

HIGH COURT OF AUSTRALIA

Attorney-General for Victoria

Vs.

Commonwealth

(Gavan Duffy C.J., Rich, Starke, Evatt and McTiernan JJ.)

23 May 1935

Gavan Duffy C.J., Evatt and McTiernan JJ.

All questions of law and fact arising in this action have been remitted to the Full Court for determination.

The Attorney-General for the State of Victoria sues the Commonwealth of Australia at the relation of the Victorian Chamber of Manufactures. As finally elucidated during the hearing, the plaintiff's complaint is that, although the Commonwealth Clothing Factory (situated in Melbourne, Victoria) is lawfully operating under sec. 63 (1) (da) of the *Defence Act* "for the manufacture of naval and military equipment and uniforms," the Commonwealth has not restricted its operations to such purposes, but, as alleged in par. 4 of the statement of claim, "clothing has been manufactured and supplied to Commonwealth Government Departments other than the Department of Defence and the business has been carried on of manufacturing and supplying clothing to the Government Departments of the State of Victoria, Municipal Bodies constituted in the said State under its laws relating to local government and to other public utilities operating in the State and to other persons."

The plaintiff alleges that these additional operations of the factory are not authorized by sec. 63 (1) (da) of the *Defence Act*, nor by sec. 63 (1) (f) thereof; and that, if and so far as such provisions purport to authorize the operations, they are *ultra vires* the Parliament of the Commonwealth, the relevant power of which is to legislate in respect of the "naval and military defence of the Commonwealth and of the several States." The plaintiff claims an appropriate declaration and injunction.

In the main, the defendant relies upon the contention that the additional operations of the clothing factory are authorized by the *Defence Act* (sec. 63 (1) (f)), and that such operations are within the power of the Parliament. It is also contended that the executive power of the Commonwealth Executive under sec. 61, and the special position of the Governor-General under sec. 68 as Commander-in-chief of the naval and military forces of the Commonwealth, of themselves constitute a sufficient authority to do what has been done. Objection is made to the plaintiff's title to sue for relief, and it is also said that, in any event, the Court should, in its discretion, refrain from giving any relief owing to the fact that the practices now objected to have been continued for a long time with the knowledge, and, in many cases, for the express benefit, of the State of Victoria. It is finally contended that the High Court has no jurisdiction to hear and determine the action.

This last objection should first be dealt with. The [Constitution](#) itself vests jurisdiction in the High Court in all matters in which the Commonwealth is a party ([sec. 75](#) (iii.)). It was argued that there is

no "matter" before the Court. But the claim of the plaintiff, like the defence of the defendant, is based entirely upon legal grounds, dependent upon the meaning and application of the [Constitution](#), and of Commonwealth legislation. It is nothing to the point that the statement of claim may be demurrable, or that the defendant can produce a good answer in law to the claim, and that in the end the appropriate order of the Court should result in the dismissal of the action. A "matter" is none the less such because the defendant is entitled to succeed in resisting a plaintiff's claim, and we hold that the Court has jurisdiction.

Any objection based upon the plaintiff's title to sue necessarily disappears if it is held that the additional operations of the clothing factory are within the authority committed to the Governor-General by [sec. 63](#) (1) (da) and [sec. 63](#) (1) (f) of the *Defence Act*; for, in that event, the case of the Attorney-General of Victoria is resolved into a claim that, on a true interpretation of the statute, the provisions of the [Constitution](#) itself have not been observed. In our opinion, it must now be taken as established that the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provision of the [Constitution](#) for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents (*Attorney-General (N.S.W.) v. Brewery Employees Union of New South Wales*[1]).

In the present case, we are of opinion that a sufficient statutory warrant is to be found for all the operations of the clothing factory. By [sec. 63](#) (1) (da) and [sec. 63](#) (1) (f) the Governor-General is empowered, not only to "establish and maintain factories for the manufacture of naval and military equipment and uniforms," but also, subject to the provisions of the Act, to "do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State." It appears that the Governor-General established the clothing factory at Melbourne as long ago as 1911. During the war of 1914-1918, "immense quantities of clothing and equipment were required to meet the requirements of the naval and military forces of the Commonwealth, and in consequence there was a great increase in the output of the clothing factory."

A changed policy was adopted at the end of the war when "orders for articles were accepted from State Departments and Services and from State organizations of a public or semi-public character in cases where the manufacture of such articles would not require the installation or acquisition of additional machinery and such manufacture could be profitably carried on."

The reason for the changed policy was that "the war having ended, the demand for naval and military clothing was very greatly reduced, and it was deemed by the Governor-General to be undesirable to reduce the plant and staff of the clothing factory to dimensions sufficient to deal only with the peace-time demand for naval and military clothing and clothing for other departments of the Commonwealth."

It need only be added that:—(1) The classes of clothing manufactured for other than immediate military and naval purposes are, for the most part, of a "uniform" character, appropriate to the purpose of the ordering party. (2) The bodies making use of the factory in this way include the Victorian railway and police services and other departments of State, the Melbourne Tramways Board, the Melbourne City Council, the Boy Scouts and Sea Cadets, and the Ambulance organizations. (3) The purchases by individual persons have been very few, not exceeding in value £100 in any year, and including, for instance, officers of sea-going vessels, usually members of the Naval Reserve. (4) A large proportion of the total staff has been employed in the factory for years, and has become expert in the production of uniform clothing.

Although no formal Order in Council was made for the purpose of authenticating the judgment and opinion of the Governor-General, we think it is clear that the Governor-General deemed it necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory, so as to be prepared to meet the demands which would inevitably be made upon the factory in the event of war. Therefore, the operations complained of by the plaintiff so far as they are not authorized by sec. 63 (1) (da) of the *Defence Act*, are authorized by sec. 63 (1) (f) thereof.

This brings us to the question whether the legislative power in respect of defence is a sufficient warrant for the legislation so construed and so applied to the facts. It is obvious that the maintenance of a factory to make naval and military equipment is within the field of legislative power. The method of its internal organization in time of peace is largely a matter for determination by those to whom is entrusted the sole responsibility for the conduct of naval and military defence. In particular, the retention of all members of a specially trained and specially efficient staff might well be considered necessary, and it might well be thought that the policy involved in such retention could not be effectively carried out unless that staff was fully engaged. Consequently, the sales of clothing to bodies outside the regular naval and military forces are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm. In such a matter, much must be left to the discretion of the Governor-General and the responsible Ministers.

In these circumstances, we hold that the objections of the plaintiff, as far as they are based on the [Constitution](#), should fail. The plaintiff relied upon the case of *The Commonwealth v. Australian Commonwealth Shipping Board*^[2], where this Court held that an agreement made between the Australian Commonwealth Shipping Board and the Municipal Council of Sydney was beyond the powers of the former body. The *Commonwealth Shipping Act 1923* had provided for the establishment of a shipping line under a board of directors called the "Australian Commonwealth Shipping Board," and made it a body corporate. The Board's general authority was defined by sec. 10 (a) of the Act as being "to carry on the general business of a shipowner, and any business incidental thereto." The Board was also given power to carry out in respect of Cockatoo and Schnapper Islands "the business of manufacturer, engineer, dock-owner, shipbuilder and repairer, and any other business incidental thereto or to the said works and establishments" (sec. 14 (4)). The Board's agreement with the Municipal Council of Sydney was to supply, erect and maintain six turbo-alternator sets for the Council's power house at Bunnerong, the price agreed to being £666,605.

The case was determined upon demurrer, the Board alleging no facts tending to explain the relation, if any, between the carrying out of the contract and the Board's business either as shipowner under sec. 10 (a) or as engineer under sec. 14 (4). The Attorney-General of the Commonwealth granted his fiat to the relator, the New South Wales Chamber of Manufactures, with the sole object of determining whether the statutory power of the Board had been exceeded, and, otherwise than by the relator, the Commonwealth itself was not represented at the hearing of the demurrer. As the Board was not an organ of the Executive Government itself, the executive power of the Commonwealth was not relevant to the question in dispute. The decision does not contain a complete definition of the limits of the defence power, and the statement of the majority of the Court in relation to the defence power that "extensive as is that power, still it does not authorize the establishment of businesses for the purpose of trade and wholly unconnected with any purpose of naval or military defence"^[3], does not assist the present plaintiff, because the purpose of naval and military defence has been impressed upon the operations of the clothing factory from the very commencement.

It follows that the action of the plaintiff fails and should be dismissed. It becomes unnecessary to enter upon a consideration either of the particular argument resting upon the executive authority conferred upon the Governor-General by secs. 61 and 68 of the [Constitution](#), or of the grave question involved in the argument that [sec. 81](#) of the [Constitution](#) itself enables the Commonwealth to appropriate moneys for any purpose deemed sufficient by the Commonwealth, quite irrespective of its relation to the legislative and executive authority conferred upon Commonwealth organs by other sections of the [Constitution](#).

The action should be dismissed with costs.

Rich J.

This is a relator's action brought in the original jurisdiction of this Court in the name of the Attorney-General for the State of Victoria against the Commonwealth. The purpose of the proceeding is to obtain a declaration that in carrying on a clothing factory established by the Commonwealth, the making or supplying of uniforms and clothing is beyond the powers of the Executive in so far as persons outside the Commonwealth services are supplied. The clothing factory was established primarily for the purpose of supplying soldiers' and sailors' uniforms, and uniforms required in the civil services of the Commonwealth. The relator's contention is that, in the course of the operations, the factory cannot without an excess of power, supply the requirements of the States or of municipalities, or of other persons or bodies. The relator, the Victorian Chamber of Manufactures, obtained a fiat from the Attorney-General for the State of Victoria for the present proceedings, which arise, no doubt, out of a desire to suppress the competition of the factory, such as it is. An objection is taken on behalf of the Commonwealth that the action is incompetent, because the matters complained of afford no ground of action, even if the operations of the factory were to the extent alleged beyond the powers of the Commonwealth. In considering this objection, the fact that it is a relator's action is immaterial. When the Attorney-General's fiat has been obtained, the action in his name is as competent or incompetent as if it were brought *ex officio* by him. The question, therefore, is whether, assuming *ultra vires*, the Attorney-General of a State can maintain an action against the Commonwealth to obtain a declaration and consequential relief against the Commonwealth's *ultra vires* activity. In my opinion he can. To a great extent the question is settled by *Attorney-General (N.S.W.) v. Brewery Employes Union of New South Wales*^[4] and *Tasmania v. Victoria*^[5]. In my own judgment (*ante*, p. 171) I said:—"In a matter of public right the Attorney-General sues on behalf of the public. There is no reason why his right to do so should be confined to matters of exclusively domestic concern. On the contrary, there is every reason in a Federal system that this principle should be applied to allow him to maintain proceedings to vindicate the rights conferred upon his public by a provision of the [Constitution](#)." If the Commonwealth Executive is engaged in trading operations in competition with the citizens of a State so that the public of the State are affected by acts of the Executive, and it appears that in so trading the Commonwealth is acting without any legal warrant because under the Federal system such activities could only be carried on by the State if the Crown is to pursue them at all, I think these principles apply. In the case supposed the citizens of the State are affected as such because the power exercisable in reference to them only by the State Government is assumed by the Federal Government. The Attorney-General of the State may properly represent them just as he would represent them in a unitary system if a statutory corporation exceeded its powers by a similar course of action. It was next said that even so the facts of the present case presented no matter within the meaning of the word as used in [sec. 75](#) of the [Constitution](#). This argument again assumed, as of course it must do, that the complaint of *ultra vires* is well founded. It is based upon the notion that the operations of the clothing factory can violate no right, that no one can have a claim of right to prevent them. Even

if this were correct the argument would in my opinion involve a confusion, because whether a question amounts to a matter does not depend upon the legal plausibility of a claim of right made, but upon the making of it. When the Attorney-General of a State at the instance of relators claims to restrain the Federal Government from continuing a course of action it has adopted, it seems odd to say that the claim, because misconceived, is not a matter. If the Court did not agree that it was misconceived and acceded to the claim, it could hardly be said that it acted without jurisdiction. The real question in the case is whether the Commonwealth Executive is acting beyond its powers. It cannot be doubted that under the [Constitution](#) the legislative power of Parliament enables it to authorize the Executive to establish and conduct a clothing factory to supply all the needs of the Commonwealth Government, whether Naval and Military or Civil. As at present advised I am not prepared to accede to the argument that, without legislative power, the Commonwealth Executive can enter into business operations simply because it is a juristic entity, and in conducting business is not exercising governmental power over the subject. In the present case the factory was established pursuant to legislation of the Parliament, namely, secs. 63 and 64 of the *Defence Act*. These provisions do not, it need hardly be said, exceed the defence power. But how far does it extend? It must be construed subject to the [Constitution](#) (see sec. 15A *Acts Interpretation Act 1901-1933*). So construed, does it extend to the use of the factory for requirements which are not strictly naval, military, civil or otherwise departmental? I have no doubt that to fulfil these requirements must be the primary purpose of the factory. But it must be remembered that they are of a fluctuating character. All things naval and military have the possibility of war in view, and the nature of the factory cannot be determined by peace-time requirements. A doctrine exists in the case of trading corporations that, when for the purpose of their undertakings they must control property, premises or appliances, it is within their incidental powers to utilise them for purposes akin to and not inconsistent with the primary purpose of the corporation, and thus avoid the ill consequences of their being left vacant, idle and unemployed. (See *Brice on Ultra Vires*, 3rd ed. (1893), p. 135; *Simpson v. Westminster Palace Hotel Co.*[6].) The question how far this doctrine is to be pushed in relation to corporations is one of degree, and has excited some difference of opinion (*Forrest v. Manchester, Sheffield and Lincolnshire Railway Co.*[7], and on appeal[8]). It illustrates an application of the general doctrine that things may be done which are fairly incidental or conducive to the purpose for which a power is enjoyed. On the whole I think we may apply it to the peculiar situation in which the Commonwealth Clothing Factory stands. The case was ordered to be argued before us on the pleadings, mutual admissions and exhibits thereto, and on the Commonwealth Statutory Rule No. 210 of 1926. It might, perhaps, have been more satisfactory if, for the purpose of our decision, the facts had been investigated in detail on the trial of the action. In all cases where incidental powers are relied upon there is a danger of the cart being harnessed before the horse. In the present case, however, so far as I can see, there is no inversion of the main and incidental power, and the supply to outsiders is of a minor character, and subsidiary to the main purpose of keeping a factory in going order for naval and military purposes on a scale adequate for actual and potential demand. In my opinion the action should be dismissed upon the ground that in substance the complaint is ill-founded.

Starke J.

In 1911 the Commonwealth established a clothing factory in Melbourne, which is known as the Commonwealth Government Clothing Factory. The factory was originally established for the supply of uniforms and canvas goods for the Defence Forces of the Commonwealth. Its operations were gradually extended, and now cover the supply of uniforms and other goods to various departments and services of the Commonwealth, such as the Postmaster-General's Department, the Department of Trade and Customs, and the Railway and Police Departments. The outbreak of war in 1914 led to

a great increase in the output of the clothing factory to meet the requirements of the naval and military forces of the Commonwealth. These extraordinary requirements ceased with the termination of the war in 1918. But it was deemed undesirable to reduce the plant and staff of the factory to dimensions sufficient to deal only with peace-time demands for naval and military clothing and clothing for other departments of the Commonwealth, so it began, in the financial year 1919-1920, to accept contracts and orders for clothing and other goods from the State of Victoria for services such as the Railways, the Police and Penal Departments, various public utilities of the State such as the Tramways and Fire Brigade Boards, the municipality of Melbourne, and institutions such as the Aquarium and Ambulance Service, and also from a few private persons.

The Parliament of the Commonwealth made various appropriations of public moneys for the establishment and upkeep of the clothing factory, but since June 1917 the factory has been entirely self-supporting, and its profits have been sufficient to refund to the Commonwealth the whole, or if not the whole, practically the whole of the moneys provided for its establishment and maintenance.

The present action is brought by the Attorney-General of the State of Victoria on the relation of the Victorian Chamber of Manufactures for a declaration that the business carried on in the clothing factory, or alternatively that the making and/or supplying of clothing and uniforms for purposes other than naval and military purposes or alternatively for persons or bodies other than departments of the Commonwealth, is beyond the powers of the Commonwealth, and also for a declaration that the *Commonwealth Defence Act 1903-1932*, in so far as it authorizes the carrying on of the clothing factory or in so far as it authorizes the carrying on of the business of making and/or supplying clothing for purposes other than naval and military purposes or for persons or bodies other than the departments of the Commonwealth, is beyond the powers of the [Constitution](#), and for ancillary relief.

The jurisdiction of this Court to entertain such an action at the suit of a competent plaintiff is, I think, well settled ([Constitution](#), [sec. 75](#) (iii.); *The Commonwealth v. New South Wales*[9]; compare, in the United States, *Monaco v. Mississippi*[10]). But is the State of Victoria, or the Attorney-General of the State, a competent plaintiff? In my opinion, the answer must be in the affirmative. Acts are alleged which, it is contended, are beyond the powers of the Commonwealth and usurp the functions of the State (*Tasmania v. Victoria*[11]). It is said that, while the Commonwealth in establishing the clothing factory was clearly authorized by the *Defence Act 1903-1932*, sec. 63 (1) (da), yet the extension of its operations to the manufacture of clothing and other equipment for various departments and services of the Commonwealth other than naval and military equipment is beyond the powers of the Commonwealth. But I cannot assent to this contention. The supply of uniforms and clothing to the various departments and services of the Commonwealth is incidental to the administration of the various departments of State under the control and management of the Commonwealth, and to services rendered by the Commonwealth under and pursuant to the powers and authorities contained in the [Constitution](#). There is nothing unlawful in the Commonwealth using an organization established under a law of the Commonwealth for any lawful purpose of the Commonwealth. If a factory be established under the *Defence Act 1903-1932* for the manufacture of naval and military uniforms, what is there to prevent that factory being used for other legitimate purposes of the Commonwealth? The factory in the present case is not organized as a corporation with limited and defined powers. The occasion for its establishment was the manufacture of naval and military uniforms, but there is nothing in the [Constitution](#), or in any principle of law, that renders the use of that organization for purposes within the limits of the powers and functions of the Commonwealth unlawful or in contravention of the [Constitution](#) or any law of the Commonwealth. The distribution of the costs of manufacture to the different departments and services may well be

matter of internal management and arrangement, but that involves nothing illegal.

The Attorney-General for the State of Victoria is on firmer ground, however, when he contends that the [Constitution](#) does not warrant the Commonwealth launching out on the general business of manufacturing clothing and other goods for the States, or for public bodies constituted under the laws of the States, or for private individuals. The provisions of [sec. 51](#) of the [Constitution](#) contain no such power in express terms. But it is claimed that [sec. 63 \(f\)](#) of the *Defence Act 1903-1932* does authorize such an extension of operations. It provides that the Governor-General may, subject to the provisions of the Act, do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or any State. This means the Governor-General acting in a constitutional manner, that is with the advice of the Executive Council (*Acts Interpretation Act 1901-1932*, [sec. 17](#)). It may be inferred from the mutual admissions of the parties that the Governor-General deemed it desirable so to extend the operations of the factory, but it is conceded that no formal Order in Council has been passed sanctioning the extension. The existence of such an order is not, I think, essential, if the operations have in fact been sanctioned by the Governor-General. It must be remembered that the legislative powers of the Commonwealth are enumerated, and their limits cannot be transcended. In the last resort it is for the Courts to determine whether the legislative and executive acts of the Commonwealth are within the powers conferred by the [Constitution](#). The *Defence Act* doubtless gives the Governor-General the widest discretion. But, while his decisions are entitled to the highest respect, the Act cannot be taken to mean that the Governor-General may do whatever he thinks proper, whether within the constitutional power of the Commonwealth or not. Such a construction would defeat the Act, and could only be adopted in cases where the language compelled that result. (See *Acts Interpretation Act 1930*, No. 23, [sec. 3](#).) The exercise of the Governor-General's discretion must be confined within the constitutional power of the Commonwealth. But it is not for the Courts to determine whether the matters and things deemed necessary or desirable by the Governor-General are or are not appropriate for the constitutional object: all that the Courts have to consider is whether the means selected have some real and substantial relation to that object, or are calculated in some appreciable degree to advance it (*Farey v. Burvett*[[12](#)]). The legislative powers of the Commonwealth confer upon it no authority whatever to establish and maintain clothing factories for purposes other than those contained in its enumerated or constitutional powers. It may be desirable to do so from the point of view of efficiency and economy, but constitutional warrant is still lacking. There is no relation between establishing and maintaining a clothing factory for Commonwealth purposes, and extending its operations to purposes wholly beyond the constitutional power of the Commonwealth (*The Commonwealth v. Australian Commonwealth Shipping Board*[[13](#)]).

It was sought to justify the extended operations of the factory by reference to the executive power of the Commonwealth ([Constitution](#), [sec. 61](#)); the command of the naval and military forces ([Constitution](#), [sec. 68](#)); and the power of the Commonwealth to appropriate money for the purposes of the Commonwealth ([Constitution](#), [sec. 81](#)).

The executive power of the Commonwealth extends to the maintenance of the [Constitution](#) and of the laws of the Commonwealth. It may well be that the executive power "is co-extensive with the responsibility and power of the Commonwealth" and not limited "to matters connected with departments actually transferred or matters upon which the Commonwealth has power to make laws and has made laws" (cf. *Berriedale Keith, Responsible Government in the Dominions*, 1st ed. (1912), vol. *ii.*, p. 809). But there is nothing in the [Constitution](#), or in any law of the Commonwealth, which enables the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes. No executive power to do so is expressed, and such a power

cannot be implied from anything found in the [Constitution](#) or from the establishment of a clothing factory under the Defence power (*The Commonwealth v. Australian Commonwealth Shipping Board*[14]).

The command of the naval and military forces is titular. It may, in the absence of statutory provisions, justify orders regulating the navy and the army and providing for their equipment and so forth. But the command cannot and does not warrant the doing of acts which transcend the constitutional power of the Commonwealth.

Lastly, the provisions of [sec. 81](#) of the [Constitution](#) are called in aid: "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this [Constitution](#)." This provision is relied upon as an independent source of power. Thus, in the United States of America "it will be found that the public moneys of the United States have been devoted to a great variety of purposes, many of which have no relation to the exercise of the specific powers vested by the [Constitution](#) in the National Government; they have been, to mention only a few instances, in aid of road-building, education, agriculture and relief, at home and abroad, of sufferers on account of fires, floods, earthquakes, &c." (*Willoughby on The Constitution of the United States*, 2nd ed. (1929), vol. *i.*, p. 103). The [Constitution](#) of the United States enables Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States" (Art. 1, sec. VIII., cl. 1). "Hence it is that, though Congress has not a general legislative power to provide that the Federal Government may do everything, whether by way of regulation or direct control and operation, which may conceivably secure the common defence and promote the general welfare of the United States, it nevertheless has a general power to appropriate the public moneys of the United States for these purposes" (*Willoughby, ibid.*, p. 98). "But this, it may be predicted," he adds (*ibid.*, p. 105), "will be as far as the Courts will permit Congress to go. In other words, they will not admit that, because Congress has the power to lend Federal financial aid to projects which concern the general welfare of the United States, even though these projects have no relation to the matters enumerated in the [Constitution](#) as within Federal control, therefore, Congress may authorize the Federal Government, through its own agencies to carry out these non-enumerated projects." The provision in the [Constitution](#) of Australia is not identical with that in the [Constitution](#) of the United States; indeed, in [sec. 96](#), express provision is made for giving financial assistance to any State on such terms and conditions as the Parliament thinks fit. (See *Victoria v. The Commonwealth*[15].) Further, it should be observed that [sec. 83](#) provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law—which I take to mean in accordance with law. The power to appropriate moneys "for the purposes of the Commonwealth" does not, in my opinion, enable the Commonwealth to appropriate such moneys to any purposes it thinks fit, but restricts that power to the subjects assigned to, or departments or matters placed under the control of the Federal Government by the [Constitution](#). No constitutional warrant, therefore, for the extension of the operations of the clothing factory to general business purposes can be found in the appropriation power.

It was suggested during the argument that clothing manufactured for the supply of services or persons other than services or persons under the control or in the employ of the Commonwealth, must nevertheless remain the property of the Commonwealth, and consequently might be treated as surplus stock in the disposition of the Commonwealth. The argument is, to my mind, untenable. The property may remain in the Commonwealth, but the manufacture of clothing for purposes other than

those allowed by the [Constitution](#) does not establish any right so to do, or permit the disposition of such clothing in a manner not allowed by the [Constitution](#). By such means all constitutional checks might be avoided and the position of the States under the [Constitution](#) gravely compromised.

A declaration should be made that it is beyond the powers of the Commonwealth under the [Constitution](#) to carry on the business of manufacturing clothing for or supplying clothing to the States or to public utilities established under the laws of the States, or to private bodies or persons.

Action dismissed with costs.

Solicitors for the plaintiff, Moule, Hamilton & Derham.

Solicitor for the defendant, W. H. Sharwood, Crown Solicitor for the Commonwealth.

[1] [\[1908\] HCA 94](#); [\(1908\) 6 C.L.R. 469](#).

[2] [\[1926\] HCA 39](#); [\(1926\) 39 C.L.R. 1](#).

[3] (1926) 39 C.L.R., at p. 9.

[4] [\[1908\] HCA 94](#); [\(1908\) 6 C.L.R. 469](#).

[5] Ante, p., 157.

[6] [\[1860\] EngR 1064](#); [\(1860\) H.L. Cas. 712](#); [11 E.R. 608](#).

[7] [\[1861\] EngR 631](#); [\(1861\) 30 Beav. 40](#); [54 E.R. 803](#).

[8] (1861) [\[1861\] EngR 777](#); 4 De G.F. & J. 126; [45 E.R. 1131](#).

[9] [\[1923\] HCA 23](#); [\(1923\) 32 C.L.R. 200](#).

[10] [\[1934\] USSC 117](#); [\(1934\) 292 U.S. 313](#); [78 Law Ed. 1282](#).

[11] Ante, p. 157.

[12] [\[1916\] HCA 36](#); [\(1916\) 21 C.L.R. 433](#).

[13] [\[1926\] HCA 39](#); [\(1926\) 39 C.L.R. 1](#).

[14] [\[1926\] HCA 39](#); [\(1926\) 39 C.L.R. 1](#).

[15] [\[1926\] HCA 48](#); [\(1926\) 38 C.L.R. 399](#).

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