DEFENCE POWER OF THE COMMONWEALTH IN TIME OF PEACE

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THE scope of the defence power of the Commonwealth in time of war, and during the transition from war to peace, has been considered by the present Mr. Justice Sugerman and Mr. W. J. Dignam and by myself in articles in the *Australian Law Journal*.[1] The general conclusion of these articles is that once the High Court elected to give to s. 51 (vi) a meaning more extensive than the raising and equipping of defence forces and matters narrowly incidental thereto, it began a course of judicial legislation which makes it impossible to lay down any precise definitions or limitations on the power, or to predict the course of decision with reasonable certainty. The present writer suggested that each of the Second World War decisions in which Commonwealth defence measures were held invalid could be shown to conflict with the general propositions of cases upholding other defence measures, and that each such restrictive decision could be explained only on the basis of an opinion of the majority Justices that the measure in question *in actual fact* would not assist the war effort, or on an opinion that it had been enacted in bad faith or for the purpose of achieving an object other than the prosecution of the war, or on a revived doctrine of implied State immunities. Similar considerations apply to the "transition" cases. The final decision of the Court in the "unwinding" cases[2] amounted in substance to a policy decision that the Commonwealth had been given sufficient time for post-war reconstruction. It was not an arbitrary decision in the sense of having no support at all in reason, but it was arbitrary in the sense that the arguments for treating the Commonwealth's transition power as ending in about December 1949 were no better than the arguments for ending them, say, in December 1948 or December 1950. It was what the logicians call a "decision" question, and amounted in substance to the Court seizing a favourable psychological moment for committing itself.

Since the defence power in these well-explored phases of maximum operation (as exemplified by the *Uniform Tax* case[3] and the *Industrial Peace* cases[4]) and of declining ambit (as exemplified in *Sloan v. Pollard*[5]) leave one with no legal doctrine but only rhetorical

[1](1943) 17 A.L.J. 207; (1946) 20 A.L.J. 295; (1949) 23 A.L.J. 255.
[2]*R. v. Foster, ex parte Rural Bank etc.* (1949) 79 C.L.R. 43.
[3]*South Australia v. Commonwealth* (1942) 65 C.L.R. 373.
[4]*Australian Woollen Mills Ltd. v. Commonwealth* (1944) 69 C.L.R. 476; *H. V. McKay Massey Harris Pty. Ltd. v. Commonwealth* (1944) 69 C.L.R. 501.
[5](1947) 75 C.L.R. 445.

phrases and a trust in the statesmanship of the Court, one cannot expect that there will be any greater certainty about the ambit of the defence power in time of peace, a subject upon which judicial pronouncements are much fewer. Before the Second World War, the only aspect of the peacetime defence power clearly established by judicial decision was the power of the Commonwealth to make continuing provision for the welfare of returned soldiers; *A. G. Commonwealth v. Balding.*[6] In *Queensland Newspapers Pty. Ltd. v. McTavish,*[7] the High Court again clearly recognized the ability of the Commonwealth to make permanent provision for veterans or for members of the peacetime defence forces, although the particular regulations then considered were treated as having been enacted only for the sort of short-term reconstruction purposes whose supporting power was considered to have expired in 1949. Even as to the "repatriation" power, however, there are suggestions that the Court would require a relatively direct provision of benefits, and would not permit the advancement of the soldier at the expense of the civilian property-owner as contemplated in the regulations held invalid by *McTavish's* case. Apart from this question, the period between 1919-1939, and the period since the great "unwinding" of 1949, present two pairs of cases which can by careful casuistry be reconciled with each other, but each exemplified two conflicting policies or emotional attitudes to the problem in question.

The first pair of cases is *Commonwealth v. Australian Commonwealth Shipping Board*[8] and *A. G. Victoria v. Commonwealth,* (the *Clothing Factory* case[9]). In the former, the High Court held unanimously on demurrer that the Commonwealth Shipping Board was not authorized to contract for the supply of electrical generating equipment to the Bunnerong Power House. The precise questions were whether this activity was authorized by s. 14 of the Commonwealth Shipping Act 1923, and if so whether such authorization was constitutional. Isaacs and Higgins JJ. were satisfied to say that the legislation authorized the Shipping Board only to carry on a shipping line and engineering works as incidental to the conduct of that line; as pointed out in the *Clothing Factory* case, the hearing on demurrer meant that the Court was not presented with evidence which might have shown that the manufacture and sale of this equipment was reasonably incidental to maintaining the dockyards for the purpose of the Board's shipping line, in the same way that the sale of uniforms to tramway authorities etc. was held incidental to maintaining the plant in the *Clothing Factory* case; perhaps such evidence would have changed the opinion of Higgins

[6](1920) 27 C.L.R. 395.
[7](1952) 85 C.L.R. 30
[8](1926) 39 C.L.R. 1.
[9](1935) 52 C.L.R. 533.

J., but it seems likely that Isaacs J. would not have been impressed. But Knox C.J., Gavan Duffy, Rich and Starke JJ., in a joint judgment, explicitly dealt with the constitutional question raised; they held that if the activity was authorized by the Act, then the latter was to that extent invalid, since "despite the practical difficulties facing the Commonwealth in the maintenance of its dockyards and works, the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war." It is difficult to believe that further evidence as to the "practical difficulties" of the Commonwealth would have shaken this majority. In the *Clothing Factory* case, Gavan Duffy C.J., Evatt and McTiernan JJ. (in a joint judgment) and Rich J. held, Starke J. dissenting, that a clothing factory operating under s. 63 of the Defence Act for the manufacture of naval and military equipment and uniforms validly carried on the business of supplying uniforms to government departments, municipal bodies, public utilities and other persons. This was decided on mutual admissions of fact, which suggested, as similar evidence in the *Shipping Board* case might have suggested, the great convenience of maintaining such a factory in reasonably full operation, of having conditions of permanent employment for skilled labour and opportunity for training juniors, and of conducting the enterprise so as to relieve the taxpayer of unproductive subsidies. But the admissions fell a good deal short of suggesting that the only way of maintaining a supply of defence uniforms was to enter into competition with private enterprise in the non-military uniform trade. The joint judgment upholds the validity of the clothing factory's operations in these words: "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. . . . 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." They distinguished the *Shipping Board* case on the ground that the Court must there have regarded the supply of electrical equipment as a trade "wholly unconnected with any purpose of naval or military defence"; it is suggested with respect that they quoted this observation out of context. It is also suggested that Starke J. in his dissent followed more faithfully the substance of the reasoning in the *Shipping Board* case, and that the majority

while purporting to distinguish that case were actually overruling it and establishing the proposition that, even in peacetime, the defence power extends to activities which are not "directly" or "immediately" relevant to the maintenance of defence forces, but which are merely helpful or useful for that purpose. However, the difference between these cases is trivial, and the *Clothing Factory* case could in turn have been given a very restricted application.

The pair of basically conflicting cases in the Second World War period is the *Communist Party* case[10] and the *Capital Issues* case.[11] Before dealing with them, however, it is necessary to point out that the whole course of decision from *Dawson v. Commonwealth*[12] to the "unwinding" cases[13] involved a judicial picture of a peacetime defence power as something very much more restricted than either the wartime power or the transitional power. From the way in which particular wartime controls were given a temporary validity after hostilities ended, one tended to make at least negative inferences concerning the peacetime power, as that it would *not* extend to general control of land sales, sales of stocks and shares, butter rationing, regulation of wages apart from the existence of an interstate industrial dispute or petrol rationing.[14] This writer ventured, in 1949, the opinion that the Commonwealth could not, while peace lasted, resume anti-inflation controls in reliance upon the defence power.[15]

The *Communist Party* case, decided on 9 March 1951, appeared to be what lawyers tend to call a logical culmination, what they ought to call a sociological culmination,[16] of the "unwinding" decisions. The Parliament recited in the Communist Party Dissolution Act 1950 a number of serious allegations concerning the nature and purpose of the Australian Communist Party which if true would have justified the prosecution of that Party in the ordinary Courts; the Act then purported to dissolve the Party, to provide for the dissolution by executive action of "fellow-traveller" organizations, and to attach some civil disqualifications to persons who had

[10] *Australian Communist Party etc. v. Commonwealth* (1951) 83 C.L.R. 1.
[11] *Marcus Clark & Co. Ltd. v. Commonwealth* [1952] A.L.R. 821.
[12] (1946) 73 C.L.R. 157.
[13] *R. v. Foster, ex parte Rural Bank etc.* (1949) 79 C.L.R. 43.
[14] Obverting *Dawson v. Commonwealth* (1946) 73 C.L.R. 157; *Miller v. Commonwealth* (1946) 73 C.L.R. 187; *Sloan v. Pollard* (1947) 75 C.L.R. 445, applying *R. v. Foster, Wagner v. Gall* (1949) 79 C.L.R. 43.
[15] (1949) 23 A.L.J. 255, 258.
[16] *Queensland Newspapers Pty. Ltd. v. McTavish* (1952) 85 C.L.R. 30, decided on 3 October 1951, may be regarded as an appendix to *Collins v. Hunter* (1949) 79 C.L.R. 43. However, the decision also marks a change of emphasis. The joint opinion stresses not so much what is *appropriate* to a transition control, as the probable *intention of Parliament* that the control should be related to transitional facts. This seems to involve a nice Hegelian distinction between Parliament's "real" and "apparent" will.

been Communists. It is likely that in time of war, the High Court would have treated the Parliamentary opinion as conclusive and the consequential Parliamentary and executive action as justified by the defence power. But Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ. held, against the dissent of Latham C.J., that the Act was invalid, as not being within any power of the Commonwealth and in particular not within the defence power as it existed in 1950. For the purpose of this discussion, we can exclude the opinion of Webb J.; it is submitted that His Honour in substance dissented from the reasoning of the rest of the majority, and held, following the wartime cases, that at all times Parliament and the Executive may validly take preventive measures based upon their opinion as to desirable defence policy, provided that facts showing the reasonableness of the policy are either within judicial notice or are proved; His Honour held the Act invalid only because he would not take judicial notice of the allegations in the preamble to the Act, and the Commonwealth would not undertake to prove them.[17] Webb J.'s opinion is a completely logical working out of doctrine that the essential nature of the defence power is the same in peace and war, and that part of its essential nature is that Parliament and the Executive must be given the power to determine for themselves whether a particular measure is necessitated by a given state of facts; however, it is suggested with respect that he misinterpreted the intention of the Act, which was to attach consequences not to a state of "fact" but to a state of parliamentary opinion. The other majority opinions traverse some questions which go to the root of constitutional doctrine in a system of judicial review, and express distinctions of great subtlety. The Justices go to some pains to avoid a simple decision that it is inconsistent with the separation of judicial power to permit Parliament to condemn and punish an association in a proscriptive Act; Fullagar[18] and Webb[19] JJ. explicitly deny that the Act was invalid on that ground. Nevertheless, it is submitted that the opinions other than that of Webb J. depend on a conception of judicial power. In all of them, the distinction between "real" facts or "objective" facts, on the one hand, and the opinion of the Parliament and Executive as to the existence of facts, on the other, is frequently adverted to. It is plain enough here as in other legal contexts that "fact" or "real fact" or "objective fact" means what the Court considers to be a fact. It would not have helped the Act if an opinion as to the nature of the Communist Party had been required of a leading newspaper editor, or an anthropological institute, as a condition of the statute's

[17] See espec. (1951) 83 C.L.R. 1, 243-5. [18] (1951) 83 C.L.R. 1, 268.
[19] (1951) 83 C.L.R. 1, 234.

operation, although either might be better qualified to judge the "facts" than the Court, the Parliament or the Executive. What the Court is insisting on is its monopoly of the power to say what are the "real" facts – the minor premise in the syllogism which concludes with a sanction, the existential particular to which a classification attaches. Throughout the opinions runs the contrast between Parliament attaching sanctions to a class of activities and leaving it to the Courts to decide whether particular persons' actions come within the class, and Parliament dealing with particular persons' activities because of an opinion held by Parliament that they come within a class. The contrast has no meaning except within the context of a system in which only the judicial power is permitted to bridge the gap between making a classification and placing a particular within it.[20]

But in the case of the defence power, the Court was up against the formidable array of wartime decisions in which this fundamental rubric of judicial review was disregarded.[21] Fullagar J. reserved the question whether there was real inconsistency between cases such as *Lloyd v. Wallach* and the proposition that Parliament cannot measure its own powers,[22] but it is submitted with respect that the inconsistency is patent. The reasoning process in the detention cases is as follows. In time of war, seditious persons may be interned. (Undoubtedly valid under the defence power, as a measure reasonably conducive to victory in war.) In the opinion of the Executive, Smith is a seditious person. (But if the same information were disclosed to the Court, it might conclude that Smith is not a seditious person. On further inquiry, it might consider that the Minister responsible is dealing with Smith because the Minister owes him money.) The opinion of the Executive as to whether Smith is seditious cannot be examined by the Court. (Therefore the Commonwealth has been able to intern a person because he is owed money by a Minister.) But while Webb J., as mentioned, was prepared to treat this sort of executive power as a permanent feature of the defence power, the majority preferred to make a pragmatic distinction between the hot-war power and the peace power, and to treat conclusive executive discretion on internment, dissolution of associations etc. as peculiar to the war power.

But the majority also drew a distinction between "primary" and "secondary" aspects of the defence power. A primary defence law is one directly concerned with the raising, equipping and conduct of

[20]See espec. per Dixon J. (1951) 83 C.L.R. 1, 193.

[21]*Lloyd v. Wallach* (1915) 20 C.L.R. 299; *Welsbach Co. v. Commonwealth* (1916) 22 C.L.R. 268; *Ex parte Walsh* [1942] A.L.R. 359; *Reid v. Sinderberry* (1944) 68 C.L.R. 504; *Stenhouse v. Coleman* (1944) 69 C.L.R. 457.

[22](1951) 83 C.L.R. 1, 258.

armed forces; a secondary defence law deals with the conditions in the community which are in turn relevant to such "direct" defence activities, but only as the general background for them – such as peace in industry, monetary inflation etc.[23] Generally speaking, it is stated, the Commonwealth can validly enact laws under the "secondary" defence power only in time of hot war. On this aspect of the matter, the Communist Party decisions are somewhat unsatisfactory on two points. Firstly, it is not clear whether the Court took judicial notice of a disturbed state of international relations, or thought it could infer them from the recitals in the Act, or whether on the contrary it was inclined to doubt the existence of such a state of affairs in fact or to consider it insufficiently recited in the preamble.[24] The Korean war had begun at the time of the Royal assent to the Act, but had not reached major proportions. My own feeling is that the case was decided in a "peace" rather than a "pre-war" atmosphere, but nevertheless the opinions can be read as depending merely on a distinction between hot war and peace, rather than on distinctions between different degrees of peace. Secondly, it is not clear whether the Court considered that to prevent alleged sedition, fomenting of industrial strife in key industries, etc., is an aspect of the "secondary" or of the "primary" power. One would expect it to be treated as an aspect of the "primary" power, and Fullagar J. seems to have been of this opinion in the *Capital Issues* case,[25] but there are dicta in the Communist case suggesting the contrary. Of course, the distinction between "primary" and "secondary" defence powers depends not on *a priori* logical categories, but on experience and an informed evaluation of the probability of a law or executive action having a more or less speedy or substantial effect on a war situation. But for what the distinction is worth, the majority said that generally speaking "secondary" laws are valid only in hot war and for the transition stage to peace; in peace, only "primary" laws are valid. Depending on your reading of the judgments, you can therefore consider the decision as having a wider *ratio decidendi* than suggested in the last paragraph. The widest reading is that in time of non-hot-war, no "secondary" laws are valid. Another is that in time of "undisturbed" peace, no secondary laws are valid. My own preference is for the view that the law here in question was "secondary" only in one sense, namely that it relegated constitutional judgment as to connection with

[23]The distinction seems to cut across that between "specific" and "non-specific" defence laws drawn in the *Industrial Lighting* case, *Victorian Chamber of Manufactures v. Commonwealth* (1943) 67 C.L.R. 413, espec. at 418.

[24]See espec. per McTiernan J. (1951) 83 C.L.R. 1, 207-8.

[25]*Marcus Clark & Co. Ltd. v. Commonwealth* [1952] A.L.R. 821, 850.

defence to the Executive,[26] and that the Court was not drawing critical distinctions between peace, disturbed peace, and anticipated war, but was merely holding that nothing short of hot war permitted the Parliament and Executive to determine conclusively that an association was seditious and deal with it accordingly.

In the *Capital Issues* case,[27] the Court had to deal with an Act and regulations in which the utmost care and art had been displayed in order to overcome the judicial obstacle encountered in the *Communist Party* case. The Defence Preparations Act 1951 recites in detail the existence of an international situation in which it is essential that defence preparations should be undertaken on an increased scale and with great speed; compare the absence of such emphatic declarations in the Communist case. The Act was passed in a general economic situation, of which the Court took judicial notice, of considerable inflation and shortages of materials. It authorized the Governor-General to make regulations "for or in relation to defence preparations", including the expansion of Australian manufacturing capacity, diversion of resources, "adjustment of the economy" to meet the threat of war and of economic dislocation caused by the measures themselves, and provision of assistance to allies. The Act then excepted from the power taxation, borrowing and conscription. It is very difficult to deny validity to an Act in this form; it could not authorize the Governor-General to do any more than the Courts are willing to put within the Commonwealth's power, but so far as the measure might at first reading extend beyond such powers, s. 15A of the Acts Interpretation Act comes to the rescue. It is the sort of legislation which can be attacked only in detail as the Executive gives effect to it. The particular regulations challenged (and indeed the only important regulations hitherto made under the Act) were the Defence Preparations (Capital Issues) Regulations 1951. These regulations required the consent of the Treasurer to the raising of fresh capital, in specified circumstances and otherwise than through specific channels, by private enterprise corporations. The Treasurer was authorized to refuse his consent if the raising of the money in question might have the effect of diverting resources in a manner prejudicial to the expanded defence programme. If a company applying for and refused consent challenged the Treasurer's refusal (a course for which no special procedure was provided, but which might be done on mandamus or suit for declaration), the party might apply for a statement of the Treasurer's grounds of refusal, which the Treasurer

[26]This is brought out especially clearly by Fullagar J., (1951) 83 C.L.R. 1, 256-8.

[27]*Marcus Clark & Co. Ltd. v. Commonwealth* [1952] A.L.R. 821.

was then required to supply, and this statement was to be *prima facie* evidence for both parties.

The art of this regulation consisted in concentrating attention on what had appeared to be the main vice of the Communist Party legislation – namely the extent to which it elevated the opinion of Parliament and the Executive at the expense of judicial control. In this regulation, the Executive comes to the Court with an appearance of frankness and trust to put before it the considerations which are relevant to deciding whether or not this anti-inflation control has a reasonable connection with expanding the armies, navies and air forces. The majority (Dixon C.J., McTiernan, Webb and Fullagar JJ.), it is suggested with respect, fell into a trap. They devoted so much attention to contrasting the "objective tests" by which the regulations' "connection, or want of connection, with the defence power may be seen or ascertained",[28] with the arbitary character of the Communist Party Dissolution Act, that the question whether "secondary" controls of this kind, however administered, should be treated as within even a pre-war defence power, consistently with the trend of earlier decision, was given insufficient attention. Williams and Kitto JJ. dissenting were not deceived, and their opinions, it is suggested with respect, constitute a much more faithful exposition of the long-term trend of judicial thinking on these questions. However, as indicated at the outset of the article, we are not dealing with logical categories but with policy decisions, and the majority was certainly at liberty to extend the scope of the peacetime defence power if it felt that under modern conditions and in existing international circumstances, general economic controls have become reasonably necessary to the initial stages as well as to the final catastrophe of war. As indicated above, the *Communist Party* case can be read as not deciding the "secondary defence power" issue, and while the dissentients were able to quote dicta from their erring brothers' opinions in that case which seemed to tell against their present opinion,[29] those same brothers could quote other dicta from the Communist Party opinions which at least left the question at large.[30]

But it is suggested that the Capital Issues decision is inconsistent with the Communist Party decision in a much more fundamental matter than the opinion question as to the proper scope of the "secondary" defence power in peace, namely on the very matter of the power to determine the relation between a particular and a norm, which on the narrowest reading was essential to the latter

[28]Per Dixon C.J. [1952] A.L.R. 821, 828.
[29][1952] A.L.R. 821, 841, per Williams J.
[30]*ibid.* at 851, per Fullagar J.

decision. The opinions of Williams and Kitto JJ. on this question are persuasive. The procedure provided by the regulations for informing the Court as to the grounds on which the Treasurer had acted fell far short of vesting the Court with the power to decide the sufficiency of the connection between a particular refusal of additional capital and the expansion of the armed forces. The most that this procedure could do was to satisfy the Court that the *Treasurer* was bona fide of the opinion that the connection existed, and had acted on relevant considerations. Supposing that the Communist Party Dissolution Act were now redrafted along the following lines: vest in the Executive the power to order the dissolution of associations if they exhibited the features and advocated the policies recited in the 1950 Act; require the Executive on application to the Court to state the facts concerning a proscribed association which it alleged brought it within the scope of the Act. Would this now be upheld? If so, then the *Communist Party* case depended on a trivial objection to the drafting of the legislation, not as the opinions suggest on a fundamental principal as to the operation of judicial review in a federalism which can be overridden only in time of hot war. If the Communist Party decision required Parliament to state offences relevant to defence and leave it to the Courts to hear prosecutions thereunder, one might have expected the Court to require Parliament now to forbid the use of specific materials, equipment or labour, relevant to defence, for other than defence purposes, and leave it to the Courts to decide whether the law had been broken.

It was an ironical circumstance that the Court held in favour of the validity of the Capital Issues Control just as the Government was greatly relaxing that control, dispersing leading personnel of the Capital Issues Board, and resigning itself with some cheerfulness to an invalidation of the control which many of its followers and the business community expected and wanted. Like the *Clothing Factory* case, it is an isolated decision whose implications might be restricted by the course of future decision. As it stands, however, the decision appears to establish that in time of international tension short of war, the Commonwealth may validly establish economic controls under the "secondary" defence power in a manner which leaves not only the general appropriateness of the control for helping defence, but its application in particular cases, to the decision of the Executive, provided that the opinion of the Executive is shown to be honest and not unreasonable. If substantial distinction from the Communist Party decision is required, it may be found in the pragmatic consideration that raising money is less important than liberty of opinion.