AUSTRALIAN COMMUNIST PARTY v. THE COMMONWEALTH

No judgment of any Australian court since the judgment of the High Court in the *Banking Case*[1] was awaited with greater public and professional eagerness than that delivered by the Full Bench of the High Court (seven judges) on 9 March, 1951, in the *Australian Communist Party v. The Commonwealth*,[2] after a forensic battle in November and December, 1950, lasting no less than nineteen days and engaging the forces of ten King's Counsel and twelve junior members of the Bar. Although the Australian Communist Party was held, as an unincorporated association, to be not a competent party to the proceedings, its name remained on the record as the first plaintiff, and as the central figure in the drama it is eminently appropriate that it should thus give its name to the report of the case.

The Communist Party Dissolution Act, 1950.

The action was brought by the Communist Party and certain of its members and by a number of trade unions for a declaration of invalidity of the Communist Party Dissolution Act 1950 and appropriate injunctions. This Act had been brought down by the Liberal-Country Party coalition Government of Mr. R. G. Menzies to give effect to the promise of those parties given to the people in the general election of December, 1949, that if elected to office they would ban the Communist Party.[3] There were three main provisions of the Act. Firstly, the Australian Communist Party was declared to be an illegal organisation and was dissolved and its property forfeited to the Commonwealth. Secondly, provision was made for the dissolution and forfeiture of the property of other associations connected in various specified ways—some of them very tenuous—with the Communist Party or with "communists" as defined in the Act.[4] Such associations would be dissolved on being declared unlawful by the Governor-General. The Governor-General was authorised to make such a declaration on being satisfied (a) that the association came within one of the categories of associations specified in this provision of the Act, and (b) that its "continued existence . . . would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth." Thirdly, provision was made for action to be taken against individual communists. Where the Governor-General was satisfied (a) that a person was a member of the Australian Communist Party or a "communist," and (b) that he was "engaged, or . . . likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth," he might make a declaration accordingly. Such a declaration did not directly make the person concerned liable to any criminal penalty, but had

1. *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1.
2. [1951] A.L.R. 129.
3. For the legislative history of the Act see F. R. Beasley, *Australia's Communist Party Dissolution Act*, 29 Can. Bar Rev. 490-503.
4. "A person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin": s. 3.

the effect of disqualifying him from the Commonwealth service and from holding office in certain key trade unions. The operative sections of the Act were preceded by a long preamble containing a legislative indictment of the Communist Party as an association engaged in subversive activities directed towards violent revolution and part of the world communist revolutionary movement.

The Decision of the High Court.

The case came before the Full Court by way of a case stated by Dixon J. for the opinion of the Court on the following questions:

1. (a) Does the decision of the question of the validity or invalidity of the provisions of the Communist Party Dissolution Act 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth, and ninth recitals of the preamble of that Act and denied by the plaintiffs, and

   (b) Are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth?

2. If no to either part of question 1 are the provisions of the Communist Party Dissolution Act 1950 invalid either in whole or in some part affecting the plaintiffs?

The answers given by the Court to these questions were:—

1. (a) No: All judges except Webb J., who considered that the question of validity did depend on a judicial determination of the facts, but without limitation by the recitals in the preamble.

1. (b) No: All judges except Webb J., who held that the plaintiffs were entitled to adduce evidence to establish the invalidity of the Act.

2. The Act was wholly invalid: all judges except Latham C. J. who held it valid. Webb J. felt constrained to hold the Act invalid in view of the Commonwealth's statement that it declined to adduce evidence in support of validity.

The Defence Power and the Internal Security Power.

The judgment of the Court is of vital importance to the interpretation of the Federal Parliament's powers under the Constitution in respect of defence and internal security, and to the general question of the function of the High Court as the custodian of the Constitution and the relations of the Court with the Federal Parliament. Since the Constitution gives the Federal Parliament no direct power to deal with communism or bodies believed to be subversive or to dissolve associations, constitutional support for the Communist Party Dissolution Act had to be sought in other legislative powers conferred by the Constitution. The powers relied on were the powers to make laws with respect to defence[5] and internal security.

5. Constitution s. 51 (vi). "The naval and military defence of the Commonwealth."

The internal security power is generally taken to be derived from a combination of the executive power of the Commonwealth[6] and the "incidental" power,[7] though Dixon J.'s view is that it is a power which is necessarily inherent in any governmental organism without reference to the particular terms of its constitution, a view which is held in the U.S.A.[8] The Court held that neither power could justify the Act in the circumstances.

Opinion of Parliament or Executive as to Scope of Power cannot be Conclusive.

So far as the direct proscription of the Communist Party was concerned, the six members of the Court who formed the majority all held that the mere opinion of Parliament was not sufficient to establish the necessary connexion between the legislation and the defence power or the internal security power. As Fullagar J. put it, "Parliament cannot recite itself into a field the gates of which are locked against it." For example, as Dixon J. said, it would be impossible to bring under the legislative power with respect to patents a direct grant of a monopoly for a specified manufacturing process simply by reciting that it was an invention. The legislation must provide some scope for the court to exercise its function of testing its provisions against the Constitution. This must be done by making the operation of the law depend on the *objective existence of some fact or course of conduct, e.g.* by forbidding certain descriptions of conduct or establishing objective standards or tests of liability. Those objective facts or standards can then be examined by the court to see if they provide the necessary connexion between the legislation and some head of power conferred by the Constitution. The members of the Court were at pains to reiterate what has been said on many other occasions, that so far as the defence or the internal security power is concerned, the court does not seek to determine whether the law will in truth assist in the defence or security of the Commonwealth: in fact all the judges were careful not to express any opinion on the merits or policy of the Communist Party Dissolution Act. It is enough if the law might *reasonably be thought capable,* in the opinion of the court, of assisting in the defence or security of the Commonwealth, having regard to the apprehended danger which the law is designed to meet.

In the case of the dissolution of the Communist Party, no objective standards or tests of liability were laid down at all. The recitals in the preamble merely showed, in effect, that Parliament was seeking to constitute itself the judge of whether the Communist Party was guilty of conduct of such a nature as to attract the operation of the defence power or the internal security power. In spite of the absence of any such objective tests in the Act, Webb J. would have left the question of validity to be determined entirely on the evidence which

6. Constitution s. 61: "The executive power of the Commonwealth is exercisable by the Governor-General and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth."

7. Constitution s. 51 (xxxix): "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth or in the Federal Judicature, or in any department or officer of the Commonwealth."

8. [1951] A.L.R. at 169; *Burns* v. *Ransley* (1949) 79 C.L.R. 101 at 116; *R.* v. *Sharkey* (1949) 79 C.L.R. 121 at 148-149.

might be brought before the court as to the activities of the Communist Party, but this view was rejected by all the other judges, including Latham C.J.

Just as the Court was not disposed to allow Parliament to assume the power to determine conclusively the existence of facts necessary to attract the operation of the defence power or the internal security power (or any other legislative power), so it was not prepared to allow Parliament to confer any such authority on the Executive Government. The power given by the Act to the Governor-General to make declarations and so to dissolve associations and forfeit their property and to deprive citizens of civil rights and liberties was not controllable by any court so far as the constitutional validity of the declarations was concerned. The Act did confer a right of appeal against a declaration to the High Court or a Supreme Court, but solely on the ground, in the case of an individual, that he was not a communist, or, in the case of an association, that it did not belong to any of the specified classes of associations liable to dissolution. No provision was made for appeal against the determination of the Government that the individual or association was acting in a manner prejudicial to the security and defence of the Commonwealth, *etc.* But only if the individual or association was in fact so acting could action be validly taken by the Commonwealth under the defence or the internal security power. So the Act purported to give to the Executive complete and unfettered discretion to determine the existence of the facts necessary to support the constitutional validity of the law. It would thus be possible for the Act to be invoked against a person or association which was not in fact acting in any way prejudicial to the security and defence of the Commonwealth, *etc.*, without that person or association having any legal redress. The Executive was therefore being authorised to do something which was ***ultra vires*** of the Commonwealth and that part of the Act was therefore invalid.

War-Time Precedents Distinguished.

Up to this point it might be thought that the Court's decision was a foregone conclusion. The High Court had never developed any general theory or practice of judicial restraint in the face of legislation designed to give effect to national policy. And in the particular case of the defence power the Court had on many occasions made it quite clear that it was not for the Federal Government or Parliament to determine conclusively whether any measure was necessary for the defence of the Commonwealth, a viewpoint expressed most recently and unequivocally in the unanimous consolidated judgment of the Court in *R. v. Foster*,[9] *Wagner v. Gall*,[9] and *Collins v. Hunter*.[9] However, the question was not so simple as this. The Commonwealth was able to cite certain decisions of the High Court upholding the validity of war-time legislation giving executive authorities the widest discretion to abrogate civil rights and liberties of individuals and associations. It had been held, for example, in *Lloyd v. Wallach*,[10] *Ex parte Walsh*,[11] and *Little v. The Commonwealth*,[12] that war-time regulations empowering a Minister to order the detention of persons believed by him to be disaffected were valid.

9. (1949) 79 C.L.R. 43. 10. (1915) 20 C.L.R. 299. 11. [1942] A.L R. 359.
12. (1947) 75 C.L.R. 94.

And in the *Jehovah's Witnesses Case*,[13] although it was held by a majority of the High Court that National Security Regulations empowering the Governor-General, in terms very similar to the provisions of the Communist Party Dissolution Act, to dissolve associations [14] were invalid, the decision went not on the ground that the Federal Parliament was *incapable* of providing for the dissolution of associations on the mere opinion of the Executive Government that they were subversive, but on the ground that the consequences attached to dissolution under those Regulations, especially the absolute forfeiture of their property in such a way as to defeat the rights of creditors, went too far. How, then, did the Court distinguish these cases?

Dixon J., McTiernan J., Williams J., and Fullagar J. based the distinction squarely on the differing conditions of war and peace. In war-time the Court had conceded to Parliament a much wider latitude than in time of peace to determine what measures were necessary for the defence of the Commonwealth. During World War II the Court had repeatedly upheld the validity of legislation, both Parliamentary and subordinate, regulating and controlling many different aspects of commercial and social life which in time of peace would be quite outside the scope of the defence power.[15] But it must be remembered that even during that period the Court did not concede unlimited power to Parliament to enact legislation in the name of defence.[16] However, the four judges mentioned indicated that they were prepared to admit the validity, in time of actual war, of legislation of this kind, directly proscribing individuals or associations or conferring complete discretion on the Executive to do so, or to do other things in pursuance of what Parliament or the Executive alone, without judicial control, considered were the interests of defence. Fullagar J. called this the "secondary aspect" of the defence power, under which the Court takes the view that there is a general presumption of validity of defence legislation, simply because of the nature of modern war, requiring, as it does, the total organisation of the human and material resources of the nation. *Salus populi suprema est lex.* It was frankly recognised that many facts which would justify legislative or executive action in the name of defence could not, in time of war, be put before the courts for security reasons. McTiernan J. went so far as to say:[17] "The Australian Communist Party, like the Communist parties in other countries, is a political party formed in accordance with Lenin's conception of a world-wide political movement which would strive to establish a proletarian dictatorship and to impose Marxism everywhere; and by reason of these circumstances the Australian Communist Party manifests strong sympathy with the foreign and domestic policy of the government of the U.S.S.R. It follows that if war occurred in which that State was the enemy or there was imminent danger of such a war, the Commonwealth could

13. *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1943) 67 C.L.R. 116
14. It was under these Regulations that the Australian Communist Party was banned as an illegal association from shortly after the outbreak of war in 1939 until 1941, when the ban was lifted.
15. See cases cited in Sawer, *Australian Constitutional Cases*, pp. 244-249, and in Nicholas *The Australian Constitution*, p. 89.
16. *E.g. Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Case*) (1943) 67 C.L.R. 413; *Victoria* v. *The Commonwealth* (*Public Service Case*) (1942) 66 C.L.R. 488; *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Victoria* (1944) 68 C.L.R. 485, *R.* v. *University of Sydney* (1943) 67 C.L.R. 95; *Jehovah's Witnesses Case* (*supra*).
17. At p. 181

take preventive measures against Communists and Communist bodies . . . " Williams J.[18] qualified his admission that legislation of this kind would be valid in time of war by declining to admit the validity even then of absolute forfeiture of the property of proscribed individuals or associations. In making this limitation he stood by the decision in the *Jehovah's Witnesses Case* (*supra*).

Kitto J. distinguished *Lloyd v. Wallach* (*supra*), *Ex parte Walsh* (*supra*), *and Little v. The Commonwealth* (*supra*) on different grounds. While admitting that the defence power has a much wider application in time of war than in time of peace, he denied that there was any difference in the *principles* applied at such times. The legislation considered in those cases, in his view, did not remove the executive acts which it authorised entirely from the control of the courts. They remained judicially examinable both for good faith and for constitutionality (*i.e.* for the purpose of determining whether the particular acts were in truth within the scope of the defence power).[19] In this respect Kitto J.'s view was similar to that taken by Webb J.[20] He differed from Webb J., however, in holding as did all the other judges, that the exercise of the power conferred on the Governor-General to make declarations under the Communist Party Dissolution Act was intended to be completely unexaminable either for good faith or for constitutionality.[21] In no circumstances was he prepared to concede validity to such a measure.

Nature of "Declarations" by the Governor-General under the Act.

It was argued on behalf of the Commonwealth that even if the Court was not prepared to concede the same wide discretion to the Executive in the circumstances in which the Act was passed as it was in time of war, nevertheless the provisions empowering the Governor-General to make declarations did not exceed the defence power because the Act, in spite of the limitation of the express right of appeal to a court to the question, in the case of an individual, whether he was a communist, or, in the case of an association, whether it was of a kind liable to dissolution, did not make the Governor-General's determination that the individual or association was acting in a manner prejudicial to defence conclusive; that it was open to a declared person or association to challenge the declaration on the ground that he or it was not engaged in any activities which could attract the operation of the defence power. As already pointed out, however, only Webb J. accepted this argument. He relied[22] on the decisions of the High Court in *Reid v. Sinderberry*[23] and *Stenhouse v. Coleman*,[24] upholding the validity of certain provisions of the National Security Act 1939-1943 authorising the Governor-General to make such regulations as he should consider necessary or convenient for the defence of the Commonwealth, on the basis that every regulation so made could be examined by the courts for good faith and constitutionality. As Dixon J.[25] and Kitto J.[26] pointed out, however, the acts in question in those cases were *legislative*, not administrative. Legislative acts are always examinable for constitutionality. But to admit as a general principle, the validity of a provision conferring wide discre-

18. At pp. 194-195.
19. At pp. 226-227.
20. At pp. 198-201.
21. At p. 227.
22. At pp. 198-201.
23. (1944) 68 C.L.R. 504
24. (1944) 69 C.L.R. 457.
25. At p. 168.
26. At p. 229.

tion on an executive authority, including power to determine the scope of the constitutional legislative power itself, on the ground that each administrative act done in pursuance of the power could be examined to see if it was *ultra vires* of the Constitution would be a novel and dangerous principle. It would enable Acts of Parliament to be drafted in broad, vague terms, giving the widest scope to executive authorities, the constitutional validity of whose actions would be controlled only according to the whims and purse of individuals in particular cases. For example, an Act providing for the acquisition of property could leave the principles on which compensation was to be based deliberately vague, on the ground that every single determination of compensation would be subject to judicial review in order to determine whether *in the particular case* "just terms" had been provided as required by s.51 (xxxi) of the Constitution.

In any case, all the judges except Webb J. were satisfied that Parliament clearly intended the Governor-General's determination of the existence of the facts required to bring a declaration within the scope of the defence power to be conclusive. Dixon J.[27] and Fullagar J.[28] also held that it was a general principle that when powers were conferred on the King or his representative, as distinct from other subordinate executive authorities, their exercise was not examinable for good faith in any court of law, both judges citing *Duncan v. Theodore*[29] in support of that proposition.

Scope of Defence Power in case of Imminent Danger of War.

The majority of the High Court, then, adhered to the sharp distinction which had been drawn in earlier cases between times of peace and times of war in the application of the defence power. Is the "secondary aspect" of the defence power limited to times of active hostilities? Those judges who were willing to concede the validity of legislation like the Communist Party Dissolution Act in time of actual war were also willing to concede validity in times of *imminent danger* of war, though Williams J., of course, adhered to the limitation he would impose even in war-time, as mentioned above, in respect of the forfeiture of property. But they refused to admit that there was any such imminent danger at the time when the Act was passed, in spite of Australia's participation in the hostilities in Korea and in spite of Their Honours' recognition of the general state of international tension.

How is a court to determine whether there is such an imminent danger of war as to bring into operation the "secondary aspect" of the defence power? On this question there was some difference of opinion. All the judges were emphatic that recitals in an Act could not be conclusive on the court, but both Dixon J. and McTiernan J. remarked[30] on the fact that the recitals to the Communist Party Dissolution Act made no allusion to any apprehension of danger from external aggression. McTiernan J.[31] made the interesting suggestion that the Court would give "very great weight" to a formal statement by the Executive Government of its appreciation of the international

27. At pp. 163-164.
28. At p. 212.
29. (1917) 23 C.L.R. 510, 544; [1919] A.C. 696, 706.
30. At pp. 171, 181.
31. At p. 181.

situation, especially if it stated that there was an impending danger of war. Fullagar J.[32] asserted that the question depended entirely on the doctrine of judicial notice, and he would confine within very narrow limits the types of facts necessary to support the validity of defence legislation which might be established by evidence.[33] Williams J.,[34] on the other hand, would place no limits on the adducing of evidence to establish the factual basis necessary for validity. This would presumably also be Webb J.'s view, since he was prepared to allow the whole question of the validity of the Communist Party Dissolution Act to rest on the production of appropriate evidence. Kitto J.[35] took a similar view. He made a useful classification of facts in connexion with the defence power: ". . . three classes of facts may be distinguished, namely, those which bear upon the degree of national danger by reference to which the extent of the power at the relevant time must be determined; those which relate to the existence of a particular purpose, within the wider purpose of defence, which the measure in question is capable of aiding; and those which are relevant only to the question whether the measure is likely to produce results of advantage to the defence of the country." Evidence might be brought, he said, to establish facts of the first two classes. But the court is not concerned with facts of the third class at all: they fall within the realm of policy which is the province of Parliament and do not bear upon the validity of the law.

Latham C.J.'s Criticism of the Majority View.

It was on this question of the means by which a court is to determine the existence of an imminent threat of war that Latham C.J.'s opposition to the majority view was particularly strong. He pointed out[36] that an international crisis bearing the seeds of war might arise so quickly or so secretly that there would be no general knowledge of the situation sufficient to warrant the taking of judicial notice of the danger. Nor, in many cases, could the existence of the crisis be proved by adducing evidence in the ordinary way, because the strict legal rules of evidence would exclude much of the necessary information, and because much of that information would be likely to have been garnered from secret or confidential sources, such as friendly foreign embassies, which could not be made public.[37] The Chief Justice further pointed out[38] that it is the Executive Government which has the sole authority to take the most vital step of *declaring* war. But the courts have never considered it part of their function, when asked to pass upon the validity of legislation enacted in the interests of defence following on a declaration of war, to question whether the war itself was really a war in defence of the Commonwealth. So, on the view taken by the majority of the Court, the constitutional power to enact a great deal of war-time defence legislation, including legislation such as the Communist Party Dissolution Act, could be brought into operation by a *purely executive act*. Why, then, should it not be brought into operation by an executive or Parliamentary decision short of a declaration of war? His Honour gave short shrift to such principles as *salus populi suprema est lex*: "Such pithy proverbs represent not an application, but a negation,

32. At p. 217. 33. At pp. 210-211, 217-218. 34. At pp. 191-192.
35. At p. 223. 36. At pp. 153-154. 37. At p. 142. 38. At p. 147.

of law."[39] The voice of the statesman is discernible in the Chief Justice's view[40] that the identification of national dangers, whether external or internal, depends on the objectives of national policy. These objectives can be determined only by the Government or Parliament. The courts, then, should accept the Government's or Parliament's identification of national dangers.

Latham C.J.'s statement of the problems of government in relation to the vital matter of defence against external or internal enemies, and of the difficulties created by the view taken by the majority of the Court, would be very hard to refute. Most students of government and governmental officers concerned with the direction of national policy would undoubtedly sympathise with his attitude. It may not be without significance that before being appointed Chief Justice His Honour was Attorney-General in a Commonwealth Ministry.

The Internal Security Power

As I have already indicated, the attitude taken by the members of the Court to the internal security power proceeded along similar lines to that taken towards the defence power. The majority held that, just as Parliament could not arrogate to itself or confer on the Executive conclusive power to determine the existence of the facts necessary to attract the operation of the defence power, so it could not do likewise in relation to the internal security power. Only Dixon J. and Fullagar J. referred to the question whether the internal security power would expand in time of an actual or threatened outburst of internal violence in the same way as the defence power expands in time of actual or threatened war. Dixon J.[41] would commit himself no further than to say that such conditions "might perhaps" justify legislation like the Communist Party Dissolution Act. Fullagar J.,[42] however, while admitting the elasticity of the power according to the domestic situation, was emphatic that it could not expand to an extent comparable with the "secondary aspect" of the defence power.

Conclusion

The Communist Party Dissolution Act marked a bold attempt by the Menzies Government to induce the High Court to adopt a deliberate policy of judicial restraint in relation to the defence and internal security powers, to accept Parliament's determination of national dangers which must be met by preventive measures. The Chief Justice was prepared to adopt such a policy, but there can be no doubt that it would result in a considerable accretion to Commonwealth power and would thus be a further serious blow to the federal balance of power laid down in the Constitution. The fifty years' history of the Federal Constitution has been a history of gradual (sometimes sudden) growth in Commonwealth power relative to that of the States.[43] But the majority of the Court were not prepared to further encourage this growth in this case. They were not prepared

39. At p. 154.
40. At p. 141.
41. At p. 172.
42. At p. 214.
43. *See* K. H. Bailey, *Fifty Years of the Australian Constitution*, 25 A.L.J. 314.

to abdicate, in time of peace, any of the Court's established power to review legislation in the light of the Court's own interpretation of the Constitution. It is probably unnecessary to say that the decision of the Court was in no sense a certificate of good conduct for the Australian Communist Party. The members of the majority were agreed that the *situation* envisaged by the preamble to the Act could be dealt with by the Federal Parliament, but not by the means adopted in the Act.

Dixon J.[44] concluded his judgment by saying: "This conclusion may be thought to bear out Dicey's well-known statement that Federal Government means weak government, Dicey *Law of the Constitution* (2nd ed.), p. 157: (9th ed.), p. 171". But he went on to say: "But it is necessary to remember that we are not here concerned with the extent to which the defence power allows of the suppression of definite conduct as distinguished from definite people and of the dissolution of bodies offending against definite prohibitions or failing to conform to definite requirements as distinguished from bodies made definite by the identification of the legislature or of the Executive." Nevertheless, in spite of this reminder, the decision in the *Australian Communist Party v. The Commonwealth* suggests that the Federal Parliament will have a rocky legal road to travel in enacting measures designed to prepare the country for the contingency of war. It must always submit to the High Court's view of the nature and degree of the dangers threatening the country, and to the High Court's view of what measures might reasonably be considered capable of meeting its assessment of those dangers. The Court has always said, as the members of the majority in this case said, that it is not concerned with matters of policy in the sense of whether any particular measure will in fact assist in the defence of the Commonwealth. But of course the Court, on the view taken by the majority in this case, is concerned with matters of policy in another sense. The question whether any measure might reasonably be considered capable of aiding defence clearly depends, fundamentally, on matters of policy. A judge's basic views on the function of government, on the nature of war, and on the nature of war organisation—all matters on which there is scope for considerable difference of opinion—must necessarily affect his decision. What will the Court say, for example, of such general control legislation, designed ostensibly to lay a sound economic foundation on which to fight a war, as the Defence Preparations Act 1951? What will it say of such developmental projects, designed ostensibly to strengthen the country's defences, as the Snowy Mountains Hydro-Electric Scheme, established by the Snowy Mountains Hydro-Electric Power Act 1949? No Government can be sure of the answer.[45]

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44 At p. 179.

45. It may be of interest to note that on a referendum submitted to the electors by the Federal Government under s. 128 of the Constitution on 22 September, 1951, a proposal to amend the Constitution by conferring on the Federal Parliament power to make laws with respect to communism and to pass a law in the terms of the Communist Party Dissolution Act 1950 was rejected by a narrow majority of all electors and by a majority of electors in three States, New South Wales, Victoria, and South Australia.