II. Commonwealth

Introductory.

Although it had only been elected in December 1949 and was barely halfway through its normal term, the nineteenth Commonwealth Parliament was dissolved in March 1951. That year also saw the opening of the twentieth Parliament.

The third period of the first session of the nineteenth Parliament commenced on 7th March 1951; eleven days later the Prime Minister (the Right Hon. R.G. Menzies) requested the Governor-General to grant a dissolution of both Houses of the Parliament on the ground that the Senate had failed to pass the Commonwealth Bank Bill after it had been twice passed by the House of Representatives; the situation contemplated by sec. 57 of the Constitution had thus arisen. On 19th March the Governor-General signed a proclamation dissolving both Houses and calling for general elections on 28th April. It is of interest to note in this context that a double dissolution had been granted on only one previous occasion, namely, in 1914, after the Senate had twice rejected a Bill to prohibit preference to unionists in government employment; and that in 1951 the Menzies government was successful at the polls with working majorities in both Houses.

During 1951 82 public Acts were passed by the legislature, of which only three were passed by the nineteenth Parliament. The twentieth Parliament was opened by the Governor-General on 12th June 1951; the first period of the first session continued from that date until 14th July, and the second period began on 26th September and ended on 29th November. It was during the second period that the greater part of the year's legislation was enacted.

I. CONSTITUTIONAL.

Introductory.

The measures dealt with under this heading include a Bill[1] which was not presented to the Governor-General for the royal assent because it failed to obtain the majorities required by sec. 128 of the Constitution; an Act to re-establish the parliamentary Public Accounts Committee; and two other Acts which are placed here, not because they may be related to the Constitution in the lawyers'

1 Constitutional Alteration (Powers to deal with Communists and Communism) Bill.

sense but because they are of interest to the student of government, the Constitution, and constitutional practice in the broader sense.

Public Accounts Committee.

The purpose of the Public Accounts Committee Act (No. 60 of 1951) is to reconstitute the Joint Parliamentary Committee of Public Accounts, first established by an Act of 1913 (No. 19) and later suspended by the Committee of Public Accounts Act (No. 58 of 1932) as a depression economy measure. The latter Act provided that the Committee might be reconstituted by resolution passed by both Houses of Parliament.

In his 1947-48 report the Auditor-General advocated the removal of the suspension imposed by the 1932 Act and referred to the rapid increase of Commonealth revenue and expenditure since pre-war years; he expressed the view that the need for a more detailed survey of expenditure was now much greater than it was when the Committee had functioned from 1913 to 1932. Although the Committee could be reconstituted by resolution, a new statute has been passed which, as did the repealed Act, provides for a committee of ten members of whom three are members of and appointed by the Senate, the remainder being members of and appointed by the House of Representatives. The duties of the Committee as laid down in the repealed Act were (a) to examine the accounts of the receipts and expenditure of the Commonwealth, and to report to both Houses of Parliament any items in those accounts, or any circumstances connected with them, to which the Committee thought that the attention of the Parliament should be directed; (b) to report to both Houses of Parliament any alteration which the Committee thought desirable in the form of the public accounts or in the method of keeping them or in the mode of receipt, control, issue or payment of public moneys; (c) to inquire into and report upon any question in connection with the public accounts which was referred to it by either House; and (d) any other duties assigned to the Committee by Joint Standing Orders approved by both Houses.

In addition to those duties, which have been retained in the present Act, the Committee is now required to examine each statement and report transmitted to the Parliament by the Auditor-General in pursuance of the Audit Act 1901-48. By virtue of sec. 11 the Committee may, and if so requested by a witness shall, take in private evidence whether oral or documentary which in its opinion relates to a secret or confidential matter, and such evidence, if so

taken at the request of a witness, may not be disclosed without the authority of the witness. The Act also makes provision for the appointment by the Committee of not more than two Sectional Committees to report to it upon such matters with which it is concerned and as it directs; each Sectional Committee is to consist of three or more members.

Defence and the regulation-making power.

Dicey in his *Law of the Constitution* crystallised the traditional Liberal concept of the virtues and functions of the constitution of the United Kingdom, asserting the essentials of constitutional government to be "the sovereignty of Parliament and the rule of law." Likewise Hearn in his *Government of England* considered that the fundamental principles of the constitution consisted in the control of the executive by the will of Parliament and the restriction of administrative discretion within legal forms. When Dicey was writing the first edition of *Law of the Constitution* his principles did not even then describe adequately the role played by the executive; and in his *Law and Opinion in England* he expressed his apprehension of the growth of executive powers. In spite of the inaccuracies (as a mere description of a state of fact) of Dicey's *Law of the Constitution,* many people, more particularly lawyers and those engaged in the social sciences and politics, have come to regard the twin principles found therein as the ideal towards which a well governed polity should strive. It was with an attitude clearly conditioned by Dicey's views, and clearly desirous of adhering to the traditional constitutional concepts of parliamentary sovereignty and the rule of law, that the Lord Chancellor in October 1929 appointed the Donoughmore Committee (*sc.,* the Committee on Ministers' Powers) with the following terms of reference:— "to consider the powers exercised by or under the direction of or by persons or bodies appointed specially by Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the rule of law."

Furthermore, to meet what was considered a threat to the accepted principles and canons of constitutional law and practice (as enunciated by Dicey), namely, government by the executive, the House of Commons in 1944 set up a Select Committee (now known as the Committee on Statutory Instruments). Its present terms of reference are to consider each statutory instrument laid, or laid in

draft, before the House and requiring the negative or affirmative resolution procedure, and to decide whether to call the attention of the House to it on any of the following grounds:— (1) that it involves taxation or expenditure; (2) that the parent Act purports to make it immune from challenge in the courts; (3) that it appears to make some unusual or unexpected use of the powers conferred by the parent Act; (4) that it purports to have retrospective effect in the absence of express authority in the parent Act; (5) that there appears to have been an unjustifiable delay in its publication or in laying it before Parliament or in notifying Mr. Speaker why an instrument required to be laid before the House needs to come into operation before being so laid; and (6) that for any special reason it requires elucidation.

Throughout the English-speaking world it is now generally accepted that any regulation-making power exercised by the executive or by administrative officers should be related to specific heads of legislation and should function only to bring into effect some particular enactment—each grant of power relating to a concrete or specific course of activity or policy. Constitutional tradition requires that any such power should not be freed from particularity; that the broad heads of policy should not be found in regulations or orders; that "blank cheque" legislation should be reserved only for times of dire peril—when in French law an *etat de siege* would be declared, when all is confusion, when unified direction is necessary to save the country, and when Parliament cannot be assembled quickly.

In time of peace a statute such as the Defence Preparations Act (No. 20 of 1951) is a veritable *lex regia.* Comparison should be made between the regulation-making power conferred by the National Security Act 1939-46 (under sec. 5), which in all conscience gave an extremely wide power to the executive, and the powers conferred by the Defence Preparations Act 1951 (sec. 4). The terms on which the power is conferred by the war-time Act seem to be models of precision in comparison with those used in the cold war Act. The latter should also be contrasted with the Defence Production Act 1950 of the Congress of the United States; the latter, unlike the Australian Act, indicates specific subjects for subordinate legislation; for example, priorities and allocations, authority to requisition, expansion of productive capacity and supply, price and wage stabilisation, settlement of labour disputes, and control of consumer and real estate credit. Thus Congress, before it delegates powers of this

kind to the President, lays down the general lines of the programme to be adopted.

It is important to note that sec. 4 contains some restrictions on the regulation-making power, for it provides that

"Regulations—

(a) imposing taxation;

(b) with respect to the borrowing of money on the public credit of the Commonwealth;

(c) for or in relation to the compulsory direction of labour; or

(d) imposing any form of, or extending any existing obligation to render, compulsory naval, military or air force service"

are not authorised by the Act. It is, however, improbable that the High Court would regard any regulations relating to the matters set out in paras. (b), (c) or (d) as being within the defence power as it is interpreted in time of peace. If it was the intention of the Parliament that the regulation-making powers were to be based not only on the defence power but on any of the powers in sec. 51 of the Constitution which may be relevant, then it is submitted that there is not sufficient particularity in the grants of power in the section to make such an intention effective. It is not for a moment suggested that a grant of regulation-making powers should expressly include the relevant heads of power in sec. 51, but it is suggested that sec. 4 of the Act should have been drafted with sufficient particularity to show what specific topics or policies of subordinate legislation are intended. The generality of the paragraphs of sub-sec. (2), no less than the title of the Act, gives rise to the implication that an emergency power (i.e., the defence power) alone is invoked. Therefore such regulations as would infringe the three quoted paragraphs of sec. 4 would be invalid quite apart from the prohibition of their being made at all.

Paragraph (a) appears to be superfluous, if not from a legal point of view, then from a political standpoint. It is submitted that the Commonwealth executive can exercise a delegated power to levy taxes but only if such a power is granted by the legislature in clear words particularising both the ambit of the executive's discretion and the specific subject-matter of the tax.[2] Be the legal question as it

[2] See the *Wooltops Case—The Commonwealth and the Central Wool Committee v. Colonial Combing, Spinning and Weaving Company Limited*, (1922) 31 C.L.R. 421 (especially per Isaacs J. at 433-434 and 444),

may on this point, it would be a very bold and impolitic government which would seek, in time of peace, to tax the people of Australia by subordinate legislation, regulations, and orders.

These criticisms are not levelled against the concept of the general need for defence preparation; they are directed against the extreme vagueness of the grants of power in sec. 4 of the Act. The extensive use of preambles is also open to criticism. The High Court will not consider itself bound by them; it will not regard such recitals as a substitute for the facts and realities of a given situation. Fullagar J., clearly summarising the unanimous opinion of the High Court on this point, has said, " . . . it seems to me that it would be contrary to principle to allow *prima facie* probative force to recitals of fact upon which the power to make the law in question depends. It is, as I have said, clearly impossible to allow them conclusive force, because to do so would be to say that Parliament could recite itself into a field which was closed to it."[3]

Finally it may be noted that the broad terms of this enactment are not themselves likely to be declared invalid by the High Court. They operate merely as a conduit, passing legislative power from Parliament to the executive. Therefore questions of validity will arise rather upon the secondary level of regulations or even the tertiary level of orders.

Transitional defence powers.

The Defence (Transitional Provisions) Act (No. 43 of 1951) gives the force of law for a further year to the comparatively few surviving National Security Regulations and Orders, the operation of which (by virtue of the Defence (Transitional Provisions) Act 1946-1950) would otherwise cease on 31st December 1951. While most of these regulations would normally be no longer needed except for transitional or winding-up purposes, the new exigencies of this period of the cold war and rearmament make it undesirable to dispense at present with some of the surviving war-time provisions. This aspect of the Act finds expression in the third recital in the preamble. Nevertheless it is submitted that in peacetime laws which are still

and *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*, (1939) 61 C.L.R. 735 (especially per Latham C.J. at 765-766, where he referred to *Powell v. Apollo Candle Co.*, (1885) 10 App. Cas. 282, and *Nott Bros. & Co. Ltd. v. Barkley*, (1925) 36 C.L.R. 20).

[3] *Australian Communist Party & Others v. The Commonwealth & Others*, (1950-51) 83 C.L.R. 1, at 264.

couched in the form of regulations should be placed in the statute book as Acts of Parliament; there is no war situation which now requires that legislative provisions should be issued by the executive with dispatch and promptitude. Democratic government requires that laws should be enacted by the democratic process implicit in the concept of parliamentary supremacy. It is also submitted that the continued embodiment of laws in the form of regulations is unsatisfactory for the reason that the publication of the annual volumes of Statutory Rules appears to be sadly in arrear. The annual publication of National Security Regulations in a separate *Manual* has been completely discontinued. Thus this branch of the Commonwealth laws fails to comply with the criteria of "cognoscibility and accessibility."[4]

The unsuccessful referendum.

In 1950 the Parliament of the Commonwealth passed the Communist Party Dissolution Act, which the High Court subsequently declared to be invalid[5] as being beyond the legislative powers of the Commonwealth. The High Court said that

(1) Communists and communism not being specifically listed among the subjects of Commonwealth power, the dissolution of the Australian Communist Party and the exclusion of communists from certain offices could, under present circumstances, be accomplished only under the defence power if at all.

(2) In time of peace, a statute to dissolve bodies or to exclude persons from office because Parliament thinks their existence or conduct to be prejudicial to defence cannot be justified under the defence power; it is for the Court to decide the question of fact as to what conduct is prejudicial to defence.

(3) In time of a major war, or when, in the opinion of the Court, the existence of the Commonwealth is threatened, a statute seeking to do what the Communist Party Dissolution Act purported to do could be justified under the defence power, but not otherwise.

(4) The Court, not the Parliament nor the government, must be the final judge both of the existence of the degree of danger

4 See the strictures on this point of lack of publicity by Scott and Evershed L.JJ. in *Blackpool Corporation v. Locker,* [1948] 1 K.B. 349.

5 See note 3, *supra.*

and of the necessity of the measures adopted to meet it; and the Court will form its judgment on such notorious facts, that is, facts known to the public generally, as the Court will, following its ordinary rules, notice judicially.

Proposing to insert a new sec. 51A into the Constitution, the Constitution Alteration (Powers to deal with Communists and Communism) Bill dealt with two separate and distinct legislative powers. The first would have permitted the Parliament to make such laws for the peace, order and good government of the Commonwealth with respect to communists and communism as it considered to be necessary or expedient for the defence or security of the Commonwealth. The second sought to give to the Parliament power to make a law in the precise terms of the Communist Party Dissolution Act, the very measure which had been declared unconstitutional and invalid by the High Court. It is interesting to note that this second power would have had the unusual effect of incorporating a particular statute in the Constitution itself, although a power to amend that statute was also to be included.

This measure, being an alteration of the Constitution, was the subject of a referendum held on 22nd September 1951 under the provisions of sec. 128 of the Constitution. It failed to be carried in accordance with the terms of that section, not obtaining the support of (a) a majority of the electors voting throughout the Commonwealth or (b) a majority of the States.

II. INDUSTRIAL LAW.

The Conciliation and Arbitration Act (No. 2)[6] amends the Principal Act with regard to secret ballots, the enforcement of awards, and contempt of the authority of the Commonwealth Court of Conciliation and Arbitration. Further, it adds to the four matters which by the amending Act of 1947 (No. 10) were placed within the exclusive jurisdiction of the Court, two further general matters of paid sick leave and long service leave. Finally, a new section 78 is inserted which prohibits incitement to breach of an award.

Secret ballot in union elections.

On the topic of secret ballots the Act does three things: First, it provides that the rules of every industrial organisation shall require that the election of officials to places of executive or administrative

[6] No. 18 of 1951.

responsibility in the organisation shall be by secret ballot, and that the rules shall guard against irregularities or in other words will ensure the full and free recording of votes by all members entitled to vote and by no others, and a correct ascertainment and declaration of the results of the voting. Secondly, it permits electoral ballots to be officially conducted not only when an industrial organisation so requests, as was provided by Act No. 28 of 1949, but also where a given number or proportion of the members request the Industrial Registrar to conduct the election. Thirdly, it expands the provisions in the Principal Act dealing with secret ballots in connection with industrial disputes as distinct from elections. It enables the Court to order that the views of the members themselves shall be ascertained by secret ballot when the Court considers that this might prevent, or bring a settlement of, a dispute. This provision is sufficiently wide to authorise the Court to exercise the power in relation to organisations bound by the award of any Commonwealth tribunal. It may be noted that the operation of the earlier provisions is now extended to disputes not before the Court or other tribunal, and that a ballot may be taken of a section or class of members as distinct from the whole union or a branch.

Punishment for contempt.

Before the decisions of the High Court in the *Metal Trades Case*[7] and the *Gas Employees' Case*[8] it was considered that the Arbitration Court had complete power and jurisdiction under sec. 29 to enforce its awards by punishing disobedience and by proceedings for contempt of court. Because the Court was in 1947 specifically created a superior court of record, and the specific (and limiting) provisions with regard to punishment of contempt contained in the original Act were omitted, it was assumed that the Court would have all the inherent powers to punish for contempt that flowed at common law from its declared status as a superior court of record. But the High Court held in the *Metal Trades Case* (which was followed in the *Gas Employees' Case*) that the Arbitration Court did not derive from the provision that it should be a superior court of record any power to punish disobedience of its awards additional to the powers set out in sec. 29. Secondly,

[7] *The King v. Metal Trades Employers Association, ex parte Amalgamated Engineering Union, Australian Section,* (1950-51) 82 C.L.R. 208.

[8] *The King v. The Commonwealth Court of Conciliation and Arbitration, ex parte The Federated Gas Employees Industrial Union,* (1950-51) 82 C.L.R. 267.

the Principal Act had authorised the Arbitration Court to grant injunctions to prevent contraventions of the Act; it was thought that this included injunctions in respect of breaches of awards made under the Act. In the two cases mentioned a majority of the High Court held that while the Arbitration Court could issue injunctions in respect of breaches of the Act itself, it could not do so in respect of awards and orders made under the Act. Sec. 6 of the new Act amends sec. 29[9] of the Principal Act and empowers the Arbitration Court to enforce obedience to its orders and awards. Sec. 7 is in general terms and enacts a new sec. 29A which clearly vests the Arbitration Court with all the inherent powers of a superior court of record to punish contempts of its authority, including the power to punish as contempt disobedience of orders made by it directing compliance with awards or enjoining breaches; but the maximum penalties that can be imposed for these particular forms of contempt are limited. The Attorney-General of the Commonwealth may apply in the public interest for an order of the Court under sec. 29 of the Principal Act.

Furthermore, the powers of the Court, as the superior court in the arbitral jurisdiction, are extended to breaches or non-observance of awards and orders made by other Commonwealth industrial conciliation and arbitration tribunals. Some of these special tribunals have their own rules of enforcement; but cases may occur where it would be appropriate that the powers given by the Principal Act to issue injunctions and to make orders for compliance should be exercised by the Court even in relation to the awards and orders of those other tribunals.

Membership records.

The Conciliation and Arbitration Act (No. 3)[10] deals with three matters. First, the filing with the Industrial Registrar of the membership records of industrial organisations; secondly, the representation of the parties before the Arbitration Court and the Conciliation Commissioners; and thirdly, the jurisdiction of Conciliation Commissioners to renew awards that contain provisions with respect to annual leave and sick leave.

The Act No. 18 of 1951 had introduced provisions requiring organisations to file with the Industrial Registrar copies of their regis-

[9] It may be noted that sec. 29 of the Principal Act appears in Act No. 10 of 1947 as sec. 33, but is renumbered 29 by the operation of sec. 26 and the Second Schedule of that Act.

[10] No. 58 of 1951.

sters of members—which of course they have always been required to keep—and to file quarterly lists of changes in membership. Those provisions were not novel but were based on various State Industrial Arbitration Acts that have been in operation for some time. Under the new Act the Industrial Registrar is authorised to exempt an organisation, as a whole or as to a branch thereof, from compliance with the provisions as to the filing of membership records. However, he must first be satisfied that the method and system of keeping and maintaining the records of membership of the organisation are such as to provide in a convenient form accurate particulars of the membership if they are needed for an officially conducted ballot or election. He is also given power to withdraw the exemption if he is not satisfied as to the manner in which the records are kept.

Representation of parties.

The provisions of the Principal Act relating to the representation of parties by counsel, etc., before the Court and the Conciliation Commissioners are amended; they had, during the course of the years, been changed a number of times. At one stage, the consent of the parties alone was required. At another, either the consent of the parties or the leave of the tribunal was sufficient. In 1930, the requirement of both leave and consent was introduced. A new sec. 46[11] was inserted in 1947 by Act No. 10 of that year to prohibit the representation of parties by counsel, solicitor, or paid agent except by leave of the Court and with the consent of all parties. In proceedings before a Conciliation Commissioner there was a categorical prohibition of representation by any such persons. The section did not apply, however, to judicial proceedings before the Court; moreover, interveners could have been professionally represented before the Court or a Conciliation Commissioner.

The Chief Conciliation Commissioner has reported that "A majority of the Commissioners considered that this prohibition"—that is, the prohibition of professional representation in proceedings before them—"deprives them of the aid of skilled and experienced representatives of both employers and employees. Some of us who have occupied the position of Conciliation Commissioner for a number of years realise the value of such help and I am able of my own

11 The number of this section is to be found as follows:— By sec. 8 of the amending Act of 1947 a new sec. 43G was inserted in the Principal Act: by virtue of sec. 26 and the Second Schedule of the 1947 Act sec. 43G was renumbered 46.

experience to say that the attendance of such representatives at conferences has conduced to the settlement of disputes and, generally speaking, has expedited rather than retarded the hearing when the dispute has come to arbitration. From information conveyed to me I believe that a number of organisations, particularly the smaller ones which cannot afford to employ a person solely on this type of work or with not enough of it to enable its officers to obtain the necessary knowledge and experience, would welcome a change in the Act at least to provide that such representatives should be permitted to appear with the consent of the Commissioner and all the parties."

This statement has borne fruit. Under the amending Act a party before a Commissioner may apply for permission to engage representatives, and the Commissioner is empowered to determine whether the application shall be granted; a similar rule applies to the Court. Thus the Act does not provide that counsel, etc., shall automatically have the right to appear.

Leave.

The Act No. 18 of 1951 reserved to the Court jurisdiction in relation to annual or other periodical leave with pay, sick leave and long-service leave with pay; but by the later Act the Conciliation Commissioners are permitted, when renewing existing awards, to continue their provisions (if any) as to annual leave and sick leave.

III. FISCAL MEASURES.

Income tax.

The problem presented by the ubiquitous use of the corporation in modern commercial life is to what extent it is necessary and permissible to "pierce the veil" of legal personality in order to see the real persons, purposes, and intentions covered by the legal form.[12] It has been the policy of the courts as well as of the legislature to pierce the veil where the device of corporate personality is or may be used fraudulently and in particular for the evasion of tax obligations, so that no mere act of incorporation may tend to lessen or increase

12 See *Daimler Company Ltd. v. Continental Tyre and Rubber Company (Great Britain) Ltd.*, [1916] 2 A.C. 307, and *Sovfracht (V/O) v. Van Udens scheepvart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] A.C. 203, with which may be contrasted *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22; and see generally W. Friedmann, Legal Theory (2nd ed.), 358-373.

the income tax obligations of individuals or small groups of individuals. By sec. 15 of the Income Tax and Social Services Contribution Assessment Act (No. 44 of 1951), which repeals sec. 103 of the Principal Act and inserts new secs. 103, 103A, 103B, 103C, and 103D, the Commonwealth legislature has boldly, perhaps too boldly, pierced the veil of legal personality. This is seen particularly in the device to defeat the practice of subdividing a private company into two or more smaller companies.[13]

The fiscal advantage of this practice is ended for the category of "private companies deemed to be related"; these cannot separately enjoy the benefits of sec. 103C (1) because their retention allowance is calculated on the combined undistributed income of all the related companies. The provisions of the amending Act are sufficiently important to be reproduced in full:—

> Sec. 103C (3). . . . two private companies shall be deemed to be related to one another if . . .—
>
> (a) one company is a subsidiary of the other; or
>
> (b) one person, or persons not more than seven in number, hold in one of the companies shares representing either—
>
> (i) more than half of the paid-up capital (other than capital represented by shares bearing a fixed rate of dividend only); or
>
> (ii) more than half of the voting power,
>
> and that person, or those persons or any one or more of them, as the case may be, hold in the other company shares representing either—
>
> (iii) more than half of the paid-up capital (other than capital represented by shares bearing a fixed rate of dividend only); or
>
> (iv) more than half of the voting power.
>
> (4) for the purposes of paragraph (b) of the last preceding sub-section, where shares in a private company representing—
>
> (a) not less than three-quarters of the paid up capital (other than capital represented by shares bearing a fixed rate of dividend only); or

[13] The advantage of such a subdivision lay in the provision of the Principal Act whereby a private company could retain, free from the tax on undistributed income, an amount known as the retention allowance. This was calculated according to a graduated scale decreasing as the amount of undistributed income increased. Thus the subdivision of a private company into two or more smaller companies gained the advantage of this scale for each of them (see (1948-50) 1 University of Western Australia Annual Law Review, 339). It is convenient to note at this point that a new graduated scale setting out the new retention allowance is to be found in sec. 103C (1); this commences at 50 per cent. of the first £1000 of distributable income not in fact distributed, and ends at 10 per cent, of the excess of distributable income over £10,000 not in fact distributed.

(b) not less than three-quarters of the voting power,

are held by one person and his relatives, or by persons not more than seven in number and their relatives, that one person, or those persons not more than seven in number, shall be deemed to hold shares in that company representing more than half of that paid-up capital, or more than half of that voting power, as the case may be.

(5) For the purposes of the last two preceding sub-sections—

(a) a person and his nominees shall be deemed to be one person, and a nominee of a relative of a person shall be deemed to be a relative of that person; and

(b) a company shall be deemed to be a subsidiary of another company if—

(i) shares representing not less than half of the voting power of the first-mentioned company are held directly or indirectly by that other company;

(ii) shares representing not less than half of the paid-up capital of the first-mentioned company (other than capital represented by shares bearing a fixed rate of dividend only) are held directly or indirectly by that other company; or

(iii) the first-mentioned company is a subsidiary of a company which is itself, whether directly or by virtue of the application of this sub-paragraph to one or more companies, a subsidiary of that other company.

It may be noted that these definitions are so wide that companies may be deemed to be related even when there is no actual relationship of policy or organisation. Situations may be foreseen where companies could be caught within the net of these provisions through a fortuitous identity in the proprietorship only and not through any tax evasion scheme. The curtain of legal personality has been lifted by these provisions; may this not have been done too boldly? This point should be borne in mind by practitioners advising on the formation of private companies; it may become necessary for them to inquire into the interests (in all other private companies) of all proposed shareholders in the new company, for it may easily happen that two companies will be deemed to be related through having some shareholders in common though without anything else in common.

Provision is however made for the circumstances in which it would be unreasonable to tax a company as a private company. Where such circumstances are alleged to exist, a company is entitled to state its case to the Commissioner of Taxation and, if dissatisfied with his decision, to take its claim to a Taxation Board of Review for further adjudication. Public companies are no longer subject to tax on undistributed income.

Another important amendment is contained in sec. 21 which gives to primary producers the right to withdraw from the system

of averaging of income. This right of withdrawal commences to apply to incomes for the year ended 30th June 1951 and once exercised is irrevocable.

The Act exempts the pay and allowances of members of the Navy, Army, Air and auxiliary forces serving in operational areas in and around Korea and Malaya, and applies to pay and allowances earned since the commencement of operations in those areas in June 1950. Provision is also made to exempt from taxation (as from 1st July 1951) income from scholarships, bursaries, and similar educational allowances. The exemption applies where the recipient is receiving full-time education at a university, school, or college; it is intended to ensure that the whole of the amount of the scholarship is available for the purpose for which it was provided. Deductions for gifts to community hospitals are also allowed as from 1st July 1951; the concession also applies to gifts to public funds to be used fr the establishment or maintenance of such hospitals.

Broadcasting fees.

The purpose of the Broadcasting Act (No. 41 of 1951) is to increase the fee for broadcast listeners' licences, except those issued to certain classes of pensioners, to £2, and to repeal the provision in the Principal Act (No. 33 of 1942 and its amending Acts) which required listeners to obtain additional licences at half the ordinary fee for each receiver in excess of one. The fee for a pensioner's licence remains at 10s.

To effect these changes a number of amendments have been made to the Principal Act. Secs. 96-101 are repealed; new sections are inserted which repeat most of the existing provisions, modified as already explained. Listeners in Zone 1, which is the area within approximately 250 miles of any national broadcasting station, will pay the new fee of £2; listeners living in the remainder of the Commonwealth and Territories will pay £1. 8s. instead of 14s. Age and invalid pensioners, widow pensioners, and persons in receipt of a service pension under the Repatriation Act 1920-50 who live alone or with another person whose income does not exceed that of the pensioner, continue to pay a fee of 10s. only. As has always been the case, no fees are charged for licences for schools or for the blind. In all cases a single licence fee covers any number of receivers in the one house.

Under this Act, sec. 100 of the Principal Act, which required vendors of broadcast receivers to notify sales to the Postal Depart-

ment, is repealed without being replaced, but the obligation apparently continues. A similar provision appears in the regulations made under the Act.

Banking policy.

In 1945 the Commonwealth Bank Board was abolished and the management of the Bank vested solely in the Governor, who was assisted in the determination of monetary and banking policy by an Advisory Council. By the Commonwealth Bank Act (No. 16 of 1951) the Board is re-established; it now consists of the Governor of the Bank as chairman, the Deputy Governor as deputy chairman, the Secretary to the Department of the Treasury, and seven other members of whom not more than two may be officials of the Bank or of the Commonwealth Public Service. The periods of the original appointment of these seven members will range from one to five years, each appointment thereafter being for five years; hence one member at least will retire in each year. Voting on any question is by majority; if there is an equality of votes, the chairman has a casting vote. The Board is to determine the policy of the Bank in its central banking and trading activities, the policy of the Commonwealth Savings Bank being also a matter for its decision.

With respect to the monetary and banking policy of the Bank, the Act provides that the Bank shall keep the government informed. If government and Bank differ on a policy matter the Treasurer of the Commonwealth and the Board must endeavour to reach agreement; if they fail, the Board is to furnish a statement of its views, and the Treasurer may submit a recommendation to the Governor-General who, on the advice of the Federal Executive Council, may determine the policy to be adopted by the Bank. This procedure is intended to ensure that any submission to the Governor-General as to banking policy will only be made after full consideration by the government.

Where the government determines the policy to be adopted by the Bank the Treasurer is required by the Act to inform the Bank accordingly and to lay a statement of the proposed policy, together with a statement of the views of the government and of the Bank, before each House of the Parliament within fifteen sitting days after the policy has been communicated to the Bank.

With the re-establishment of the Bank Board certain consequential alterations (set out in the Schedule to the Act) have been made in the relevant provisions of the Principal Act.

IV. DEFENCE.

Universal military service.

The National Service Act (No. 2 of 1951) establishes a system of national training for the defence forces of Australia. The Defence Act 1903-50 had formerly provided that all male inhabitants of Australia being British subjects and between the ages of 18 and 60 were liable in time of war to serve in the Citizen Forces.

There is considerable difference between the National Service scheme provided for by this Act and the earlier training scheme authorised by Part XII of the Defence Act. Under the latter, youths were liable for service in one form or another in the junior cadets, the senior cadets, and the Citizen Forces, from the age of 12 to the age of 26. Service was scattered over this lengthy period, but there was rarely any continuous training for longer than fourteen days. The essence of the new scheme is that it provides for continuous periods of service sufficiently long to enable not only the necessary basic training to be given but also an introduction to specialised forms of service.

The scheme involves the registration of persons liable to service under the Act, and provides for their interview and medical examination; deferments and exemptions can be allowed on various grounds. Machinery provisions are included for the actual call-up. All male British subjects of the age of eighteen years and ordinarily resident in Australia are required to register as and when called upon to do so by notice published in the *Gazette*. The only persons exempt from registration are certain officials in the service of international bodies, diplomatic personnel, men already serving in the Permanent Forces, aboriginal natives of Australia, and certain others. Youths of seventeen may register if they can show good reason for doing so; this is designed to meet the needs of those who, for reasons associated with their chosen careers, wish to perform their principal period of service before commencing their studies, etc. The obligations of the Act may be extended by ministerial direction to persons who are not British subjects. Migrants coming to this country with the intention of making it their home should, equally with Australian citizens and other resident British subjects, make their contribution to the country's defence preparations and be made liable to training. Training for national service alongside Australians of the same age would play an important part in the assimilation of migrants. But there are difficulties in that it is not customary for the nationals of one country to be subjected to compulsory military service in the forces of another

country; in some cases, those who join the forces of another country are liable to lose their original nationality and may become stateless. On the other hand, among the migrants to this country are many who are already stateless.

The Act provides for examination by a medical board consisting of two doctors; the standards of fitness will be laid down by the Services themselves. Every registrant who complies with the prescribed standard of fitness will be liable to call-up unless he is exempt; the exempt classes, apart from persons physically or mentally unfit, are theological students, ministers of religion, members of religious orders, and conscientious objectors. Part IV of the Defence Act provided[14] that persons whose conscientious beliefs do not allow them to bear arms shall be liable in time of war to be enlisted for duties of a non-combatant nature. During the Second World War, however, these rules were superseded by the National Security (Conscientious Objectors) Regulations, which provided that if a person was found by a court to hold conscientious beliefs which did not permit him to engage in any form of naval, military, or air force service, he should be totally exempt; but if his objection was only to combatant duties. he should be enrolled for non-combatant service.

The present Act adheres to the principles established by the National Security Regulations and admits conscientious objection as a ground of exemption from service. But the applicant for exemption must establish the grounds of his objections to the satisfaction of the court, which will consist of a police, stipendiary, or special magistrate. Those who do not establish an objection to *all* forms of service will be registered for non-combatant duties.

It is a basic principle of the scheme that training should begin during the individual's nineteenth year, but to this principle there are exceptions. Call-up may be deferred for apprentices and students whose course of study at a university, technical school or other approved educational establishment would be seriously dislocated if they were required to do their national service at the same time as others of their age; they may be granted deferment until they have completed their courses. Deferment may also be granted to persons residing at places too remote from training centres for them to be able to attend conveniently for training after the first and major period of continuous service. There is a general qualification that no person can be called up to commence service under the Act if he has reached the age of 26 years.

14 See now the Defence Act 1951, sec. 7.

Individuals who claim that service would impose exceptional hardship on them or on their parents or dependants may apply to a court, which may grant deferment for any period up to twelve months. At the expiration of the granted period the individual may apply to the court for further deferment.

Service is with the Citizen Naval Forces, the Citizen Military Forces, or the Citizen Air Force over a period of five years, during which the trainee will undergo 176 days' training. Having completed that training, he is under no further liability to training or service apart from that which would attach, under the defence legislation, to all members of the Citizen Forces should war break out before the end of the five years. This Act does not deal with liability to serve in time of war; but, as the Royal Australian Navy and the Royal Australian Air Force do not enlist persons who are not liable to serve overseas, the Act provides that no registrant is to be allotted to or be called up for service with the Navy or Air Force unless he has indicated in advance that he is willing to serve beyond the limits of Australia.

Subject to certain qualifications, an employee is entitled to reinstatement in his employment on his return from a period of national service. He is protected from dismissal, except for reasonable cause, for a period after his reinstatement equivalent to the period which he has just served in the Forces. The qualifications are that the employee must have been employed by the employer for at least thirty days immediately before going into camp, and that after coming out of camp he must present himself for work without delay. The Act further provides that a reinstated employee, if he stays in the job for at least as long as the period of absence in the Forces, will have that period of absence counted as time worked in his employment for the purpose of calculating his right to annual leave, sick leave, and (where applicable) long service leave and superannuation. The employer is required to pay his employee for any time which the latter loses from work while attending for an interview or for medical examination.

Apart from a number of minor and technical amendments of detail, the National Service Act (No. 2)[15] provides for three principal matters: First, the constitution of medical boards; secondly, the circumstances in which a trainee may be discharged before completing 176 days' training; and thirdly, the procedure in relation to persons who fail to fulfil the requirements of a call-up notice or to render

[15] No. 63 of 1951.

the service required under the Principal Act. Sec. 20 of the latter Act had provided that a medical board should consist of not less than two doctors selected as the Minister might direct; but in the more remote and sparsely populated areas it was apparently found impracticable to constitute such boards. Sec. 4 of the new Act provides that one doctor can act as a board in the circumstances mentioned in the section.

The Principal Act had created an obligation on certain persons to serve for 176 days, but makes no provision for discharge before that period has been completed. Where medical unfitness supervenes through injury or the development of a pre-existing condition it may be necessary to discharge the trainee; what is to be done with the man who commits a serious offence while serving and, after being punished in accordance with service law, is still liable under sec. 33 of the Act to complete his 176 days? Sec. 8 of the new Act amends sec. 35 of the Principal Act and confers on the Naval Board, the Military Board, and the Air Board the power to discharge from the Citizen Forces a person who is (1) classed as permanently unfit (medically) for service or (2) deemed unsuitable for further training on other grounds such as misconduct.

The law with respect to persons who do not obey the call-up is elastic, varies with the circumstances, and permits the exercise of discretion on the part of the magistrates and the service authorities. Where the circumstances indicate that the offender is not trying to escape his obligation, the court has power to release him upon his entering into an undertaking, supported by a bond, to obey a second notice calling him up for the next camp. (He is, of course, also liable to be punished by a fine). If he then fails to appear, his bond is forfeit and he will be arrested and brought before the court and committed into service custody as if he had not been released on bond. The alternative method is that by which an offender who is not released on bond is liable to a penalty, fixed by sec. 51 (as enacted by sec. 10 of Act No. 63) at a maximum of £50, and in addition to committal to the custody of a prescribed member of the Service concerned (i.e., the offender is taken under escort to a Navy, Army, or Air Force establishment). The new sec. 9 covers the case of the individual who has started his training in the normal way but later refuses to complete it; for example, the man who does his 98 days' initial training in the Army and later refuses to attend a fourteen-day camp. While he is no doubt subject, as a member of the Citizen Forces, to the laws applicable to those Forces, special provision is now made for situations of this kind; the liability to service continues for

the balance only of the period of national service that remains unfulfilled.

The Defence Act.

The Defence Act (No. 2)[16] introduces a number of amendments into the Defence Act 1903-1951 some of which, but not all, are consequential upon the passing of the National Service Acts (Nos. 2 and 63 of 1951). Sec. 8 contains provisions which relate to native forces in Territories administered by the Commonwealth. Both the Navy and the Army are raising volunteer native forces in the Territories of Papua and New Guinea. As the latter is a United Nations Trust Territory it is necessary to make special provision for the regulation and control of the forces raised there. Sub-sec. (1) of the new sec. 35A provides that native forces raised in a Trust Territory are not to be required to render service except as permitted by the Charter of the United Nations. Sub-sec. (2) permits regulations to be made for the control and discipline of any native force.

Sec. 11 of this Act exempts certain diplomatic and United Nations officials from liability to serve in time of war under the provisions of Part IV of the Principal Act. The exemption of United Nations officials accords with certain international conventions to which Australia has subscribed; parallel exemptions are to be found in the National Service Act. Sec. 12 repeals secs. 62 and 62A, which comprise Part V of the Defence Act 1903-51 and relate to compulsory service in junior and senior cadet forces, and replaces them by a new sec. 62. Compulsory training of cadets was suspended in 1929, and service has since been carried out on a voluntary basis. The new section gives legislative effect to this principle and provides for an Australian Cadet Corps on a voluntary basis, consisting of persons under the age of 18.

Sec. 16 repeals and re-enacts with amendments secs. 123A and 123AA of the Principal Act and relates to the supply of intoxicating liquor in military canteens, camps, and depots. Sec. 123A of the Principal Act related only to compulsory training under Part XII of that Act, which was repealed by the National Service Act. It is now provided that a person shall not sell nor supply intoxicating liquor in any military canteen, camp, depot or other establishment to a person under 21 who is rendering service as required by the National Service Act. It also provides that no person under 21 shall be in

[16] No. 59 of 1951.

possession of intoxicating liquor except by direction of a duly qualified medical practitioner. It further enacts that liquor shall not be sold nor supplied to, nor be in the possession of, any other person in any military canteen, camp, depot or other establishment except on such conditions as the Military Board determines and subject to the approval of the Minister.

Sec. 18 inserts a new sec. 123F in the Principal Act which provides that a person shall not be permitted to serve in the defence forces if he has been convicted of a crime which, in the opinion of the Naval Board, the Military Board, or the Air Force Board is such as to render him unsuitable for service in the defence forces, or if in the opinion of the appropriate service Board the service of that person in the defence forces might be prejudicial to the security of the Commonwealth. Sec. 19 contains a regulation-making power in respect, *inter alia,* of (a) the declaration as a prohibited area of a place used or intended to be used for a purpose of defence, (b) the prohibition of persons from entering, being in, or remaining in the prohibited area without permission, and (c) the removal of such persons from the area. The section also contains a regulation-making power in respect of the prohibition of the use, except as prescribed, of a word, group of letters, object or device which is descriptive or indicative of a part of the Forces or of a service or body of persons associated with the defence of the Commonwealth. Until the passage of this Act the only protection on this point was that afforded by war-time regulations continued under the Defence (Transitional Provisions) Act.

V. REPATRIATION,

Sec. 137 of the Re-establishment and Employment Act (No. 11 of 1945 as amended) is of great interest to students of administrative law. Sub-sec. (1) merely gives the Governor-General power to make regulations "not inconsistent with this Act"; sub-sec. (2), however, permits the making of regulations "providing for the repeal or amendment of, or the addition to, any provision of this Act." The period during which this latter regulation-making power may be exercised is limited by sub-sec. (3) to the period until "the termination of all wars in which His Majesty was engaged at the date of commencement of this Part." At that time, too, all regulations made under sub-sec. (2) are repealed and the provisions of the Act are to have effect "as if no such regulations had been made." Before the period limited in sub-sec. (3) had expired, sec. 3 of the Re-establishment

and Employment Act (No. 48 of 1951) saved the regulations made under sec. 137 (2) from extinction; it validates the amendments made by regulation and gives them full force, effect, and duration as if they had been enacted by statute.

A new part is also inserted in the Principal Act which defines the benefits to be extended to members of the Forces engaged in the present operations in Korea and Malaya. Most of the benefits covered by this new Part are an extension to those members of the Forces, with very little alteration or adaptation, of the benefits set out at large in the Principal Act. With respect to reinstatement in employment, Division 1 of Part II is excluded for the present purpose, and the provisions now deemed suitable by the legislature are set out in Division 2 of the new Part XI.

War service homes.

The object of the War Service Homes Act (No. 74 of 1951) is to direct the limited amount of money now available into the building of new homes so as to increase the total number of houses available. It was formerly the policy of the Department which under the Principal Act (the War Service Homes Act 1918-49) arranges the finance of home purchase by ex-servicemen to do so in the four following ways:—

(1) *Group building.* This involves the purchase of areas of land, their development, the preparation of layouts, modern planning of houses of various types, and a contract with a well established builder for the erection of the homes which, when completed, are made available to eligible persons on the basis of urgency of need.

(2) *Individual home-building.* Here three different methods are employed: (a) The supply of one of the many standard plans and specifications designed by the Department, at a reduced price; (b) the preparation of individual plans and specifications by the Department to meet the applicant's requirements; and (c) the supply by an applicant himself of plans and specifications prepared for him by a practising architect or other competent person. Tenders are then invited by the Department, or the applicant may introduce his own builder who submits a tender. In the majority of cases the contract is between the Department and the builder, with the Department undertaking supervision; in other cases the applicant may prefer the practising architect to carry out the detailed supervision and the Department exercises a general oversight and makes progress payments on the basis of the work done.

(3) *Purchase of existing property.* The applicant indicates the property in respect of which he requires financial assistance; the Department then arranges a valuation and a technical report on the property. It is necessary to ensure that the property is a good security for the money paid by the applicant and by the Commonwealth, that the construction is sound, and that the title is clear.

(4) *Discharge of existing mortgages.* It may be noted that this and the preceding method do not directly increase the amount of home building in Australia, whereas methods (1) and (2) directly stimulate building. Hence the practice of discharging existing mortgages is made subject to the direction of the Minister. The present direction is, in pursuance of the policy already mentioned, to discourage the practice of discharging existing mortgages.

The other major amendment is designed to give to men who have served in Korea or Malaya the same rights under the Principal Act as are enjoyed by ex-servicemen of the two World Wars.

VI. THE PUBLIC SERVICE

Apart from amendments in 1945 which provided a new system of promotions appeals and introduced employees' representation at certain points in service administration, no substantial changes have been effected in the machinery of control provided by the Public Service Act since 1922. It is a commonplace that changed conditions and especially the increased size and complexity of the Service have confronted the Public Service Board with problems which cannot be handled satisfactorily under that Act.

The most important amendments to be found in the Public Service Act (No. 2)[17] relate to sec. 29, which deals with the creation and abolition of offices and with the determination of salary classifications for newly created offices. The Act does not change the present procedure which requires the approval of the Governor-General for the creation and abolition of offices, but it permits the Public Service Board, after obtaining a report from the permanent head of the department concerned, to vary the salary classification of officers as required. This is intended to relieve the Executive Council of a considerable volume of purely formal business, and places the Public Service Board in the same position as other wage-fixing authorities in the Commonwealth. The second amendment to the section enables all positions of similar designation and classification to be uniformly

[17] No. 46 of 1951.

reclassified and the present occupants thereof to be automatically appointed thereto. The older practice under which every office on reclassification became vacant now applies only to the reclassification of specified offices.

The sections of the Principal Act relating to payment of salaries have been simplified and consolidated. A new sec. 32 is inserted to permit the Public Service Board to determine, by notice published in the Commonwealth *Gazette,* the conditions of advancement in certain categories of employment. Previously these conditions were prescribed in a schedule to the Public Service Regulations, but as they required frequent amendment and affected only officers in the positions concerned, a simpler procedure is substituted. A similar change has been made in the section dealing with advancement examinations.

Amendments to the sections of the Principal Act dealing with leave of absence, other than annual recreation leave, give the Board more adequate powers. The provisions for leave of absence for defence service have been extended. A concession on furlough has been made to officers who retire after at least twenty years' service. Previously furlough had been granted only in respect of each completed period of five years' service; by the new section service of more than twenty years will be treated on an annual basis instead of five-yearly.[18] A further amendment permits the grant of additional recreation leave (according to the period of actual service) during the year or years when furlough is taken.

An amendment to sec. 84 enables the Board to appoint returned soldiers to the permanent service, despite physical defects, if it is satisfied after medical examination as to their capacity to perform their duties; this gives the Board the same discretion as it already has in regard to non-soldier entrants to the service. A new sec. 8A clarifies the Board's power to exempt staff from the provisions of the Act and to determine conditions for exempted staff. An amendment to sec. 21 relieves the Board of the burden of publishing a comprehensive staff list every year; it may now publish lists as it thinks necessary or whenever so directed by the Prime Minister. Finally, provision is made for the creation of additional Promotions Appeal Committees as the need arises.

[18] The Commonwealth Employees Furlough Act (No. 28 of 1951) contains similar provisions as to federal employees who are outside the Public Service Act.

Compensation to injured employees.

The Commonwealth Employees' Compensation Act (No. 27 of 1951) increases the amount of compensation payable to Commonwealth employees or their dependants in cases of injury or disease due to their employment. This increase follows similar legislation in most of the States and also reflects the continued advance in the cost of living since the Principal Act was last amended in January 1949. The new rates, in the various categories, represent broadly a 50 per cent. increase on the existing scale. There is also an adjustment of the lump sum compensation payable to an injured employee who is retired on the ground of invalidity caused by injury sustained in the course of his employment and who is entitled to a superannuation pension; the Act provides for payment of a lump sum in place of weekly amounts. Additional allowances, at the rate of 15s. per week, are paid in respect of each child under 16 whether such child was born before or after the injury; but this provision does not extend to the children of a marriage contracted after the injury.

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