R. 161.

[33] (1952) A.L.R. 821. [34] *Ibid.*

[35] Defence Preparations Act (Cwlth.), No. 20 of 1951, s. 13. [36] No. 20 of 1951.