High Court of Australia

Australian Communist Party v Commonwealth ("Communist Party case") [1951] HCA 5; (1951) 83 CLR 1 (9 March 1951)

HIGH COURT OF AUSTRALIA

AUSTRALIAN COMMUNIST PARTY v. THE COMMONWEALTH [1951] HCA 5; (1951) 83 CLR 1

Constitutional Law (Cth.)

High Court of Australia
Latham C.J.(1), Dixon(2), McTiernan(3), Williams(4), Webb(5), Fullagar(6) and Kitto(7) JJ.

CATCHWORDS

Constitutional Law (Cth.) - Powers of Commonwealth Parliament - Defence - The Constitution - Laws of the Commonwealth - Execution and maintenance - Conciliation and arbitration - Public service - Judicial - Acquisition of property - Incidental power - Defence power - Exercise - Existence of war - Requirement - Preparation against risk of war - Enemies - Actual or potential - External and internal - Overthrow or dislocation of established system of government - Alleged revolutionary party - Use of treasonable or subversive means - Dislocation in industries vital to security and defence - Dissolution of party - Bodies of persons or persons - Unlawful association - Declaration by Governor-General - "Satisfied" - Forfeiture to Commonwealth of property of party and declared persons - Declared persons - Ineligibility to hold office in an industrial organization relating to vital industry - Freedom of "intercourse" among the States - Statute - Preamble - Recitals - Allegations of fact - Effect - Facts - Necessity - Desirability - Proof - Validity of statute - Severability - The Constitution (63 & 64 Vict. c. 12), ss. 51 (vi.), (xxxi.), (xxxv.), (xxxix.), 52, 61, 71, 92 - Judiciary Act 1903-1948 (No. 6 of 1903 - No. 65 of 1948), s. 18 - Commonwealth Conciliation and Arbitration Act 1904-1949 (No. 13 of 1904 - No. 86 of 1949) - Acts Interpretation Act 1901-1948 (No. 2 of 1901 - No. 79 of 1948), s. 15A - Communist Party Dissolution Act 1950 (No. 16 of 1950).

HEARING

Sydney, 1950, November 14-17, 20-24, 27, 28, 30; December 1, 4, 6-8, 11-15, 18, 19.
Melbourne, 1951, March 9. 9:3:1951
CASE STATED.

DECISION

March 9.
The following written judgments were delivered:-

LATHAM C.J. In these proceedings the Court is required to adjudicate upon before the Court upon a case stated under the Judiciary Act 1903-1948, s. 18, by which Dixon J. has referred to the Court two questions which arise in each of eight actions in which the plaintiffs claim declarations that the Act is invalid. The questions submitted to the Court are as follows:-
"1.(a) Does the decision of the question of the validity or invalidity of the provisions of the Communist Party Dissolution Act 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth? 2. If no to either part of question 1 are the provisions of the Communist Party Dissolution Act 1950 invalid either in whole or in some part affecting the plaintiffs?" (at p129)

2. The plaintiffs in the actions are the Australian Communist Party, certain trades unions registered under the Commonwealth Conciliation and Arbitration Act 1904-1949, a trade union not so registered, and individual persons who hold positions as officers of one or other of the plaintiff unions. The Communist Party is not shown to be a legal person and therefore is not a competent plaintiff. But there are individual persons as co-plaintiffs in the action to which it purports to be a party.
1. I propose first to summarize the provisions of the Act. (at p129)

3. The Act is introduced by a preamble which states, inter alia, that the Australian Communist Party is a revolutionary party using violence, fraud, sabotage, espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of government of Australia and, particularly by means of strikes or stoppages of work, causing dislocation in certain industries which are declared to be vital to the security and defence of Australia. The Act dissolves the Australian Communist Party and forfeits its property (s. 4). The Act provides, subject to a declaration by the Governor-General, means for the dissolution of bodies of persons associated in the manner specified in the statute with the Communist Party or communism (s. 5) and for the forfeiture of the property of such associations (s. 8). The Act also contains provisions penalizing acts which are directed towards the continuance of the activities of an association (s. 7). The Act (ss. 9 and 10) deals also with individual persons and provides, subject again to a declaration by the Governor-General, that persons with specified communist associations shall be ineligible for holding office under or for employment by the Commonwealth or for holding office in an industrial organization which the Governor-General declares to be an organization to which s. 10 applies. (at p130)

4. An association can be declared to be an unlawful association under the Act only if it falls within one of the descriptions contained in s. 5(1). These provisions all specify some degree of association with the Communist Party or with communism. Further, it is necessary (s. 5(2)) that the Governor-General should be satisfied that the body of persons to which it is proposed to apply the law is a body of persons to which the section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth (s. 5(2)). Where these conditions are satisfied the Governor-General may declare the body of persons to be an unlawful association. (at p130)

5. Section 5(3) contains a provision that the Executive Council shall not advise the Governor-General to make such a declaration unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security and two other persons appointed by the Governor-General in Council. This committee consists of responsible persons but it is not a court and the Governor-General is not a judicial officer. (at p130)

6. Section 5(4), (5) and (6) provide for an application to a court to set aside the declaration on the

ground that the body in question is not a body to which the section applies. Thus a body would be able to challenge before a court the declaration that it was associated in the manner set out in s. 5(1) with the Communist Party or with communism, but would not be able to challenge in a court the declaration of the Governor-General as to the other element which is the condition of making a declaration, namely that the continued existence of the body would be prejudicial to defence or to the maintenance and execution of the Constitution, &c. (The defendants have argued, it is true, that the decision of the Governor-General as to the last-mentioned matter is examinable in a court to some extent. I deal with this question later.) (at p131)

7. In the case of individuals, their disqualification for union office or employment by or under the Commonwealth is governed by s. 9. This section applies to persons who have the association with communism specified in s. 9(1). Section 9(2) provides that where the Governor-General is satisfied that the person is a person to whom the section applies and that that person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may make a declaration accordingly. This section contains provisions corresponding to those contained in s. 5 with respect to the consideration of material by a committee and an application to a court to set aside the declaration on the ground that the person is not a person to whom the declaration applies. As in the case of s. 5, s. 9 does not provide for any application to a court in respect of the declaration that the person is engaged or likely to engage in the prejudicial activities specified in the section.
2. I will now summarize the principal arguments adduced on behalf of the plaintiffs and then set out the provisions of the Act in greater detail. The plaintiffs were represented by several counsel and the arguments presented on behalf of them respectively were naturally not identical. (at p131)

8. First, it is objected by the plaintiffs that the Act is invalid because it is not a law with respect to any subject with respect to which the Commonwealth Parliament has legislative power. More particularly it is contended that it is not a law which is authorized by s. 51(vi.) and s. 51(xxxix.) of the Constitution. These paragraphs provide that the Commonwealth Parliament may make laws with respect to - "(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth: . . . (xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." (at p131)

9. Section 61 of the Constitution provides:- "The executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." (at p132)

10. In support of this objection the plaintiffs rely upon many decisions of the Court that there must be a real and substantial connection with the subject matter of power before a law can be held valid. It is contended that, apart from the preamble to the Act, there is nothing to show that the existence of the Communist Party or of affiliated organizations or the continuance in offices of persons belonging to or associated with that Party have any relation to defence or to the maintenance of constitutional government. It is contended that the statements contained in the preamble are irrelevant to all questions affecting the validity of the Act because the Commonwealth Parliament is unable to create legislative power under the Constitution by purporting to determine some particular fact or set of facts in a particular way. (at p132)

11. Secondly, it is contended that if the allegations contained in the preamble to the Act are relevant to the determination of the question of the validity of the Act evidence is admissible to show that the recitals are untrue. It is argued that the fact that Parliament was satisfied that they were true is irrelevant to the question of the validity of the Act. (at p132)

12. Thirdly, under the Act the Parliament purports, it is said illegitimately, to exercise judicial power in (a) dissolving the Australian Communist Party by direct enactment, and (b) making the provisions of s. 5 (relating to unlawful associations) and s. 9 (relating to individuals) dependent upon the opinion of the Governor-General. (at p132)

13. Fourthly, it is argued that the provisions for forfeiture of property are contrary to the provisions of s. 51(xxxi.) of the Constitution, which provides that the Commonwealth may make laws with respect to the acquisition of property "upon just terms" and not otherwise. (at p132)

14. Fifthly, it is contended that as the plaintiff unions are Federal unions and they and their officers have many inter-State activities, s. 92 of the Constitution prohibits the enactment of any law which prevents the carrying out of those activities. It has been argued that no law, Federal or State, can control the inter-State operations of political parties, of unions or of officers of those parties or of officers of unions. (at p132)

15. Sixthly, it has been argued that no Federal legislation can, by means other than a judicial decision, put an end to the existence of any voluntary association if that association has some lawful objectives. (at p133)

16. Seventhly, it has been contended that no Federal legislation can by any means put an end to the existence of any voluntary organization which has political objectives and is a political party. Laws which do so are, it is said, not authorized by the Commonwealth Constitution and, further, if the political party is interested in State politics, such a law is inconsistent, it is said, with the Constitutions of the States.
3. I now state the provisions of the Act in greater detail. (at p133)

17. The Act is introduced by a preamble which consists of nine paragraphs. The first three paragraphs recite the terms of the Constitution, s. 51(vi.), s. 61 and s. 51(xxxix.), to which reference has already been made. The other recitals are as follows:-
4. "And whereas the Australian Communist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat:" 5. "And whereas the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic industrial or political ends by force, violence, intimidation or fraudulent practices:" 6. "And whereas the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature and also engages in activities or operations similar to those, or having an object similar to the object of those, referred to in the last two preceding paragraphs of this preamble:" 7. "And whereas certain industries are vital to the security and defence of Australia (including the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry and the power industry):" 8. "And whereas activities or operations of, or encouraged by, the Australian Communist Party, and activities or operations of, or encouraged by, members or officers of that party and other persons who are communists, are designed to cause, by means of strikes or stoppages of work, and have, by those means, caused, dislocation, disruption or retardation of production or work in those vital industries:" 9. "And whereas it is necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the Australian Communist Party, and bodies of persons affiliated with that Party, should be dissolved and their property forfeited to the Commonwealth, and that members and officers of that Party or of any of those bodies and other persons who are communists should be disqualified from employment by the

Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry:" It will be observed that these recitals refer not only to the Australian Communist Party as a party operating in Australia, but also to the basic theories of communism, in accordance with which it is alleged that that Party engages in activities in order to bring about a revolutionary situation (par. 4). The Party is stated to be an integral part of the world communist revolutionary movement (par. 6). Persons who are communists are said to be engaged in activities designed to cause dislocation, disruption or retardation of work in vital industries (par. 8). Thus the recitals are not limited to allegations with respect to the Australian Communist Party. They contain allegations with respect to communism generally and with respect to the association of the Party with communism, and with respect to persons who are communists. Paragraphs 4 to 8 consist of allegations of fact. Paragraph 9 expresses the opinion of the Commonwealth Parliament that it is necessary for reasons of defence and the maintenance of the Constitution to enact the provisions of the Act. (at p134)

18. The Act came into operation on 20th October 1950 and the statements in the preamble must be regarded as relating to matters as at or about that date. (at p134)

19. Section 3 of the Act defines "communist" as a person who supports or advocates the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin. "Industrial organization" is defined as meaning "an organization of employers or employees associated for the purpose of protecting and furthering their interests in relation to terms and conditions of employment or for purposes including that purpose". "The Australian Communist Party" is defined as meaning "the organization having that name on the specified date, notwithstanding any change in the name or membership of that organization after that date." "The specified date" means 10th May 1948. "Unlawful association" means "the Australian Communist Party or a body of persons declared to be an unlawful association" under the Act. (at p134)

20. Section 4 of the Act deals with the Australian Communist Party. Sub-section (1) declares the party to be an unlawful association which by force of the Act is dissolved. Sub-section (2) provides for the appointment by the Governor-General of a receiver of the property of the party. Sub-section (3) provides for the vesting of the property of the party in the receiver. These consequences are produced by direct enactment. The Act does not leave it to any court to determine whether the Australian Communist Party should or should not be suppressed. Parliament has made its own decision on that subject. (at p135)

21. Section 5 provides that the bodies of persons described in sub-s. (1) may be declared by the Governor-General to be unlawful associations if he is satisfied as to certain matters specified in sub-s. (2). Before he can make such a declaration the material upon which the advice of the Executive Council to the Governor-General is founded must be considered by a committee. There may be an application to a court to set aside the declaration - but only upon the ground that a body is not a body to which the section applies. (at p135)

22. The defendants sought to support these provisions by finding in sub-s. (2) a basis for the Act. That basis was said to be the opinion of the Governor-General that the continued existence of the body would be prejudicial to the defence of the Commonwealth or the maintenance of the Constitution, &c., provided that the decision of the Governor-General could be shown, if challenged, to be an opinion in relation to a matter which was "in fact and in law" comprehended within the subjects mentioned - defence and maintenance of the Constitution, &c. I do not agree with this contention. For reasons which I state hereafter I find what I regard as a good basis for s. 5 in sub-s. (1) and, though it is not necessary for me to do so, I am of opinion that such a basis can also be found in sub-s. (2), even though sub-s. (2) is interpreted in a manner which the defendants disclaim and the plaintiffs support - namely, as making the opinion of the Governor-General unexaminable as to all the matters mentioned

in sub-s. (2) except the matter as to which an application to a court is allowed. In order to deal with the various arguments which were based on s. 5, I set out the whole of the section, which is as follows:- "5. (1) This section applies to any body of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State - (a) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act was, or purported to be, affiliated with the Australian Communist Party; (b) a majority of the members of which, or a majority of the members of the committee of management or other governing body of which, were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party; (c) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, priciples or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time within that period, promoted, the spread of communism, as so expounded; or (d) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who - (i) were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party, or are communists; and (ii) make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin. (2) Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association. (3) The Executive Council shall not advise the Governor-General to make a declaration under the last preceding sub-section unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security, and two other persons appointed by the Governor-General. (4) A body of persons declared to be an unlawful association under sub-section (2) of this section may, within twenty-eight days after the publication of the declaration in the Gazette, apply to the appropriate court to set aside the declaration, on the ground that the body is not a body to which this section applies. (5) At the hearing of the application, the applicant shall begin; if evidence is given in person by such officer or officers of the applicant as the court is satisfied is or are best able to give full and admissible evidence as to matters relevant to the application, the burden shall be upon the Commonwealth to prove that the applicant is a body to which this section applies, but, if evidence is not so given, the burden shall be upon the applicant to prove that the applicant is not a body to which this section applies. (6) Upon the hearing of the application, the declaration made by the Governor-General under sub-section (2) of this section shall, in so far as it declares that the applicant is a body of persons to which this section applies, be prima-facie evidence that the applicant is such a body." (at p137)

23. All the bodies referred to in pars. (a), (b), (c) and (d) of s. 5 (1) possess the characteristic of being associated in some degree with the Australian Communist Party or with communism - both of which have been defined by Parliament in the preamble to the Act as public dangers. If Parliament has the power to suppress any such body by direct legislation, it might have done so by declaring them, as well as the Australian Communist Party itself, to be unlawful associations and dissolving them. Parliament has not done so. It has required that other conditions also be satisfied, namely, that the body should, in the opinion of the Government (the Governor-General advised by the Executive Council) be a body the continued existence of which would be prejudicial to defence, &c. Another condition is that the material on which the Government acts should have been considered by a committee. A further condition is that the declaration may be set aside by a court upon the ground that the body is not a body to which the section applies. All these conditions operate to limit what would

otherwise have been a more extended operation of s. 5. (at p137)

24. Section 6 provides that when a declaration is made with respect to a body of persons it shall, upon the expiration of twenty-eight days after the publication of the declaration in the Gazette, be dissolved. Sub-section (2) provides means for postponing the dissolution of the Party in the case of there being an application to a court to set aside the declaration. (at p137)

25. Section 7 creates offences with penalties. They are all associated with attempts to carry on the activities of an unlawful association which has been dissolved. As examples I mention s. 7(1)(a) - a person shall not knowingly "become, continue to be, or perform any act as an officer or member of an unlawful association", and "(d) in any way take part in any activity of an unlawful association or carry on, in the direct or indirect interest of an unlawful association, any activity in which the unlawful association was engaged, or could have engaged, at the time when it became an unlawful association." It was argued that the effect of this latter provision was to prevent any person taking part in future in an activity of any kind in which the association had been engaged or should have engaged. For example, an association might collect money for hospitals. It was argued that this section would make it an offence for any person, after the association was declared, to collect money for hospitals. This argument finds no support in the words of the section. What is prohibited under par. (d) is taking part in any activity of an unlawful association, that is to say, as such an activity, and it also prohibits carrying on activities of the association in the direct or indirect interest of an unlawful association. Accordingly there is no ground for the contention that the Act prohibits the doing by any person of anything that an unlawful association has done or could do, however innocent. (at p138)

26. Section 8 relates to the appointment of a receiver of the property of an unlawful association. Section 9 is a section dealing with individual persons corresponding to s. 5, which deals with associations. The section contains the following provisions:- "(1) This section applies to any person - (a) who was, at any time after the specified date and before the date upon which the Australian Communist Party is dissolved by this Act, a member or officer of the Australian Communist Party; or (b) who is, or was at any time after the specified date, a communist. (2) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, make a declaration accordingly." (Section 9(1)(a) cannot come into operation unless the Act does effectively dissolve the Australian Communist Party.) (at p138)

27. These provisions are followed by provisions requiring an examination of material by a committee and giving a right to apply to a court to set aside a declaration made in respect of an individual "on the ground that he is not a person to whom this section applies". The comments made upon s. 5 apply also to s. 9. (at p138)

28. Section 10(1) provides that a person in respect of whom a declaration is in force under the Act - "(a) shall be incapable of holding office under, or of being employed by, the Commonwealth or an authority of the Commonwealth; (b) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth; and (c) shall be incapable of holding an office in an industrial organization to which this section applies or in a branch of such an industrial organization." (at p138)

29. Section 10(3) provides - "Where the Governor-General is satisfied that a substantial number of the members of an industrial organization are engaged in a vital industry, that is to say, the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry or the power industry, or any other industry which, in the opinion of the Governor-General, is

vital to the security and defence of Australia, the Governor-General may, by instrument published in the Gazette, declare that industrial organization to be an industrial organization to which this section applies." (at p139)

30. Section 11 provides in sub-s. (1) - "If, upon the making of a declaration in respect of a person under this Act, that person holds any office referred to in sub-section (1) of the last preceding section or is employed by the Commonwealth or by an authority of the Commonwealth, that person shall, by force of this Act, be suspended from the office or employment." (at p139)

31. Section 12 provides that if an industrial organization is declared under s. 10(3) any office in that organization held by a declared person shall become vacant. (at p139)

32. These sections deprive declared persons of contractual rights and limit the power of appointment to offices in Commonwealth employment and in industrial organizations. (at p139)

33. Section 15 provides that it shall be the duty of the receiver of an unlawful association to take possession of the property of the association, to realize it, to discharge the liabilities of the association and to pay or transfer the surplus to the Commonwealth. (at p139)

34. Section 16 provides for an application to the High Court to determine any question relating to the property or liabilities of the association or to the performance of his duties or the exercise of his powers under the Act. (at p139)

35. Section 27 provides as follows:- "Where the Governor-General is satisfied that the continuance in operation of this Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a Proclamation accordingly and thereupon this Act shall be deemed to have been repealed."

4. By pleading and by affidavit the plaintiffs have denied the statements contained in the fourth, fifth, sixth, eighth and ninth recitals of the preamble to the Act. The plaintiffs propose to adduce evidence in support of these denials with a view to establishing that the Act is not authorized by the legislative power of the Commonwealth and is therefore void. An affidavit of one of the plaintiffs sets out the allegations, contrary to the recitals, which that plaintiff desires to establish by evidence. Further affidavits show that the Australian Communist Party, the plaintiff unions and their officers engage in substantial inter-State activities, including inter-State correspondence.

5. The principal argument of the plaintiffs related to the alleged connection of the Act with the subjects of defence of the Commonwealth (Constitution, s. 51(vi.)) and protection of the constitutional government of the Commonwealth (Constitution, s. 51(xxxix.) and s. 61). It has been decided on many occasions that Commonwealth legislation can be valid only if it has a real connection with a subject matter of legislative power which is assigned to the Commonwealth Parliament by the Commonwealth Constitution. Many cases might be cited in support of this proposition. I refer only to the following cases among those upon which the plaintiffs particularly relied (Victoria v. The Commonwealth [1942] HCA 39; (1942) 66 CLR 488, at pp 506, 507, 509 ; Victorian Chamber of Manufactures v. The Commonwealth [1943] HCA 22; (1943) 67 CLR 413 ; Bank of New South Wales v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at p 186). (at p140)

36. The plaintiffs also relied upon decisions of this Court to the effect that Parliament cannot define or extend its constitutional power by reciting facts or by a legislative statement of connection between a particular law and a head of power. The powers of the Commonwealth Parliament are defined, and therefore limited, by the Constitution. The Court has held on several occasions that the opinion of the Parliament or the opinion of the Governor-General or of a Minister that a particular matter is within the legislative power of the Commonwealth Parliament did not affirmatively establish that the matter

actually is within such power. The plaintiffs relied particularly upon Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 . See also South Australia v. The Commonwealth (Uniform Tax Case) [1942] HCA 14; (1942) 65 CLR 373, at p 432 ; Reid v. Sinderberry [1944] HCA 15; (1944) 68 CLR 504 . It is therefore argued for the plaintiffs that the statements in the preamble to the Act certainly cannot be taken to be conclusive proof of the facts stated and, indeed, that they are not even prima-facie proof - that the Court itself must be satisfied that they are true before they can form a foundation for such legislation as that contained in the Act. Thus it is argued that the Act really operates in a vacuum by dissolving the Australian Communist Party, no connection between the continued existence of the Australian Communist Party or of the other associations mentioned in the Act and the subject of defence or maintenance of the Constitution, &c., being shown. In relation to such other associations and to individuals, the operation of the Act depends, not only upon the conditions of ss. 5(1) and 9(1) being satisfied, but also upon the opinion of the Governor-General that the association or the individual is concerned in activities prejudicial to the matters mentioned in the Constitution, s. 51(vi.) and (xxxix.), that is, defence of the Commonwealth and maintenance of the Constitution and laws of the Commonwealth. Such an opinion, it is said, cannot establish a real connection of the Act with the subjects to which it purports to relate. (at p141)

37. The defendants did not dispute the authority of the cases mentioned, but, relying upon statements in those cases that a statement by Parliament should be treated with respect, though not as conclusive, argued that, unless the Court had judicial notice of facts which showed those statements to be untrue, the statements should be accepted as conclusive. The defendants also asked the Court to take judicial notice of the truth of a series of propositions relating to communism, communist propaganda and motives, and generally as to dangers of war in the existing international situation. It was contended that the facts stated in those propositions provided a constitutional basis for the Act.
6. Before examining the relevance to the present case of the authorities cited I propose to refer to some general considerations affecting the nature of the defence power and of the power to make laws to protect the existence of constitutional government. (at p141)

38. These powers are, I propose to show, essentially different in character from most, if not all, of the other legislative powers of the Commonwealth Parliament. The exercise of these powers can be intelligent only when they are used in relation to some national objective which is concerned with protecting the country against what is regarded as a danger. The most important question which arises in these cases is whether legislation for such a purpose approved by Parliament cannot be valid unless it is also approved by a court after hearing evidence as to the existence of national danger. (at p141)

39. These powers are perhaps the most important powers intrusted to the Parliament of the Commonwealth. The continued existence of the community under the Constitution is a condition of the exercise of all the other powers contained in the Constitution, whether executive, legislative or judicial. The preservation of the existence of the Commonwealth and of the Constitution of the Commonwealth takes precedence over all other matters with which the Commonwealth is concerned. As Cromwell said, "Being comes before well-being". The Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot perform their functions unless the people of the Commonwealth are preserved in safety and security. (at p142)

40. Any Government which acts or asks Parliament to act against treason or sedition has to meet the criticism that it is seeking not to protect government, but to protect the Government, and to keep itself in power. Whether such a criticism is justified or not is, in our system of government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. The contention that such an argument affects the validity of a law reminds me of the decision of a court in another country, when I was there, in a case of alleged treasonable conspiracy. The Court held that the accused did not intend to destroy government, but only to bomb public offices and assassinate ministers and generals and others. As they intended to take over the task of governing the country

themselves, they were not guilty. I did not then, and do not now, agree with such a decision. (at p142)

41. The exercise of these powers to protect the community and to preserve the government of the country under the Constitution is a matter of the greatest moment. Their exercise from time to time must necessarily depend upon the circumstances of the time as viewed by some authority. The question is - "By what authority - by Parliament or by a court?" (at p142)

42. The defence power is, it has been held by this Court, a power which is essentially related to purpose. There is no difference in this respect between the defence power and the power to protect the community against attacks upon or undermining of constitutional government. The exercise of either power may affect the rights and duties of persons in Australia, whether or not the country is at war. What I say in this judgment about the former power applies equally to the latter power. (at p142)

43. I therefore proceed to consider what matters are, or normally may be, taken into account in ascertaining whether dangers exist against which laws passed under the defence power may be directed. (at p142)

44. Defence policy depends upon the identification in some manner of dangers against which, it is thought, the community should be protected. No defence policy can be determined merely upon an examination of facts proved by legally admissible evidence.
(a) In the first place, there must be a decision as to the objectives of national policy. What are to be regarded as dangers to be guarded against? If the national policy aims at, for example, an alliance with Russia, the identification of the dangers against which legislation should be directed will be entirely different from the identification of such dangers if policy is directed to the creation or development of friendship with certain other countries. If the policy is for communism, there will be one complex of real or apprehended dangers. If the policy is against communism, there will be a completely different complex of such dangers. Thus the acceptance of some national objective is the governing consideration in determining against what dangers the Commonwealth should be guarded by the exercise of one or both of the legislative powers now under consideration. Policy frequently aims at the changing of facts in accordance with ideas. Persons with different ideas upon national policy will almost certainly approve different policies in relation to the same facts. No finding of facts by a court can provide an answer to the problem of identifying national dangers against which the people are to be defended. Thus the most important question in these cases is whether the Parliament of the Commonwealth, responsible to the people, has the decisive power to determine whether Australia is for communism or against communism, and to legislate in accordance with its decision, or whether it can do so only if a court agrees with its decision. Precisely the same question would arise if Parliament had legislated against Nazism or Fascism at a time when, in the judgment of Parliament, it was thought wise to do so. My reasons for judgment would be the same in any such case as in this case.
(b) In the next place, defence policy includes defence against internal enemies and against real or suspected internal agents or supporters of actual or potential external enemies. The power of defending the people committed by the Constitution to the Commonwealth would be a weak protection if it did not extend to protecting the people against internal attack by means of subversive and treasonable activities. Such activities may assume many forms. In addition to actual assistance given to an enemy in time of war, fifth-column work prepares the way for an enemy by undermining the morale of a people and by hindering the exercise of governmental powers in the community. It is a great help to a potential enemy to have inside a country a body (with activities which are ostensible and innocent) which engages in propaganda designed to make people think that potential invaders will be actual liberators. This is a well-established form of revolutionary technique. One of the most effective forms of fifth-column work is to use any real or pretended dispute - political, industrial or religious - as a means of promoting social confusion and dislocating the economy of a country. The aim will be to prevent the production of coal and steel for military and other purposes and particularly

for munitions and to make it impossible to build up reserves of oil, coal, steel and other materials which are essential in modern war. Any interference with industries vital to defence will help any external enemy.
(c) Thus, in determining whether there should be legislation against what the adoption of a policy has decided are national dangers against which defence is necessary, many circumstances may, and generally will, be taken into consideration. There may be extensive examination of the international situation, the views upon which may determine whether action should be taken against an external power or against persons who are regarded as agents for an external power which is a potential future enemy and against which cautionary action, or possibly even war, is necessary. Whether another country is a friend or not - whether a change in its government or in the policy of its government is likely - these are matters of judgment, not of fact in the ordinary sense. It can only be a question of opinion and not a question of fact upon which a court can make a decision as to whether the international situation is "set fair" or "stormy" and in what quarter a storm is likely to arise. A person with one set of political ideas may approve an existing international situation, whereas a person with another set of political ideas may take an exactly contrary view. These are not matters for a court to consider.
(d) In addition to information of all kinds relating to the international situation and opinions with respect to such information, the capacity of a country to defend itself will be taken into account. Thus it will be necessary before determining upon a particular course of action in relation to defence matters, external or internal, to consider the strength and readiness of the naval, military and air forces, the peaceful or disturbed state of the industry of the country, its material resources, the morale of the country, the readiness of the people to fight, their ideas upon what is nationally right and wrong, their national hopes and fears, emotions and apprehensions; all of these matters will enter into the consideration of defence policy. Thus the internal situation may be a matter of the greatest importance. The responsible authorities, in making up their minds upon these matters, will act upon diplomatic reports, intelligence reports from many countries, security reports, rumour, suspicion - upon much information which is necessarily secret - and upon other material which is highly relevant but which could not possibly be proved or used in any way in accordance with legal rules of evidence. No Government could produce such material in a court. Much of it would be derived from friendly foreign chancelleries and would necessarily be highly confidential. Reports from its own representatives and officers would, in the interests of public safety, also necessarily be confidential, and the identity of the security officers who made the reports could not be disclosed. Publication of such reports might well bring about a situation of aggravated danger which they were designed to prevent or forestall. (at p145)

45. This is the kind of material which lies at the basis of any responsible defence policy. No authority can make a sensible decision in relation to such policy unless such material is available to it. Such material cannot be made public in a court and most of it would be inadmissible in evidence.
(e) The next stage in determining policy consists in answering the question whether the situation as so estimated and assessed contains elements of danger to the country. Upon this question there are always different opinions. What to some is a dangerous threat is to others a promise of paradise. Even men who agree in general policy may have different ideas as to whether real danger exists. Such a question cannot possibly be determined merely by evidence as to facts. The plaintiffs' argument really means that in Australia such debates as took place between Pitt and Fox and between Burke and Paine must take place, not only in Parliament and before the people, but ultimately, and then only with final significance, in the courts.
(f) If, upon the basis of what are regarded by Ministers and Parliament as relevant matters, it is considered by the Government and Parliament that there is a danger to the country, the next question is whether legislation should be passed to meet the danger or whether it is wiser to ignore it. As to the proper character and extent of that legislation opinions will differ. (at p145)

46. The Government and Parliament are responsible to the electorate for the policy of "fight" or "not fight" which they adopt after such consideration as is thought proper has been given to all the above matters. (at p145)

47. The matters mentioned under the above headings (a) to (f) are mainly matters purely of policy and of opinion. They are not actual or objective facts which can be "found" by a court. Such matters of "fact" as are involved have no significance except in relation to some policy. Many of the relevant matters, as already stated, could never be made public. The plaintiffs contend that the view of the Government and Parliament, based upon the considerations mentioned, is irrelevant when the validity of legislation is to be determined. If a court agrees with Parliament that certain legislative action is really for the defence of Australia the Court will hold an Act to be valid. If the Court disagrees with the view of Parliament, then it must, it is argued, hold the Act to be invalid. (at p146)

48. That this is the question involved in these cases was most clearly put on behalf of the Australian Communist Party. In a written argument submitted on behalf of that plaintiff the following submission is made with reference to legislative measures sought to be supported as laws for the purpose of maintaining the Constitution: - "It is for the Court to determine (a) whether the measures might reasonably be considered to be necessary, and (b) what is the nature and extent of the actual threat to the maintenance of the Constitution and the execution of the laws of the Commonwealth." It is obvious that as a matter of principle the same argument must apply to the defence power, and the case was so argued on behalf of all the plaintiffs. I take the following statement, in relation to the defence power, from the reasons for judgment of my brother Williams: - "The legislation would have to define the nature of the conduct and the means adopted to combat it, so that the Court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose." In my opinion this proposition accurately expresses the principal contention against the validity of the Act. The plaintiffs contend that when it is sought to support legislation under the defence power, before a court can hold the legislation to be valid, the court first must be satisfied upon legally admissible evidence as to the existence of the "actual or objective facts" relied upon as a basis for the legislation; secondly, the Court must be satisfied that those facts constitute a danger to the Commonwealth; and thirdly, the Court must be satisfied that the legislation is reasonably necessary for the alleged defensive purpose; that is, to repeat what was said in argument, the legislation must not "go too far" or "be incommensurate" or "be too drastic". (at p146)

49. All the arguments for the plaintiffs upon this question depended upon the acceptance of a principle that it was for a court and not for a Government or a Parliament to determine whether interference with, resistance to, and undermining of a defence policy approved by a Government and by the Parliament to which it was responsible was proved to exist by admissible evidence of actual happenings and whether it was sufficiently dangerous to the community to justify an exercise of the defence power for the purpose of destroying what the Government and Parliament regarded as a hostile and traitorous organization.
7. I proceed to consider what, upon the basis of the acceptance of this contention, would be the function of a court in considering the validity of any Commonwealth statute directed against a body which was alleged to be subversive or traitorous. The question may conveniently be considered in connection with the recitals contained in the Act now before the Court. (at p147)

50. There are three possible views with respect to the allegations contained in the recitals.
(a) One communist might well admit without any apology that the recitals were all true, but would contend that they represented an entirely justifiable protest, to the point of revolution, if necessary, against an intolerable condition of society. To a person holding such an opinion the proof of the truth of the recitals would not establish the existence of any real danger to Australia, and therefore could not possibly justify any legislation under the defence power. History shows many instances of the

application of a principle that a moderate amount of assassination, and civil war itself, is quite justifiable in an endeavour to create a better world. Whether suppressing communist organizations and organizations associated with them can be regarded as action in defence of Australia or not depends, whatever facts may be established by evidence, on the political opinion with respect to communism of the judge or other person who answers the question.
(b) Another communist might vigorously deny the truth of the recitals and argue that therefore the alleged danger did not exist. If legally admissible evidence did not show that the recitals were true, then, on the plaintiffs' argument, the Act would be invalid. This is the attitude which, in these proceedings up to the present time, the plaintiffs have adopted. It would be open to them later to change their ground, and, if the facts asserted in the recitals were proved against them, to argue that what was being done was being done in the true interests of Australia, and that it was not shown that the proved activities constituted a danger which justified legislation under the defence power. Then the Court would have to decide whether or not it was in the true interests of Australia that there should be a revolution. This would be a decision upon policy and would necessarily depend upon the political views of the judge.
(c) An anti-communist might say that the recitals, or many of them, were true, and that the facts therein stated obviously showed the existence of a very grave public danger against which defence was expedient and reasonable and, indeed, necessary. Judges who were anti-communist in political opinion would agree with this proposition. (at p148)

51. Accordingly the question whether the defence of Australia requires the suppression of communist activities cannot possibly be determined by any decision upon facts. Facts which are viewed with abhorrence by persons of one political opinion are greeted with applause by their opponents. It is not for a court either to abhor or applaud. Even if all the facts stated in the recitals in the present Act were proved to be true the decision as to whether the Australian Communist Party could constitutionally be suppressed or not would, upon the arguments for the plaintiffs, be made to depend entirely upon the political opinions of the judges. The Court should, in my opinion, have no political opinions. (at p148)

52. It will be protested that the arguments for the plaintiffs do not really involve the proposition that a court should make up its mind upon any question of policy. In my opinion the express arguments of the plaintiffs do necessarily involve the consideration by the Court of what must be a question of policy and not of law. In addition to what I have already said I suggest that it may usefully be considered what the duty of the Court would be in relation to the present Act if the Act had been so framed as to allow a court to determine what the plaintiffs contend must be determined by a court before such an Act could be held to be valid. Let it be supposed that the parties adduced evidence with respect to the truth or untruth of the recitals. Let it be supposed that the Court found that some of the recitals were true, and that others of them were false. What would be the position then? Obviously on the argument of the plaintiffs the Court would have to determine whether enough facts were left to constitute a danger which called the defence power into operation. The decision upon such a question would inevitably and necessarily depend upon the political opinion of the judge as to whether communism was a good thing or a bad thing - whether what was proved showed a real danger to the people. (at p148)

53. I am aware that it is sometimes said that legal questions before the High Court should be determined upon sociological grounds -
political, economic or social. I can understand courts being directed (as in Russia and in Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the court is provided with at least a political standard. But such a proposition as, for example, that the recent Banking Case [1948] HCA 7; (1948) 76 CLR 1 should have been determined upon political grounds and that the Court was wrong in adopting an attitude of detachment from all political considerations appears to me merely to ask the Court to vote again upon an issue upon which the

electors and Parliament had already voted or could be asked to vote, and to determine whether the nationalization of banks would be a good thing or a bad thing for the community. In my opinion the Court has no concern whatever with any such question. In the present case the decision of the Court should be the same whether the members of the Court believe in communism or do not believe in communism. (at p149)

54. In my opinion the arguments for the plaintiffs show no adequate appreciation of the functions of the executive and of Parliament in a system of government under a Federal constitution. The governing questions in relation to defence and to the protection of constitutional government are questions of policy with which a court has nothing to do. It is not the case that all the questions which arise in government are "questions of fact" or "questions of law" - the former possibly for a jury and the latter for a court. When those responsible for the safety of the country determine to go to war they may be moved by all kinds of considerations and circumstances, many of which could never be stated in the form of categorical propositions which would be capable of proof by legally admissible evidence. Entry into a war may be determined from one point of view readily and easily as a matter of self-preservation. But where some people take this view others may take a contrary view. It is notorious that in 1939 and 1940, though Parliament and the Government considered that the defence of Australia made it necessary to fight Germany, there were those in Australia and elsewhere who contended that the war was merely an "imperialist adventure" that had nothing whatever to do with the defence of Australia.
8. It is in the light of these considerations that I come to the decisions of this Court upon which the plaintiffs rely. (at p149)

55. Upon the arguments submitted by all the plaintiffs in this case it would have been open to a defendant who was prosecuted under the War Precautions Act 1914 or the National Security Act 1939 to contend that it was wrong for the Court to consider merely whether the legislation had a real connection with the prosecution of the war, and that the Court should consider and decide whether the war itself was really an operation for the defence of Australia. Neither in the First World War nor in the Second World War did the Court ever consider any such matter. The Court in each case accepted without question the determination of those responsible for the defence of the Commonwealth that these wars were wars fought in defence of the Commonwealth. Entry into war as being for the defence of Australia was a purely executive act. It was the decision of the Government, and not the decision of any court, that the war undertaken was for the defence, or "could reasonably be thought to be" for the defence of Australia, which provided the constitutional foundation for legislation under the defence power. In such legislation the Parliament adopted and approved the executive act. It was not open to any court to pass upon such action of the Government or of the Parliament. (at p150)

56. The exercise of the power to make laws with respect to defence has never been held in this Court to be dependent on the actual existence of war at the time when the legislation was passed. The Defence Act itself was passed in a time of peace, and preparation for war and against war is included within the defence power. The power does not cease to be available when actual hostilities cease (Australian Textiles Pty. Ltd. v. The Commonwealth [1945] HCA 35; (1945) 71 CLR 161 ; Dawson v. The Commonwealth [1946] HCA 41; (1946) 73 CLR 157 ; Real Estate Institute of New South Wales v. Blair [1946] HCA 43; (1946) 73 CLR 213 ; Hume v. Higgins [1949] HCA 5; (1949) 78 CLR 116). (at p150)

57. The defence power authorizes the Commonwealth Parliament if it thinks proper to enact laws not only to punish but also to prevent injurious activities. It is not necessary for the Government and Parliament to wait until war is actually raging and a crisis is upon us before preparing for war contingencies and legislating against hostile acts, whether internal or external, and whether actually performed or only apprehended. I repeat as to this matter what I said in the case of Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth (1943) 67 CLR, at p 132 : - "In pursuance of the

powers so conferred (by s. 51 (vi.) and s. 61 of the Constitution), the Commonwealth can defend the people, not only against external aggression, but also against internal attack, and in doing so can prevent aid being given to external enemies by internal agencies. No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people. These activities, whether by way of espionage, or of what is now called fifth column work, may assume various forms. Examples are to be found in obstruction to recruiting, certainly in war-time, and, in my opinion, also in time of peace. Such obstruction may be both punished and prevented." (at p150)

58. See also Burns v. Ransley [1949] HCA 45; (1949) 79 CLR 101 and R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121 , where the Court held that the Commonwealth had power to legislate against such activities. (at p151)

59. In my opinion the defence power, executive and legislative, would enable the Government to act and the Parliament to legislate with respect to a civil war. These constitutional organs, and not the judiciary, would decide whether or not fighting on one side or the other was defending the Commonwealth and the Constitution. (at p151)

60. The plaintiffs do not contend that there is no power to pass some laws dealing with traitorous and subversive activities. Such laws may provide for the punishment of individual persons. But it is argued that a voluntary association cannot be suppressed and its property forfeited unless a court (as well as Parliament) determines that it is engaged in proved activities as actual and objective facts (i.e., as actual happenings), and unless the courts, as well as Parliament, are satisfied that the proved facts constitute a real danger, legislation against which is reasonably necessary. Unless these propositions are established to the satisfaction of a court, it is argued that no real connection with the subject matter of defence or protection of the Constitution is made out. The substance of the plaintiffs' arguments is that Parliament cannot legislate against an enemy unless the Court decides on evidence legally admissible (and the Court can have no other evidence) that it is an enemy and that the law is necessary or reasonable. In my opinion it is for the Government, subject as it is to the control of Parliament and the electors, and not for any court, to identify the enemies of the Commonwealth, internal or external. (at p151)

61. In my opinion these arguments, based as they purport to be upon many decisions of this Court, are answered by the consideration to which I have already adverted, namely that the Court did not in any case consider whether the war which was being fought was really a war in defence of Australia. That question was dealt with and determined by the Government and by Parliament itself. This Court accepted the decision of the executive and legislative authorities upon the question of policy. The decisions to fight Germany and Japan were not made by the Court. The Court was not asked, and did not presume, to hold laws valid or invalid on the ground that the war was or was not really a war for the defence of Australia. The laws were held valid not because the Court agreed with the policy of the Government and Parliament in regarding Germany and Japan as enemies, but because the legislation was held to have a real connection with the war against Germany and Japan. In other words, the action of the Government in declaring war and of Parliament in adopting that decision and legislating in pursuance of it itself created a defence situation which provided a basis for the legislation. Upon the basis of the recognition of this fact, actually created by the political decision of the Government and Parliament, the Court in its decisions applied a rule that there must be a real and substantial connection between the legislation and the defence situation so created in order that the legislation could be valid, but the Court never considered whether what Germany and Japan had done or might do could be regarded as a danger to Australia so as to warrant legislation under the defence power. The end to be pursued - the object to be achieved, namely, winning a particular war - was determined by the Government and Parliament. The only question which the Court considered in any of the cases

referred to was whether a law had a real connection with that end or object. (at p152)

62. The Court acted upon the same basis as Lord Parker when he said in The Zamora (1916) 2 AC, at p 107 : - "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public." (at p152)

63. In my opinion the Court had no authority to review the entirely political decisions in 1914 that Germany was an enemy of the Commonwealth, or in 1939 and 1941 that Germany and Japan constituted a danger to the Commonwealth. No distinction can be drawn between defence against external attack and defence against internal attack, which is more insidious than direct external attack and in some respects, because it is often secret, more difficult to combat. If Parliament decides that there is an internal danger sufficiently serious to justify legislation, in my opinion the Court has no authority to overrule Parliament upon the ground that Parliament has made a mistake as to "the facts", or that, even if Parliament is right as to the facts, the facts show no real danger to Australia. The Government is responsible to Parliament and Parliament is responsible to the people for such decisions. If Parliament disagrees with the Government, or the people disagree with either the Government or the Parliament, our system of government provides a political means of changing the policy. The courts have nothing whatever to do with such decisions. (at p152)

64. For the reasons which I have stated those who wish to challenge the truth of what Parliament has said in the recitals in this Act can do so in Parliament and before the people, but, in my opinion, not before any court. (at p153)

65. It is not in my opinion a function of a court to determine whether legislation "goes too far" or "is incommensurate" or "is too drastic" or "is or is not reasonably necessary". The only function of a court when the validity of legislation is challenged as ultra vires the Commonwealth Constitution is to determine whether it is legislation "with respect to" a specified subject matter. If a law has a connection with a subject matter which is real, it is not the function of a court to ask whether the law was in fact "reasonably necessary". In the recent case of Bank of New South Wales v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1 the Court had to consider the validity of the Banking Act 1947. Some sections of that Act provided penalties of 10,000 pounds per day in the case of certain conduct, but no argument was heard (in a case which was fully argued) that the legislation "went too far". I agree with what Dixon J. said in Miller v. The Commonwealth [1946] HCA 42; (1946) 73 CLR 187, at p 203 :- "On a question of ultra vires, when the end is found to be relevant to the power and the means not inappropriate to achieve it, the inquiry stops. Whether less than was done might have been enough, whether more drastic provisions were made than the occasion demanded, whether the financial and economic conceptions inspiring the measure were theoretically sound, these are questions that are not in point. They are matters going to the manner of the exercise of the power, not to its ambit or extent." (at p153)

66. This decision was given with respect to a law of a financial and economic character enacted in reliance upon the defence power. The principle stated is applicable in the case of all Commonwealth legislative powers. On this aspect of the case I refer to what Griffith C.J. said in Farey v. Burvett [1916] HCA 36; (1916) 21 CLR 433, at p 443 :- "It is then contended that the necessity and desirability of making the law are questions of fact to be adjudged by the Court. In answer to that argument I refer to another well-known passage in the judgment of Marshall C.J. in M'Culloch v. Maryland [1819] USSC 5; (1819) 4 Wheat 316, at p 423 [1819] USSC 5; (4 Law Ed 579) ; also quoted by my brother Barton in the Jumbunna Case (1908) 6 CLR 309, at p 345 :- 'Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.'" (at p153)

67. I respectfully agree with Griffith C.J., Barton J. and Marshall C.J. The contentions of the plaintiffs are, in my opinion, inconsistent with the principles stated in the passages which I have quoted. (at p154)

68. The cases relied upon by the plaintiffs in their main argument accordingly, in my view, when their significance is properly appreciated, do not support that argument but, on the contrary, provide an effective reply to it. Legislation of the character of the Act now under consideration may be an abuse of power. For abuse of power the Parliament is answerable to the people. When the validity of a law is challenged in the courts, the courts are concerned only with the question whether the law was, as a matter of law, within the power of Parliament. (at p154)

69. I summarize my conclusions upon this matter by saying that it is not for a court (either at the present stage of these cases, or at any later stage) to ask or to answer the question whether or not it agrees with the view of Parliament that the Australian Communist Party and organizations and persons associated with it are enemies of the country. It is for the Government and Parliament to determine that question, and they have already determined it. Whether they are right or wrong is a political matter upon which the electors, and not any court, can pass judgment. The only question for a court, therefore, is whether the provisions of the Act have a real connection with the activities and possibilities which Parliament has said in its opinion do exist and do create a danger to Australia.
9. In my opinion there is no difficulty in answering this question. Section 4, dissolving the Australian Communist Party, is the most obvious means of preventing its activity. It is equally obvious that the dissolution of the bodies mentioned in s. 5(1) and the exclusion from the offices and employments mentioned in s. 10 of the persons referred to in s. 9 are directly and immediately connected with the suppression of that against which Parliament has decided the community is to be defended. (at p154)

70. In order that the suppression of the associations in question should be effective the associations must obviously be deprived of their means of action, that is, of their property, and the fact that this deprivation is permanent in my opinion constitutes no sound objection to the legislation. It was put that this legislation was legislation to meet a temporary emergency. It is, in my opinion, wrong to base a judicial decision upon an assumption that, if there is an emergency, it is only temporary. I do not know how anybody knows that it is a temporary emergency. If the allegations in the recitals are true - as to which, as I have said, it is not for the Court to give any decision in these cases - the success of the Australian Communist Party would present Australia with a permanently altered system of government. This cannot seriously be denied. Why opposition to the Australian Communist Party and protection against subversive activities should be described as necessarily temporary in character I am unable to understand. Whether the alleged emergency is temporary or not may depend upon whether the policy of Parliament succeeds or fails. It is suggested that the property of unlawful associations ought to be held in trust for them so that later on they will be able to re-establish themselves and resume their operations. This is not like legislation for the winding up of a company. It was enacted to meet what Parliament has declared to be a national peril. The very object of the Act is to put the associations out of existence and to prevent their re-establishment. Such legislation is most directly connected with the defence of the community against the activities of these bodies. Many people, perhaps most people, particularly in our hitherto peaceful community, do not like such legislation. But that fact has nothing to do with its validity. (at p155)

71. If, however, the Act ought to be regarded as legislation "introduced to meet a temporary emergency", I do not agree that it cannot be allowed to have permanent effects. Defence legislation which has been upheld because it was passed to meet a particular emergency which has proved to be temporary most obviously can have permanent results. An ex-serviceman who obtains a war-service home retains the home after the war is over. A traitor who assists an enemy during what may be a quite short war and has been shot remains dead after the war is over. It may be added that while a war is in progress no-one can say whether the war will be "temporary" or whether it will go on for many

years.
10. The plaintiffs on many occasions referred to the old saying which is quoted in Chitty on The Prerogatives of the Crown (1820), p. 43 - ubi bellum non est pax est. In my opinion the events of recent years require a reconsideration of this maxim. Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of "peace" may not unfairly be described as an unreal application of what has become an outmoded category. The phrases now used are "incidents", "affairs", "police action", "cold war". The Government and Parliament do not regard the present position as one of perfect peace and settled security, and they know more about it than the courts can possibly know as the result of considering legally admissible evidence. I have already referred to the authorities which show that neither the technical existence of war nor actual fighting is a condition of the exercise of the defence power. At the present time the Government of Australia is entitled, in my opinion, under the defence power to make preparations against the risk of war and to prepare the community for war by suppressing, in accordance with a law made by Parliament, bodies believed by Parliament to exist for the purpose (inter alia) of prejudicing the defence of the community and imperilling its safety. It is immaterial whether the courts agree with Parliament or not.
11. The result of what I have said is that, in my opinion, it was competent for Parliament to identify communist organizations and associated persons as internal enemies of the Commonwealth and to legislate for the purpose of preventing the continuance of the existence of such organizations and for suppressing their activities and forfeiting their property. Thus (subject to some other arguments still to be considered) I am of opinion that s. 4, dissolving the Australian Communist Party, is valid. (at p156)

72. I am further of opinion that ss. 5 and 9 are valid by reason of the provisions contained in sub-s. (1) of those sections. Sub-section (1) in each case states that the section applies to bodies of persons or to individuals who have certain communist associations. Sub-section (2) then limits the application of the sections in respect of bodies of persons or individual persons to such of those bodies or persons as the Governor-General has declared in pursuance of sub-s. (2) of the sections to be acting in a manner prejudicial to the defence of the Commonwealth or the maintenance of the Constitution. In my opinion it is not necessary to go to sub-ss. (2) of ss. 5 and 9 to provide a constitutional basis for these provisions. These sub-sections operate by restricting the operation of the Act within a smaller sphere than would have been the case if they had been absent. The legislation, in particular ss. 4, 5(1) and 9(1), upon the view which I have stated, is brought within the defence power and s. 51(xxxix.) of the Constitution by the Parliamentary condemnation of communism. When the sections are so construed the fact that the operation of ss. 5 and 9 depends in part upon the opinion of the Governor-General cannot be an objection to the validity of the sections. The opinion of the Governor-General upon any matter may validly be made a condition of the operation of the legislation. Section 5(2), for example, might have provided for a proclamation of the Governor-General based upon any matter whatever; for example, provision might have been made that the Governor-General should not declare an organization under the section unless it had a certain proportion of foreign-born members or unless it had existed for ten years or for twenty years or unless the Chief of the General Staff or a State Commissioner of Police made a report to him on the matter.
12. Other arguments raised other points with respect to ss. 5(2) and 9(2). What is said as to s. 5(2) applies also to s. 9(2). The only difference between the sub-sections is that under s. 5(2) the declaration made is simply that an association is an unlawful association, whereas under s. 9(2) the Governor-General is authorized to "make a declaration accordingly" - i.e., that he is satisfied as to the matters mentioned in the sub-section. I quote s. 5(2) again:- "Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the

Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association." It was argued for the plaintiffs that all the matters mentioned in this sub-section are remitted to the unexaminable opinion of the Governor-General except in the case of the first element, namely, whether a body of persons was a body to which the section applies, in respect of which element there is provision for an application to a court. But the plaintiffs contended that the section left it to the Governor-General to determine conclusively whether the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution, &c. It was argued that this left it to the Governor-General to determine what was the defence of the Commonwealth and what was the execution or maintenance of the Constitution, &c., and also to determine whether the continued existence of the body would be prejudicial to such matters. Similarly under s. 9(2) the plaintiffs contended that the Governor-General determined finally what activities the person was engaged in and whether those activities were prejudicial to what the Governor-General considered was the defence of the Commonwealth or the execution or maintenance of the Constitution, &c. The plaintiffs relied upon what has been said on this matter in a number of authorities. It is sufficient perhaps to refer to Reid v. Sinderberry [1944] HCA 15; (1944) 68 CLR 504 . (at p158)

73. The defendants did not dispute the rule laid down in these decisions, but contended that the opinion of the Governor-General was examinable in part. It was said to be examinable in relation to the question whether what was considered by the Governor-General to be defence, or execution or maintenance of the Constitution was really defence, &c. This contention meant that a court would be able to consider whether the Governor-General had a correct conception of the meaning of defence and the execution, &c., of the Constitution. It was said that if this element in the Governor-General's opinion were shown to be correct a sufficient connection with the subject matter of power was established. I did not fully appreciate this argument. The question whether the Governor-General had a proper conception of defence, &c., could arise only in a particular case. If he were shown to be wrong, it would be the declaration, and not the Act, which, upon this view, would be invalid. (at p158)

74. In my opinion the contention of the plaintiffs as to the construction of s. 5(2) and s. 9(2) is correct. On the words of the sub-sections it is impossible to draw a distinction between any of the matters (other than the first element) as to which it is required that the Governor-General shall be satisfied. There is no ground for distinguishing in the case, for example, of s. 9(2), between the examinability of his opinion as to what is defence and his opinion as to whether a person is or was a communist or whether he has been engaged in particular activities or whether those activities are prejudicial to defence. From a practical point of view it would be very difficult indeed to give effect to the contention of the defendants. It was not suggested that any means existed for discovering what the Governor-General's conception of defence or of the maintenance of the Constitution, &c., was. (at p158)

75. Thus I agree with the plaintiffs' argument upon the construction of ss. 5(2) and 9(2) in this respect, but this conclusion does not necessarily provide a reply to the argument that the opinion of the Governor-General (which is really the opinion of the Government of the day, because the Governor-General acts upon the advice of his Ministers - see s. 9(3)) cannot in itself provide sufficient support for the provisions contained in ss. 5 and 9. I deal with this matter in par. 16 hereafter.
13. Argument was heard as to whether the Governor-General had to be satisfied under both sections, and make a declaration under s. 9(2) specifically, as to matters affecting defence and also as to matters affecting the maintenance of the Constitution, &c., or whether it would be sufficient for him to be satisfied as to one only and (under s. 9(2)) to "declare accordingly". In my opinion this question of construction cannot affect a decision as to the validity of the Act upon the view which I take of the operation of s. 5(1) and (2) and s. 9(1) and (2). Whether a particular declaration is valid or not is a

question which arises only after a declaration has been made. If the question should arise it should, in my opinion, be answered by simply following the decision in Welsbach Light Co. of Australasia Ltd. v. The Commonwealth [1916] HCA 59; (1916) 22 CLR 268 .

14. The plaintiffs relied very greatly upon the decision in Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 as a decision that no legislation could depend for its validity upon any opinion, except that of a court, to establish a connection with a subject matter of Federal legislative power. But if sub-ss. (2) of ss. 5 and 9 are read in the manner which I suggest, that is as merely providing a condition of the application of other operative provisions which are themselves valid, the objection based upon Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 ceases to have any application. In Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 the Court expressly approved the decision in R. v. Macfarlane; Ex parte O'Flanagan and O'Kelly [1923] HCA 39; (1923) 32 CLR 518 . There the Court held that s. 8A of the Immigration Act 1901-1920 was valid. The operation of that section (authorizing deportation) depended upon "the Minister being satisfied" that within three years after the arrival in Australia of a person who was not born in Australia that person was a person who advocated the overthrow by force or violence of the established government of the Commonwealth or of any State or of any other civilized country, &c. Thus the application of the section depended upon the opinion of the Minister. It was held that the law was a law with respect to immigration and was valid. In Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 the Court had to consider the validity of s. 8AA in the Immigration Act 1901-1925. That section was held to be valid as a law with respect to immigration, but not as a law with respect to other matters. The validity of sub-s. (1) was not challenged, although the case was most exhaustively argued. Sub-section (1) of s. 8AA was in the following terms:- "If at any time the Governor-General is of opinion that there exists in Australia a serious industrial disturbance prejudicing or threatening the peace, order or good government of the Commonwealth, he may make a Proclamation to that effect . . ." The application of the rest of the Act depended upon such a a proclamation being in force. It will be observed that the proclamation required was in most general terms. It referred to the "peace, order or good government of the Commonwealth" and not to any specific power. It was not suggested that such a proclamation could not be a condition of the operation of legislation otherwise within power. Section 8AA(2) of the Act provided that when any such proclamation was in force the Minister, if he were satisfied as to any of various matters - obstruction of transport of goods or passengers, provision of service by departments or public authorities of the Commonwealth, &c., might call upon a person to show cause why he should not be deported from the Commonwealth. This section was held to be valid in its application to persons who really were immigrants. It was not held that the fact that its operation depended upon the opinion of a Minister as to transport or the provision of services by the Commonwealth, &c., prevented the Act from being valid. A distinction between this case and the case of Ex parte Walsh and Johnson (1) is that in that case it was considered that the alleged law prohibited no act, enjoined no duty, created no offence, imposed no sanction for disobedience to any command and prescribed no standard or rule of conduct (per Knox C.J. (2)). This Act does prohibit acts, create duties and offences, provide for sanctions and prescribe rules of conduct. It prohibits the continued activity of certain associations - it forfeits property; it creates disqualifications for office; and it creates offences with penalties. All of these matters relate to defence if Parliament has, as the Act assumes, the constitutional right to decide against what defence should be provided.

15. The argument for the defendants sought to support s. 4, and consequentially ss. 5 and 9, upon the basis of alleged facts of which (it was said) the Court should take judicial notice. These allegations of fact were made by Mr. Barwick in the course of argument and were challenged by the plaintiffs. They were stated in propositions lettered from (a) to (t). They referred to international tension and to tension with Russia. They included allegations that certain States, including China, were satellite States of Russia, that forces against which Australia was fighting in Korea were communist-supported forces, that an extension of that conflict was feared, that communism was a world movement, was supranational in character, and that communists sympathized with Soviet Russia, the great communist State. In my opinion the matters referred to in these statements are matters which a government and

parliament may properly consider in reaching a decision upon policy, though some of them would be incapable of proof by any legal evidence. None of them, in my opinion, are matters of which the Court should take judicial notice, except perhaps the general statement that the world is in a state of uneasy apprehension and that war preparations (always stated to be defensive) are going on throughout the world. The Court may be allowed to know as much as that, but I can see no justification for the Court taking judicial notice of the other disputed and disputable propositions which Mr. Barwick has submitted. The Court can take judicial notice of notorious facts, and one thing which is notorious about what Mr. Barwick has submitted is that the allegations are matters of vigorous dispute.

16. I have stated my opinion that the validity of ss. 4, 5 and 9 and the associated provisions may be established without relying upon the declaration of the opinion of the Governor-General, for which provision is made in ss. 5(2) and 9(2). But, apart from what I have already said as to ss. 5(1) and 9(1) being within power, I do not agree that an opinion of an executive authority is irrelevant when the question under consideration is that of connection with defence or with the maintenance of the Constitution. Operations against an enemy (external or internal) are conducted by the Executive Government under the control of Parliament and not by courts. They require action. They often require prompt and decisive action. What action should be taken must frequently be left to the judgment of a responsible person. It is true, as has been held in this Court, that Parliament cannot extend its powers with reference to trade and commerce by passing laws about something which is not trade and commerce, though, in the opinion of a Minister, it is trade and commerce, and that Parliament cannot by enactment make a man an immigrant if he is not an immigrant. But in the case of defence the opinion of those responsible for defence may validly be made by Parliament the crucial matter in determining under a law whether particular action should be taken to protect the community. Thus, in Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 , the Court considered the validity of a provision in a regulation that where the Minister for Defence "has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war". It was held that the regulation was valid and that the Minister could not be called upon as a witness to state the grounds of his belief. Griffith C.J. said:- "Having regard to the nature and object of the power conferred upon the Minister, and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it" (1915) 20 CLR, at p 304 . His Honour added:- "Having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings." (1915) 20 CLR, at pp 304, 305 . Isaacs J. agreed, saying that the Minister is "the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency or the reasonableness of the belief founded upon them. He is presumed to act not arbitrarily nor capriciously, but to inform his mind in any manner he considers proper" (1915) 20 CLR, at pp 308, 309 . This decision was followed and applied in Ex parte Walsh (1942) ALR 359 and in Little v. The Commonwealth [1947] HCA 24; (1947) 75 CLR 94 by Dixon J. The latter was also a case of internment, and his Honour said that he did not think that the order was examinable upon any ground affecting the Minister's opinion short of bad faith. In Welsbach Light Co. of Australasia Ltd. v. The Commonwealth [1916] HCA 59; (1916) 22 CLR 268 the Court considered the question of the validity of a Trading with the Enemy Act which applied to companies which became identifiable only by means of a proclamation of the Governor-General and a declaration of the Attorney-General that a company was in his opinion managed or controlled, &c., by persons of enemy nationality. The Act was held to be valid. In all of these cases it was the opinion of the Governor-General or of a Minister as to the relation between a person and the defence of the Commonwealth in a particular war, and nothing else, which provided the constitutional foundation for the law. These cases must, in my opinion, be overruled if the arguments for the plaintiffs on the point now under consideration are accepted. Otherwise they become unintelligible exceptions to a supposed universal rule that the

opinion of a Government or a Minister or a Parliament - on either fact or law - cannot provide any link between a law and a subject of legislative power. (at p162)

76. Such exceptions cannot be made intelligible by saying that in "times of crisis", when there is "an enemy in our midst", much must be left to the discretion of other than judicial authorities. The doctrine for which the plaintiffs contend means that the courts, and not "merely" the Government and the Parliament of the country, should be satisfied that there really is a crisis of sufficient significance to justify the law - that there really is an enemy in our midst. A court, in reaching a conclusion upon such an issue, should, the plaintiffs contend, take into account both facts of which the Court can take judicial notice and facts duly proved by admissible evidence. The defendants, on the other hand, argue that the Court should be limited, in relation to this issue, to the consideration of facts of which it can take judicial notice. In my opinion, as already stated, the problem as to whether there is, or is likely to be, a crisis or position of danger requiring the exercise of the defence power or the power to protect constitutional government is a question which Parliament may properly determine for itself. If it is held that it can be determined only by a court, I have difficulty in seeing how a conclusion could be based only upon facts of which the Court could properly take judicial notice. A court could not take judicial notice of a "crisis" before the crisis had happened. A court could not take judicial notice even of widespread espionage and sabotage, most of which would in any case be secretly organized. A court could not determine, by the application of any doctrine of judicial notice, whether a particular interference or a series of interferences with production in vital industries was really industrial in character (as some would assert) or really political and subversive (as others would allege). The limitation of the principle of judicial notice to facts which are notorious - which are so clear that no evidence is required to establish them - appears to me to prevent a court from ever reaching a conclusion based only upon such facts with respect to an issue of actual or potential public danger calling for the exercise of the legislative powers now under consideration. On the other hand, if evidence is admissible, as the plaintiffs contend, to prove or to disprove the actual or possible existence of such a danger, the validity of Commonwealth laws will be decided upon the basis of the evidence which litigants choose to submit in particular cases. Upon the evidence called in one case, the law would be held to be valid. Upon the evidence called in another case the same law would be held to be invalid. According to the plaintiffs' arguments, if the Court, after hearing such evidence as was brought before it, thought that the suggested crisis was imaginary, or that it was not sufficiently serious to justify particular legislation, it should hold that the law was invalid, notwithstanding the contrary opinion of Parliament upon both points. (at p164)

77. This conclusion cannot be escaped (whether the Court is limited to the consideration of facts judicially known or not) by reference to such Ciceronian apophthegms as "Silent enim leges inter arma" and "Salus populi suprema est lex". Such pithy proverbs represent not an application, but a negation, of law. In my opinion the Constitution of the Commonwealth has not been so imperfectly framed that, in what the Government and Parliament consider a time of crisis when the national existence is at stake, they can act promptly and effectively, by means of executive action and legislation, only by breaking the law. Upon my understanding of their functions and of the nature of the defence power, they can act within the law to meet the crisis without being subject to the risk of being told by a court that they were acting illegally. In such a case, the Government and Parliament are not left by the Constitution to action under a cloud of legal doubt. It might well happen that the crisis would be over - one way or the other - before the Court had heard the evidence (which could easily be made very lengthy) upon the question whether there was really a crisis or not. In my opinion the Constitution does not create such perilous situations.
17. The case of Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 is not, in my opinion, inconsistent with the last-mentioned decisions. That case in its relevant aspects was a decision with respect to the immigration power, the trade and commerce power, the power to legislate with respect to Commonwealth departments, and with respect to the interpretation of a general phrase referring to

all Commonwealth legislative powers, whether they had been actually exercised or not. It was there held that the Minister's opinion that a man was an immigrant could not make him an immigrant if he really was not an immigrant and that similarly the Minister's opinion that certain matters fell within the subject of trade and commerce would not bring them within the subject if in fact they did not fall within it - and so also as to the other subjects mentioned. But, for reasons which I have already stated, the position is quite different in the case of the defence power. The Government of the day decides matters of defence policy subject to parliamentary control and, in so doing, it determines what the people are to be defended against. Such a decision is not a finding of fact or an opinion upon law. It is a decision of policy as to what ought to be done in the interests of the country. Often action must be taken upon the opinion of a responsible authority - sometimes upon suspicion and not upon proved fact. When, for example, a Minister, under the Acts mentioned in the cases referred to, or the Governor-General, under the Act now under consideration, declares that a person is acting prejudicially to the defence of the Commonwealth, he is engaging in the discharge of a function which is committed by the Parliament to the Executive Government, and his opinion in itself may legitimately bring the law within the constitutional power. (at p165)

78. It was said in the House of Lords by Lord Atkinson in R. v. Halliday [1917] UKHL 1; (1917) AC 260, at p 275 :- "As preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof." His Lordship went on to say that it was not necessary to wait until a person performed an act by which the public safety and the defence of the realm might be prejudicially affected, and that after the Minister received a recommendation with respect to a particular person, and came to the conclusion that by reason of his hostile origin or association it was expedient for securing the public safety and the defence of the realm that he should be interned, it would be "as mischievous as absurd to require that the Minister, though fully warned, should remain quiescent and look on helplessly, waiting for the time when one of the crimes mentioned in (the regulations) should be committed, and the perpetrator, if caught, and if sufficient proof were forthcoming, should be brought to justice and punished." (1917) AC, at p 276 . (at p165)

79. In my opinion the arguments for the plaintiffs which I have been considering do not show that any of the provisions of the Act are invalid.
18. It is now necessary to refer to other arguments adduced on behalf of the plaintiffs or on behalf of some of them. It was argued that no Federal law could permanently suppress a voluntary association. It was conceded that individuals might be punished for subversive or traitorous activities, but it was said that Parliament itself could not suppress any voluntary association of people associated for any objects. This contention was supported by the argument that defence legislation, assumed to be valid only in respect of what was called "a temporary emergency", could not be allowed to have "permanent" effects. I have already stated my opinion as to this proposition. The plaintiffs were able to concede, for the purposes of the present case, that a court could, if authority were given to it under a statute, perhaps suppress a voluntary association, but contended that Parliament could not. Thus, if Parliament had said that, if a court were satisfied of the existence of the facts alleged in recitals Nos. 4 to 8, the Court might dissolve the Australian Communist Party, such a law might possibly be valid. As this Act is not such a law the concession had no significance. I therefore only record my dissent from the frequent statements in the course of argument that only the opinion of a court as to a fact and that only the opinion of a court on a matter of law can produce legal consequences. I refer to what I say hereafter on the subject of judicial power.
19. It was argued that political parties and trade unions, because they are political parties and trade unions, enjoy some form of exemption from law - though the proposition was not put in that precise form. The Court heard many protests against the Act based on the fact that it applied to a political party and to trade unions. It was put that, even if such organizations engaged in subversive activities,

they also had innocent activities, and that Parliament could not by closing them down prohibit their innocent activities. A subversive or traitorous association would naturally keep its significant activities secret until it was strong enough to declare them, and in the meantime would pose as an innocent and well-meaning political party or cultural society or something like that, simply and sincerely striving for a better world. The fact that such bodies may have innocent activities as well as activities of the character described in the statute is not, any more than in the case of individuals, a ground for excluding the application of laws designed either to prevent or to punish unlawful activities. A burglar does not secure exemption from the law because he is a good father. (at p166)

80. It is further contended that the legislation affects civil rights of union officers and others by terminating contracts of employment. This is certainly the case, but I am unable to understand why it should be thought to be an objection to the validity of legislation. Most legislation affects civil rights. If such an obvious proposition requires support from authority it is sufficient to refer to West v. Gwynne (1911) 2 Ch 1, at p 12 , where Buckley L.J. said: "Most Acts of Parliament, in fact, do interfere with existing rights". There is no constitutional ground whatever for holding that Federal legislation with respect to matters within Federal power cannot affect civil rights, proprietary and others. (at p166)

81. It was said that the legislation interfered with the "fundamental right" of trades unions to choose their own officers. It certainly places limitations upon the right which the law has hitherto allowed to trades unions to choose their own officers. This right, however, exists only by reason of law and depends entirely upon law. It is subject to control by laws made by Parliaments which have power with respect to the matters to which the laws relate. (at p167)

82. Similar questions have arisen in the United States of America. Some of them were considered in American Communications Association v. Douds [1950] USSC 56; (1950) 339 US 382 (94 Law Ed 925) . In that case the Supreme Court upheld a statute which provided that, as a condition of a union utilizing the provisions of a Labor Management Relations Act 1947, each of its officers should file an affidavit stating that he was not a member of the Communist Party or affiliated with it and that he did not believe in, was not a member of or supported any organization that believed in or taught the overthrow of the United States Government by force or by any illegal or unconstitutional methods. Much of the reasoning in the judgments relates to provisions in the Constitution of the United States which are not present in the Australian Constitution. Apart from these matters, the case deals with several matters which have been discussed in the case now under consideration. The statute was passed under the trade and commerce power. It was held that Congress had power to remove obstructions to inter-State commerce consisting in "political strikes", namely "strikes instigated by communists and others proscribed by the statute who infiltrate union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy require such action". The Supreme Court further declared that notwithstanding the express protection given to freedom of speech by the Constitution of the United States, "those who, so Congress had found, would subvert the public interest, cannot escape all regulation because, at the same time, they carry on legitimate political activities". It was also held that Congress and not the courts was primarily charged with the determination of the need for regulation of activities affecting interState commerce. It was objected that the law was invalid because it would bring about the removal of union officers who refused to take the prescribed oath. This objection was not upheld. Congress had legislated to protect unions from domination and control by employers. Without expressing any agreement with the general judgment of Jackson J., I quote what he said upon this particular matter: - "I cannot believe that Congress has less power to protect a labor union from Communist Party domination than it has from employer domination" (1950) 339 US, at p 433 (94 Law Ed, at p 962) . These matters are related not only to foreign and inter-State trade and commerce,

but also to defence and the maintenance of the Constitution. In my opinion the Commonwealth Parliament has the same power to protect unions in Australia as in America. Opinions may differ as to the wisdom or desirability of such protection (and it has not been welcomed by the plaintiffs), but that fact has nothing to do with the validity of the legislation.
20. The case was argued by some counsel as if the Commonwealth Constitution contained provisions corresponding to those contained in certain other constitutions. In the Constitution of the United States of America there are provisions preventing the enactment of laws impairing the obligation of contracts or depriving persons of life, liberty or property without due process of law. In the Canadian Constitution "property and civil rights within the province" is a subject as to which the provincial legislatures are declared to have exclusive power (British North America Act 1867, s. 92). None of these provisions appear in the Constitution of the Commonwealth, and in my opinion there is no basis whatever for the attempt to create such provisions by arguments based upon the judicial power and s. 92 of the Constitution and the natural dislike of suppressive laws. The Act does affect civil rights. It does affect proprietary rights. It does affect contracts of employment. But there is no reason why it should not do all of these things if it is legislation with respect to a subject upon which the Commonwealth Parliament has power to make laws - an aspect of the case with which I have already dealt.
21. It was argued that no Federal legislation could abolish a body which had Federal political objectives or State political objectives. It could not suppress a body in the former case because, it was contended, the Federal Constitution, which provided for voting by electors, impliedly provided that there should be political parties and therefore impliedly provided that the electors should have the constitutional right to vote for any body of persons which was a political party and that therefore the Constitution impliedly provided for the existence of any political parties which any persons chose to form and, accordingly, that the Commonwealth Parliament had no power to suppress any party. It was argued that if a political party had State objectives as well as Federal objectives, if the Commonwealth Parliament suppressed the party altogether there was an interference with the constitutions of the States. It was conceded that the constitutions of the States, like the Constitution of the Commonwealth, say nothing about political parties. It is also true that the Commonwealth Constitution gives a plenary power to the Commonwealth Parliament to legislate upon the subjects committed to it. But it was said that the State constitutions, like the Commonwealth Constitution, assumed the existence of political parties and that therefore all political parties can continue to exist notwithstanding any legislation directed against them. It is obvious that the objections to Federal legislation directed against a body which took part in State politics would equally apply to State legislation directed against a body which elected to take part in Federal politics. The conclusion of these arguments is that bodies, however traitorous and subversive, are entitled to continue to exist if they are political parties though individual persons could be punished if they were prosecuted for and convicted of offences. (at p169)

83. It is difficult to deal with an argument so insubstantial. The Commonwealth Parliament has full power to make laws with respect to traitorous and subversive activities of persons, whether they act individually or in association. If that be so, the fact that the bodies have other characteristics - political, athletic, artistic, literary &c. - cannot possibly exclude the application of such laws.
22. Section 92. The plaintiffs submitted an argument based on s. 92 of the Commonwealth Constitution. The Australian Communist Party and the industrial organizations to which the Act refers, like most other bodies of any consequence in Australia have inter-State activities and write letters from one State to another. Also union officers travel from State to State in pursuance of their duties. It is argued that they are exempt from any law which inhibits those activities. (at p169)

84. The Act says nothing about trade, commerce or intercourse. When the Act operates it will restrict various activities, including inter-State activities, of the persons to whom it applies. So also does an Act which provides for imprisonment for any offence. So also does any Act which requires persons to

take out licences or to possess qualifications before they can follow certain occupations in a particular State. So do quarantine Acts. So do scores of other Acts. In all such cases the relation to inter-State trade and commerce is "remote" within the meaning of the Banking Case: The Commonwealth v. Bank of New South Wales [1949] HCA 47; (1950) AC 235; 79 CLR 497 . In that case the Privy Council held that s. 92 did not prevent the exclusion from passage across the frontier of a State of creatures or things calculated to injure its citizens. Thus the transit inter-State of diseased cattle and noxious drugs could be prevented by law consistently with s. 92. There can be nothing more injurious and dangerous than traitorous and subversive activities. If, in order to stop them, certain action is thought necessary by Parliament, if it is otherwise within power it is no objection to such action that it has the effect of preventing all those activities and other activities, whether inter-State or intra-State.
23. Acquisition of Property. The Act forfeits the property of the Australian Communist Party and provides for the forfeiture of the property of the associations declared to be unlawful. Section 51 (xxxi.) of the Constitution provides that the Parliament may make laws for the acquisition of property upon just terms. It has been held that this is the only power of the Parliament to legislate for the acquisition of property (Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth (1943) 87 CLR 314). The Act forfeits the property because the party or the association engages in or is connected with activities of the kind described in the recitals, that is, activities which are considered by Parliament to be traitorous or subversive. If this is to be regarded as a law "for the acquisition of property" I fail to see anything unjust in Parliament forfeiting the property of an association which in the opinion of Parliament possesses those characteristics. This legislation is seen to be very mild when it is compared with the common form of legislation in many countries with respect to espionage, sabotage and the like activities directed against the state, the penalty for which is often death.
24. Judicial Power. It is argued on behalf of the plaintiffs that the Act contravenes s. 71 of the Constitution, which provides that the judicial power of the Commonwealth shall be vested in courts. It was said that whenever any decision as to either a fact or a law produces a legal consequence that decision must be made by a court. Reference was made to Rola Co. (Australia) Pty. Ltd. v. The Commonwealth [1944] HCA 17; (1944) 69 CLR 185 and other cases. Upon this ground s. 4, dissolving the Australian Communist Party, was attacked. It was argued that the Australian Communist Party could be dissolved only by a court because the dissolution affected the rights of persons. Section 5 (2) and s. 9 (2) were also attacked upon this ground because it was said that the opinion of the Governor-General could not be made an element in determining any matter affecting the rights, "civil or proprietary", of any person. The contention of the plaintiffs really is that every determination of a question of law and every determination of fact where the determination produces any legal consequences is a matter for a court. This proposition, interpreted and applied universally and with precision, would not only prohibit much quite ordinary legislation which affects civil rights, but would also mean that no right or duty could be made to depend upon a decision of any administrative officer. The acceptance of such a proposition would make administration impracticable. Every day administrative officers apply and interpret laws and make decisions as to facts. The position stands as they determine it, with the results which follow according to law from their determination. The position validly so stands unless for some reason it is set aside by superior authority or is determined by a court to have been made without authority. If a decision as to the meaning of a statute or as to the existence of facts (many hundreds of which are made every day in the ordinary course of administration) is an exercise of judicial power then such decisions of administrative officers should count for nothing, independently altogether of the result of any subsequent challenge in a court. They could not be legitimated by subsequent judicial decision that they happened to be right. They would still, according to the argument of the plaintiffs, be an unauthorized exercise of judicial power and therefore entirely invalid. (at p171)

85. An effective answer to the plaintiffs' arguments on this aspect of the case is in my opinion to be found in British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation [1926] HCA 58; (1926)

38 CLR 153 , where the question of the nature of judicial power was fully considered. Isaacs J. said that "some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no a priori exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government" (1926) 38 CLR, at p 178 . The case itself upheld the validity of decisions of a Commissioner for Income Tax and of a Board of Review upon questions of fact and of law in determining liability to income tax. His Honour gave other examples from the Trade Marks Act, the Patents Act, the Commonwealth Public Service Act and the Commonwealth Bank Act of persons empowered to exercise "the functions of deciding between contestants questions of fact and discretion and of doing so with the effect in some way of binding the rights of one or more of the contestants" (1926) 38 CLR, at p 179 . The judgment of Isaacs J. was approved upon appeal to the Privy Council (Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation [1930] HCA 41; (1931) AC 275; 44 CLR 530). In the High Court Higgins J. put the matter very succinctly when he said: - "The fact that a policeman has to consider the law as well as the facts in exercising his power to arrest does not make him a judicial officer" (1926) 38 CLR, at p 201 . (at p172)

86. The Parliament might have remitted to a court, if it had thought proper to do so, the decision of the question whether a body of persons was subversive or traitorous. But, as I have said, it was not bound to do so. It is not difficult to think of reasons connected with the nature of the subject matter of the legislation which may have been regarded as relevant by Parliament as reasons for legislating directly, without prescribing the intervention of a court. Parliament may have thought that prompt action was necessary. It may have been influenced by the obvious circumstance that a propagandist subversive body believed to be working in conjunction with similar bodies in other countries could ask for nothing better than an opportunity to give evidence and produce argument in court upon such matters as have been tabulated under headings (a) to (f) in par. 6 of this judgment. It is not necessary, in order to hold that the legislation is valid, that a court should agree with these or any other suggested reasons for the particular form in which Parliament has framed the law, if the law is within power.
25. The Court has been invited to treat this Act as if it were an Act of Attainder or an Act of Pains and Penalties. Such legislation is always unpopular with those against whom it is directed and in general is detested. An Act of Attainder imposed the penalty of death by legislative action and an Act of Pains and Penalties inflicted a less penalty, again by legislative action. The Parliament of Great Britain adopted a practice of hearing the person with whom the bill dealt, but the result was secured by legislation and not by judicial action. In the Constitution of the United States there is a prohibition of such legislation. Article 1, s. 9, provides "No Bill of Attainder or ex post facto law shall be passed". There is no such provision in the Commonwealth Constitution and it has expressly been decided in the High Court in R. v. Kidman [1915] HCA 58; (1915) 20 CLR 425 that ex post facto laws may be passed. But the present Act is in no sense an Act of Attainder or of Pains and Penalties. It does not convict or purport to convict any person of any act, nor does the Act itself subject him to any penalty. He may be convicted of an offence against the Act if he is prosecuted before a court, but the Act itself does not produce any of the results of an Act of Attainder or of an Act of Pains and Penalties.
26. Section 10 of the Act relates to the disqualification of declared persons for employment by the Commonwealth or an authority of the Commonwealth and as an officer of an industrial organization engaged in a vital industry: see s. 10(3). From what I have already said it follows that in my opinion s. 10 is valid. But even if other provisions of the Act are held to be invalid, such a conclusion does not have any bearing upon the full power of the Commonwealth Parliament to make laws with respect to employment by the Commonwealth and to provide by statute, as it thinks proper, for qualifications and disqualifications for the holding of office in industrial organizations registered under the Commonwealth Conciliation and Arbitration Act 1904-1949. The Acts Interpretation Act 1901-1948, s. 15A, provides in substance that even if part of a statute is held to be invalid the rest of the statute shall be held to operate as far as possible. Even if the rest of the Act is invalid, s. 10 may in my

opinion properly be held to be valid as a law applying to persons in or seeking Commonwealth employment and to officers of registered industrial organizations. Section 5 of the Act distinguishes between such organizations which are registered and unregistered organizations. But in one respect s. 10 depends upon ss. 4 and 9. If s. 4 is invalid persons described in s. 9(1)(a) will not be subject to s. 10, because the application of s. 9(1)(a) depends upon the Australian Communist Party having been dissolved by the Act (i.e. by s. 4) upon a certain date.
27. Section 27 of the Act provides that when the Governor-General is satisfied that the continuance in operation of the Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a declaration accordingly and that thereupon the Act shall be deemed to have been repealed. Sections 5(2) and 9(2) provide that before declarations are made under the Act the Governor-General must be satisfied with respect to prejudice to either of the two matters mentioned - defence of the Commonwealth or maintenance of the Constitution &c. The condition would be fulfilled if he were satisfied as to either one or both. The plaintiffs contended that these provisions show that the intention of Parliament was that the Act should not operate unless it could be supported as legislation with respect to both of the subjects mentioned, and that therefore if it could not be supported under the latter head it ceased to operate as a defence measure, and vice versa, and therefore in either case ceased to operate altogether. In my opinion these sections have the contrary effect. Sections 5(2) and 9(2) provide that the Governor-General may make a declaration if he is satisfied as to the character of an association or of a person in relation to either of two matters. If therefore he is satisfied as to one of them the sections are to operate. Section 27 provides that when the operation of the Act is in the opinion of the Governor-General no longer necessary in relation to either of those subjects the Act is repealed. It appears to me that the intention of Parliament is quite clear that the Act shall operate so long as in the judgment of the Governor-General it is necessary for either purpose. This question, however, is unimportant if the Act is valid in all its terms in relation to both of the subjects mentioned, and in my opinion the Act is so valid. Accordingly it is unnecessary for me to consider whether any difficulty in maintaining the validity of the Act would arise if for some reason it were held that these sections prevented any severability of the provisions of the Act so as to hold them valid in relation to one subject but not in relation to the other subject. (at p174)

87. It was argued that these three sections deal with two subjects. The Governor-General might make a declaration upon the basis of one of them, subject A, and, if the Act were valid only in relation to subject B, the Act would be misapplied. Upon the view which I have taken of the Act it is unnecessary to consider this argument, but if the Act is construed (as I think it should be construed) upon an assumption of honesty in the Governor-General such a question cannot arise. (at p174)

88. Finally, I do not see that a provision that a statute is to be deemed to be repealed in a certain event, whatever that event may be, can in any way affect the question of the initial and continuing validity of the statute until such repeal takes place. The time for repeal of a statute may be fixed by reference to any event whatever. The nature of that event cannot in my opinion possibly affect the question whether the statute was validly enacted.
28. For the reasons which I have stated I answer all the questions in the case - No. (at p174)

DIXON J. In these proceedings the validity of the Communist Party Dissolution Act 1950 is in question. The primary ground upon which its validity is attacked is simply that its chief provisions do not relate to matters falling within any legislative power expressly or impliedly given by the Constitution to the Commonwealth Parliament but relate to matters contained within the residue of legislative power belonging to the States. (at p174)

2. The leading provision in the Act carries out the intention indicated by the short title. By direct enactment it purports to dissolve the Australian Communist Party eo nomine. The provision is s. 4, which says that the Australian Communist Party is declared to be an unlawful association and by force

of the Act to be dissolved. The section goes on to require the appointment by the Governor-General in Council of a receiver of the property of the body and upon the gazettal of the appointment to vest the property in the receiver, subject in the case of land to registration of title. (at p175)

3. It is of course true, as a general statement, that the law governing the formation, existence and dissolution of voluntary associations of people falls within the province of the States. The legislative power of the Commonwealth does not extend to the subject as such, and if any part of it may be dealt with constitutionally by Federal statute it is as incidental to some matter falling within the specific powers conferred upon the Parliament of the Commonwealth. To sustain the validity of s. 4, it is therefore necessary to find a subject of Federal legislative power to which the enactment of such a provision is fairly incidental. The powers upon which for this purpose reliance is placed in support of s. 4 are two. Primarily it is sought to refer s. 4 to the power conferred by s. 51(vi.) of the Constitution to make laws for the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth. But reliance is also placed upon the power which the Federal legislature undoubtedly possesses to make laws for the protection of the Commonwealth against subversive designs, whether that power be attributable to the interplay of s. 51(xxxix.) with s. 61 or forms part of a paramount authority to preserve both its own existence and the supremacy of its laws necessarily implied in the erection of a national government. (at p175)

4. The purpose shown by s. 4 of the Communist Party Dissolution Act of dissolving association of communists as unlawful is carried a step further by s. 5 of the Act. Section 5 is directed against bodies of persons possessing communist affiliations or connections of certain forms, which are defined, but it does not apply to industrial organizations registered under the law of the Commonwealth or of a State. If a body possesses any one of the required forms of communist affiliation or connection, then by sub-s. (1) the section is made applicable to the body. The body is not, however, made unlawful by reason only of its falling within the section. Whether it is to be declared unlawful is a matter confided to the decision of the Governor-General in Council. It is to be done in pursuance of a power conferred by sub-s. (2), which is expressed as follows:- "Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenace of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association." By the next sub-section (sub-s.(3)) an official committee is set up and a direction is given to the Executive Council not to advise the Governor-General to make a declaration unless the material on which the advice is founded has first been considered by the committee. It does not restrain the Governor-General in Council from making a declaration unless such a declaration is recommended by the committee. All that is made necessary is that the materials shall first be "considered" by the committee. By sub-s. (4) the body is given an appeal to a court from a declaration by the Governor-General, but the appeal is confined to the question whether the section applies to the body, that is to say to the question whether the body possesses any of the defined forms of connection or affiliation with the Australian Communist Party or communism. There is no review of the Governor-General's opinion that the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws. The section contains two further sub-sections; they deal with the hearing of the appeal and give directions as to the right or duty of the appellant to begin and as to the testimony and presumptions. (at p176)

5. In stating the kinds of communist connection or affiliation which will bring a body within the application of s. 5, sub-s. (1) embraces two periods; a period of some two years and five months before the operation of the Act, beginning on 10th May 1948 and ending on the day when the Act was assented to and took effect, viz. 20th October 1950, and secondly the period of its operation

prospectively. The date 10th May 1948 is chosen because the national congress of the Australian Communist Party was then held and the constitution adopted. It is enough if the conditions the sub-section specifies are satisfied after the Act comes into operation or if they were satisfied at some time in the antecedent period of two years and five months. The conditions which sub-s. (1) specifies consist of four alternative sets providing four tests, fulfilment of any one of which will suffice. The first set of the specified conditions upon which the application of s. 5 depends is that the body either is or purports to be affiliated with the Australian Communist Party or at any time during the antecedent period was or purported to be so affiliated. There is no definition of the rather vague word "affiliated", but in Bridges v. Wixon [1945] USSC 118; (1945) 326 US 135, at p 143 [1945] USSC 118; (89 Law Ed 2103, at p 2109) the Supreme Court of the United States said of the word when used in a not very different context that it imported less than membership and more than sympathy and that acts tending to show affiliation must be of a quality indicating adherence to or furtherance of the purposes of the proscribed body as distinguished from mere co-operation with it in lawful activities. The second alternative set of the specified conditions takes membership of the Australian Communist Party or of its central or governing committee by a majority of members of the body to which s. 5 is to apply or by a majority of the committee of management of the body or other governing body and makes any of such descriptions of common membership a test of the application of s. 5. Again it is enough if the required situation existed at any time after the Act begins to operate or at any time within the antecedent period. The third in the list of conditions upon which the application of s. 5 depends relates to the support of communist doctrine or the spreading of communism by the body. It will come within s. 5 if the required support of doctrine is given or the spreading of communism is done after the commencement of the Act or at any time within the antecedent period. The required support may take the form of the advocacy or support by the body either of the objectives the policies the teachings or the practices of communism. The communism must be as expounded by Marx and Lenin. Theoretically there may be a difficulty in saying how the provision applies if the body subscribes to some but not to all of the objectives, policies, teachings or practices, but probably it has no practical importance. The fourth alternative set of conditions specified depends upon the communistic character of the persons who govern the policy of the body to which s. 5 is to apply and the use they make of the body. It is enough that the policy of the body is either directed, controlled, shaped or influenced wholly or substantially by them. But their communistic character must consist in membership of the Australian Communist Party or in being persons who are communists in the sense that they support or advocate the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin (s. 3(1), s.v. communist). Again it is only necessary that the character of a member of the party or communist as defined should exist at some time after the commencement of the Act or at some time within the same antecedent period. But there is an additional requirement, namely that they must make use of the body as a means of advocating propagating or carrying out the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin. This appears to mean that as at the time of the application of the section to the body the persons must make use of the body for the purpose stated. (at p178)

6. It will be seen from the foregoing account of s. 5 that it provides tests of communistic connection or affiliation which must be satisfied in fact before the body becomes liable to be declared unlawful and it prescribes the manner in which the body may apply to the courts if it denies that it possesses a character fulfilling the tests. Section 23(3) requires that such an application should be dealt with by a single judge whose decision should be final and conclusive, but that is not presently important. In sharp contrast with this objective nature of the tests for the application of s. 5 to the body the actual decision of the question whether the body ought to be considered unlawful and dissolved accordingly is left completely to the final determination of the Executive. Being satisfied that s. 5 applies to the body, a matter which the body can submit to a single judge for review, the Governor-General in Council by sub-s. (2) is then to be satisfied of what may be called a compound proposition and thereupon under the word "may" is to exercise a discretion as to declaring the body unlawful. The

compound proposition is expressed indefinitely and covers a large field with no certain boundaries. It contains a number of alternatives. The proposition is that the continued existence, that is the continuance of the association, of the body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. (at p178)

7. Two things appear to me to be clear about this. The first is that it leaves to the opinion of the Governor-General in Council every element involved in the application of the proposition. Thus it would be for the Governor-General in Council to judge of the reach and application of the ideas expressed by the phrases "security and defence of the Commonwealth", "execution of the Constitution", "maintenance of the Constitution", "execution of the laws of the Commonwealth", "maintenance of the laws of the Commonwealth" and "prejudicial to". In the second place the expression by the Governor-General in Council of the result in a properly framed declaration is conclusive. In the case of the Governor-General in Council it is not possible to go behind such an executive act done in due form of law and impugn its validity upon the ground that the decision upon which it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application, as a court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage. The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law (Duncan v. Theodore [1917] HCA 38; (1917) 23 CLR 510, at p 544 : cf. (1919) AC 696 at p 706)) An order, proclamation or declaration of the Governor-General in Council is the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown. The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council. It matters not whether the attempt to invalidate an order, proclamation or other executive act is made collaterally or directly. One purpose of vesting the discretionary power in the Governor-General is to ensure that its exercise is not open to attack on such grounds and the inference that such a purpose animates sub-s. (2) is confirmed by sub-ss. (4), (5) and (6) giving as they do a special and guarded means of obtaining relief from the conclusion of the Governor-General in Council that the communistic connections of the body would bring it within the application of s. 5 and from that conclusion only. (at p179)

8. As part of an argument that sub-s. (2) was in itself based upon the legislative power with reference to defence either alone or together with that enabling the suppression of subversive designs and combinations, two contentions were advanced as to the meaning and effect of sub-s. (2). The first was that it did not intend to make the opinion of the executive decisive as to all the elements making up the compound proposition sub-s. (2) contains, but that some of them must have an independent existence in fact. Unless, therefore, the facts existed independently of the opinion the declaration would be ineffectual. (at p179)

9. The contention was put forward in a form which presented more than one choice as to the amount of objective fact the sub-section should be construed to require. But the point of the contention was, so to speak, to transfer from the realm of opinion every matter of fact and law affecting the question whether the operation of sub-s. (2) might extend beyond proper subjects of a law with respect to defence or a law directed against subversive actions or designs. (at p180)

10. The second argument was that, although no prerogative writ could go to the Governor-General in Council, yet in a suit for an injunction or in collateral proceedings the validity of a declaration under s. 5(2) could be impugned by invoking the same principles as govern discretionary powers confided to subordinate administrative officers or bodies. Those principles have been explained and applied in this Court in a succession of cases beginning perhaps with the judgment of O'Connor J. in Randall v.

Northcote Corporation [1910] HCA 25; (1910) 11 CLR 100, at pp 109-111 , the latest being Water Conservation and Irrigation Commission (N.S.W.) v. Browning [1947] HCA 21; (1947) 74 CLR 492 , except for Avon Downs Pty. Ltd. v. Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353, at p 360 , where sitting as a primary judge I dealt with the matter. (at p180)

11. These two contentions were pressed, but all I shall say about them is that the first depends upon a construction or constructions of the provision of which it is clearly incapable and the second upon applying to the Governor-General in Council rules of law which have never been applied to him and are inapplicable as well as being inconsistent with the plain meaning of the sub-section. (at p180)

12. The consequences of the making of a declaration under s. 5 are prescribed by other provisions. By s. 6 the body is dissolved at the end of the time for appealing or when an unsuccessful appeal is disposed of. Section 8 requires that the declaration shall be accompanied by the appointment of a receiver of the property of the body. When it is gazetted the property is to vest in the receiver, subject, in the case of land, to registration of title. Section 7 imposes certain negative obligations upon officers, members and others as a result of a body becoming an unlawful association and some further negative duties as a result of the dissolution of the body. The section applies to the Australian Communist Party, which s. 4 dissolves as an unlawful association as well as to bodies which may similarly be dealt with by the Governor-General in Council under s. 5. The effect of s. 7 is to make it an offence once a body has become an unlawful association for anyone to act as an officer or member, to contribute or solicit subscriptions for its benefit, or take part in any of its activities, or, in its interest direct or indirect, to carry on any activity open to it; and to make it an offence once the body has been dissolved for any one to seek to maintain it in existence or to continue its activities or to treat it as if it were not dissolved. (at p181)

13. In aid of the attack upon the validity of the Act a very wide operation was ascribed to this provision and it was sought to give it a meaning which would make it an offence for anybody to do almost anything which an unlawful or dissolved association had ever made one of its activities. But it seems clear enough that to be an offence the thing must be done or carried on as an activity of the unlawful or dissolved body or in its interest. A matter of more importance is the fate of the property vested in the receiver. By s. 15 (1) it is made his duty, after realizing the property and discharging the liabilities of the unlawful association, to pay or transfer the surplus to the Commonwealth. There is thus a forfeiture which is neither part of a punishment for a breach of the law nor an acquisition for the purposes of the Commonwealth upon just terms but something in the nature of a final or permanent deprivation of property as a preventive measure taken by direct legislative or executive action. A number of provisions are made with reference to the powers, duties and responsibilities of a receiver under the Act and for the purpose of preventing the defeat of his rights and interests, but the provisions are consequential and in the view I take need not be discussed (see ss. 15 (2), 16, 17, 18, 19, 20, 21, 22). The remaining provisions of importance are concerned not with associations of persons but with the disqualification for certain offices and positions of individuals who are or have been members of the Australian Communist Party or communists. Section 9, which in form is constructed after the general pattern of s. 5, vests in the Governor-General in Council the power of bringing about the disqualification. Sub-section (1) brings within the application of the section first any person who between 10th May 1948 "and before the date upon which the Australian Communist Party is dissolved by this Act", and second any person who is or was at any time after 10th May 1948, a communist, an expression defined to mean a person who supports or advocates the objectives, policies or teachings, principles or practices of communism as expounded by Marx or Lenin (s. 3 (1)). Then sub-s. (2), which closely resembles s. 5 (2), makes the following provision :- "(2) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the

Commonwealth, the Governor-General may, by instrument published in the Gazette, make a declaration accordingly." (at p182)

14. Sub-sections (4), (5) and (6) of s. 9 follow the plan of sub-ss. (4), (5) and (6) of s. 5. The appeal with which they deal is limited to the application of s. 9 to the person affected by the declaration made under sub-s. (2) and does not allow of his appealing against the opinion of the Governor-General in Council concerning the prejudicial character of his activities. It will be seen that sub-s. (2) of s. 9 differs from sub-s. (2) of s. 5 in the kind of declaration to be made. In the former case the declaration is that the body is an unlawful association; in the latter the Governor-General, if he decides to exercise his power, is to "make a declaration accordingly", which means in accordance with the conclusion he has reached in conformity with sub-s. (2). There is a question whether he must declare that he is satisfied in the terms of the provision with all its alternatives or whether he must condescend upon one or other of the alternatives. I should think that he could do either and that a declaration in either of the two forms would comply with the section. But I pass this question by as one which, in the view I take, is unimportant. (at p182)

15. What may be of more importance is that, as with s. 5 (2), the authority which sub-s. (2) of s. 9 is designed to confer on the Governor-General in Council would enable him to express a conclusive decision covering every element involved in the application to a given case of any or every limb of the alternatives contained in the formula concerning the actual or potential prejudicial activities of the person declared. The consequences which ensue from the making of a declaration under s. 9 in reference to a person are given by ss. 10, 11, 12, 13 and 14. Briefly the person declared becomes incapable of holding an office or employment under the Commonwealth or an authority of the Commonwealth, whether incorporated or not, and, if the Governor-General declare an industrial organization to be one to which s. 10 applies, then he cannot hold any office in that organization or in any branch of it. The section may be so applied to an organization if a substantial number of its members are employed in a vital industry. The vital industries are coal mining, iron and steel, engineering, building, transport, power and any other industry which, in the opinion of the Governor-General in Council is vital to the security and defence of Australia. As the declaration of the prejudicial nature of a man's actual or probable activities may be made before or after the declaration of a vital industry and as at the time when the second is made he may be in process of appealing from the first declaration on the ground that s. 9 (1) does not apply to him, and, further, as he may be an officer of the industrial organization when the later of the two declarations is made, special provisions are made for these various contingencies. The effect is to suspend him pending the final outcome and then, if the declaration against him stands, to vacate his office. For the purpose of his rights to any superannuation or retirement benefit, it is enacted that he shall be deemed to have resigned (s. 11 (5)). An injunction may be granted against him restraining him from performing any act, duty or function or exercising any right as the holder of an office in such an industrial organization. While a declaration against him is in force, the man may not contract or agree with the Commonwealth in respect of any services on his part for reward (s. 14). It is to be noticed that s. 9 is not limited to persons who occupy or are likely to be appointed to or engaged for any of the offices or employments mentioned in s. 10 (1) or who contract for services with the Commonwealth or are likely to do so. It enables the Executive to make a declaration against anybody falling within the description of sub-s. (1) of s. 9, although there may be no prospect in his case of a situation to which the consequences are relevant ever arising. (at p183)

16. The Act is to remain in operation until the Governor-General makes a proclamation that its continuance is no longer necessary. He must be satisfied that it has ceased to be necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth (s. 27). The duration of the Act is therefore indefinite and the power of the Governor-General under s. 5 (2) and his power under s. 9 (2) will remain exercisable for possibly a

long time after the occurrence of the facts which in the former case bring the body of persons within the application of s. 5 and in the latter case the individual within the application of s. 9. (at p183)

17. From the foregoing discussion of the Act and its meaning it will be seen that in the cardinal provisions the Act proceeds against the bodies and persons to be affected, not by forbidding a particular course of conduct or creating particular offences depending on facts so that the connection or want of connection with a subject matter of Federal legislative power may appear from the nature of the provision, but in the case of the Australian Communist Party itself by direct enactment and in the case of affiliated organizations and persons by empowering the Executive to act directly in a parallel manner. In the one case there is the judgment of the legislature itself that the body is to be dissolved as unlawful and in the other cases there is the judgment of the Executive that the affiliated bodies are to be similarly dissolved as unlawful or that a declaration shall be made against the persons who are to be thereby disqualified for certain classes of post. The consequences ensue automatically, the dissolution of the bodies, the forfeiture of their property and the unlawfulness of conduct tending to keep them or their activities alive, the loss of office by the individuals, their disqualification and their incapacity to contract with the Commonwealth for services. The Commonwealth Parliament has power to legislate with respect to the public service and under s. 51 (xxxv.) it may impose conditions upon the registration of industrial organizations under the Commonwealth Conciliation and Arbitration Act. But I shall put aside for subsequent examination the possibility of a justification being found in these powers for s. 10 (1) and in relation to it of s. 9. Subject to this reservation the validity of the chief provisions of the statute can find no support unless in the power to make laws with respect to the defence of the Commonwealth or in s. 51 (xxxix.) or in an implied power to legislate for the protection of the Commonwealth against subversive action and preparation. For otherwise the subject with which the law deals, the dissolution as unlawful of voluntary and corporate associations of people, whether because of their purposes and tendencies or for other reasons, and the disqualification of persons for descriptions of employment, does not in itself form part of any of the enumerated powers of the Parliament. Further, it cannot in itself, that is to say, because of its nature, lie within the defence power. It can fall within it, if at all, only as a means to accomplish or further some end which because of its nature is within the proper scope of defence. In the same way it can fall within the power to legislate against subversive actions and designs only as a means to the end for which that power exists. That is to say, constitutional support for the law must be sought not within what may be called the substance of any power but in the authority of the Parliament to enact what is anciliary or calculated to bring about an end within its legislative competence. (at p184)

18. An attempt was made thus to sustain the law upon the ground that s. 5 (2) and s. 9 (2) in terms require the Governor-General to be satisfied of matters which, it was said, must fall within one or other of the two legislative powers mentioned and that of themselves or with the aid of the preamble and context they showed that s. 4 was based upon a legislative satisfaction of like matters in relation to the Australian Communist Party. (at p184)

19. The matters of which the Governor-General is to be satisfied are described most indefinitely-activities prejudicial to security and defence, activities prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth. The source in s. 61 of the Constitution of much of the language of the second expression and the frequent use in relation to the prosecution of two actual and existing wars in statutory instruments of expressions like the first do not make it less true that as they are used here they express no specific connection with the subject matter of the defence power and no specific connection with any definite course of subversive conduct or design. The sub-sections commit to the Governor-General in Council complete authority over the application of these vague expressions; and how they are applied is left to depend upon the conceptions of the Executive Government. Under those conceptions conduct to which specific legislation could not be validly directed in purported exercise of the power to make laws with respect to defence might be

treated as "prejudicial to the security and defence of the Commonwealth". It must be borne in mind that what may be regulated from time to time in pursuance of the defence power must often depend on the closeness or distance of the connection seen between the matter to be regulated and the purposes of the power. The decided cases provide many examples of this in the midst of war and in the course of restoring a country organized for war to conditions of peace. The decision of this Court with respect to the continuance of petrol rationing and the regulation of women's employment and of landlord and tenant (R. v. Foster [1949] HCA 16; (1949) 79 CLR 43 supplies the most recent illustration and contains a discussion of the nature and application of the power. There is nothing unreal in the possibility that the degree of connection constitutionally necessary might be misconceived and misapplied administratively. For in the complexities governing the life of a community some connection may be traced between the defence of the country and the greater number of factors which go to make up or influence any part of its economy or of its thought. But even at a time when war placed the greatest strain upon the national life a regulation for determining the number of students who might be enrolled in a faculty in a university and giving no directions what the rest should do was held to be too remote from the purposes of the power (R. v. University of Sydney; Ex parte Drummond [1943] HCA 11; (1943) 67 CLR 95). (at p185)

20. It is thus apparent that in committing to the Executive Government an authority to say whether the continued existence of a body or the activities of a person are prejudicial to the security or defence of the Commonwealth, the sub-sections provide a most uncertain criterion depending on matters of degree. However much care and restraint there might be in the use of the power, the likelihood would remain very great of matters being considered prejudicial to security and defence which could not possibly be made the subject of legislation. Unlike the power conferred by s. 5 of the National Security Act 1939-1943, the present power is administrative and not legislative, it is not directed to the conduct of an existing war, and its exercise is not examinable and is not susceptible of testing by reference to the constitutional power above which it cannot validly rise. (at p186)

21. So much of the sub-ss. (2) of ss. 5 and 9 as refers to prejudice to the execution or maintenance of the Constitution or of the laws of the Commonwealth exhibits no apparent connection with the defence power. Its apparent reference is to s. 61 of the Constitution as affording a subject upon which s. 51(xxxix.) might operate. But it is hardly necessary to say that when the country is, for example, actually encountering the perils of war measures to safeguard the forms of government from domestic attack and to secure the maintenance and execution of at least some descriptions of law might be sustained under the defence power, even if it were thought that their nature took them outside the scope of s. 51(xxxix.) in its application to s. 61. (at p186)

22. There is even less ground in my opinion for the claim that the second part of the formula used in sub-ss. (2) of ss. 5 and 9 may be sustained as enacted in exercise of a power given by a combination of s. 61 and s. 51(xxxix.) than can be seen for the claim to base the first part upon the ower to make laws with respect to defence. In the first place s. 51(xxxix.) relates to matters arising in the course of executing the power to which the paragrph is applied, in this case the executive power, to incidents in its exercise. This is shown by the language of the paragraph and is confirmed by the decision of the Privy Council in Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. [1913] UKPCHCA 4; (1914) AC 237; (1913) 17 CLR 644 See further the discussion of incidental powers in Le Mesurier v. Connor (1929) 42 CLR 481, at pp497, 498 Some specific matter, or reasonably definite description of event, act or thing must be dealt with by the law as an incident attending or possibly atte ding the execution of the power, in this case the executive power, in aid of which s. 51(xxxix.) is invoked. The sub-ss. (2) give no such specific or reasonably definite description of any act, matter, thing or event, attending the exercise of the executive power. There is nothing but the vague or intangible conception of the existence of a body or the activities of a man being prejudicial to the executive power. (at p187)

23. Again, if the scope given for the opinion of the Governor-General in Council as to what is prejudicial to the security or defence of the Commonwealth is incapable of legal restraint within the limits of constitutional power, what is to be said of his opinion as to what is prejudicial to the maintenance of the Constitution, to its execution, to the maintenance of the laws of the Commonwealth or to their execution? The facility with which the laws are administered as a whole or this or that provision of the voluminous laws of the Commonwealth is executed might appear to the Executive Government to be impaired by an "activity", manifested in speech or deed, or by the purposes for which an association of persons exist, although in point of objective fact it could never be held a matter which a law made under s. 51(xxxix.) might validly cover. (at p187)

24. I am unable to see that the adoption of these formulas in s. 5(2) and s. 9(2) affords any reason for sustaining the grant of power to the executive to make the declarations which s. 5 and s. 9 assume to authorize or the imposition of the consequences consisting in the dissolution of the bodies as unlawful associations, the forfeiture of their property, the restriction upon the actions of officers and others and the disqualification of individuals for certain offices and employments. (at p187)

25. For myself I do not think that the full power of the Commonwealth Parliament to legislate against subversive or seditious courses of conduct and utterances should be placed upon s. 51 (xxxix.) in its application to the executive power dealt with by s. 61 of the Constitution or in its application to other powers. I do not doubt that particular laws suppressing sedition and subversive endeavours or preparations might be supported under powers obtained by combining the appropriate part of the text of s. 51(xxxix.) with the text of some other power. But textual combinations of this kind appear to me to have an artificial aspect in producing a power to legislate with respect to designs to obstruct the course of government or to subvert the Constitution. History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend. As appears from Burns v. Ransley (1949) 79 CLR, at p 116 and R. v. Sharkey (1949) 79 CLR, at pp 148, 149 , I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s. 51(xxxix.) with those of other constitutional powers. I prefer the view adopted in the United States, which is stated in Black's American Constitutional Law (1910), 2nd ed., s. 153, p. 210, as follows:- ". . . it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government . . ." (at p188)

26. In the United States the power is deduced not only from what is inherent in the establishment of a polity but from the character of the polity set up and more particularly from the power of Congress to make laws which shall be necessary and proper for carrying into execution the powers vested in Congress by the Constitution and in the Government or in any Department or officer thereof. Putting aside occasional reliance on a Federal police power, the considerations giving rise to the implied power exist in the Commonwealth Constitution. (at p188)

27. My reason for referring to the view I take of the source of the legislative power to put down subversive activities and endeavours is that it perhaps embodies a somewhat different principle, and one to which those who seek to support ss. 5 and 9 on the basis of sub-ss. (2) may appeal. But I think that the appeal must be in vain. The extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the

Executive Government thinks proper the vague formula of sub-ss. (2) relating to prejudice to the maintenance and execution of the Constitution and the laws, and by applying it to impose the consequences which under the Act would ensue. I need not repeat reasoning which I think is equally true of the insufficiency of the legislative power I have described to support legislation of such a character. It may, however, be desirable to add that no analogy exists between legislation of the kind under consideration and legislation which deals with an unquestioned subject of legislative power and in the course of doing so gives a discretion to the Executive or to an administrative officer the exercise of which affects rights and liabilities which must lie within the subject of the power and therefore may be made to depend on any event or matter the legislature may choose, including administrative opinion. Of this there are many examples in Tax Assessment Acts. The power to tax is exercised whether such an opinion enters into the prescribed basis of the tax or not. So when s. 52 of the Customs Act 1901-1947 prohibits the importation of various kinds of goods it deals with commerce with other countries and it does so none the less because wide discretionary powers are given to the administration to add to the imports prohibited: Radio Corporation Pty. Ltd. v. The Commonwealth [1938] HCA 9; (1937) 59 CLR 170 . Nothing can be prohibited but what are in truth imports and imports are necessarily a subject of the power given by s. 51(i). (at p189)

28. For the reasons I have given I am of opinion that it is not possible to sustain the Act on the ground that sub-ss. (2) of s. 5 and s. 9 are based in terms upon matters falling within the defence power or the incidental power in relation to obstructions to the executive power or otherwise. Indeed I think it may be said that if the validity of the Act can be supported it is rather in spite of than because of s. 5(2) and s. 9(2). (at p189)

29. The difficulty which exists in referring the leading provisions of the Act to the defence power and the power to make laws against subversive action evidently did not escape the notice of the legislature. For that and perhaps other reasons the Act is prefaced with an elaborate preamble. (at p189)

30. The preamble contains nine recitals. Of these the first three do no more than set out portions of ss. 51(vi.), 61 and 51(xxxix.) of the Constitution. The fourth states that the Australian Conmmunist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation in which the Australian Communist Party, acting as a revolutionary minority would be able to seize power and establish a dictatorship of the proletariat. The fifth says that the same body also engages in activities designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices. The sixth recital contains a statement that the body is an integral part of the world communist revolutionary movement which, put shortly, engages in espionage, sabotage, treasonable or subversive activities and activities like those imputed in the previous recital. The seventh recital relates only to what are industries vital to the security and defence of Australia and the eighth recites, in effect, that activities or operations of or encouraged by the Australian Communist Party and by its officers, members and others, being communists, are designed to cause by means of strikes and stoppages of work, and have so caused, dislocation, disruption or retardation of production or work in those vital industries. The ninth recital states that it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth that the Party and bodies affiliated with it should be dissolved and that officers and members of the Party and those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry. (at p190)

31. Now it appears to me that the effect of this preamble is to put forward the Act as an exercise of

one or other or both of the legislative powers invoked by the first three recitals and to give the reason why such powers should apply by stating the nature of the doctrines, designs and activities of the Australian Communist Party, affiliated bodies and officers and members thereof and other communists. (at p190)

32. By making the aims and actions of organized communism the matter bringing into play the defence power and the incidental power, s. 4 as the leading provision in the Act is placed upon an intelligible, even if an insufficient, constitutional foundation. The same foundation is made available for s. 5 and s. 9 in virtue, not of sub-ss. (2), but of sub-ss. (1) of those sections. Doubtless the reference in sub-ss. (2) to security and defence and to the execution and maintenance of the Constitution and the laws assists in showing what the recitals in effect say, namely, that communism is dealt with as a source of danger to the safety of the country and its institutions. But because all is made to rest upon the opinion and discretion of the Governor-General in Council by s. 5(2) and s. 9(2), those sub-sections leave the two sections and the provisions by which the consequences are attached to the declarations with no better support as laws with respect to defence or to matters incidental to the execution of the powers of the Executive than has s. 4. (at p190)

33. Seeing in the recitals the foundation upon which the Act had been placed as a law with respect to defence or with respect to matters incidental to the executive power, the plaintiffs in the eight actions in which these proceedings arise, alleged that the recitals were not in accordance with fact and proposed to go into evidence for the purpose of disproving them. It appeared to me that the validity or invalidity of the Act might not depend upon the truth of the recitals, and the actions being before me upon interlocutory applications, I stated a case for the Full Court raising the question. That is the proceeding now before us. It is obvious that the Full Court could not pass upon the validity of the Act if the Court was of opinion that the decision of the question depended upon a judicial determination or ascertainment of the facts stated in the preamble or that the plaintiffs were entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside power. So that question is asked first. If, however, the Court is not of that opinion then the question of the validity of the Act is submitted for decision. But the order of the questions cannot affect the logical course which an inquiry into the validity of the Act must take. For, in order to conclude that the question of the validity or invalidity of the Act does not depend on the correctness in fact of the preamble or that evidence to controvert the recitals cannot be offered, the inquiry must be pursued to the point of excluding on the one hand the possibility of the Act being valid although the facts are not in truth as recited and on the other of its being invalid although they or some of them may be as recited. That was shown by the course of the argument. For the defendants, supporting the Act, maintained, not that the preamble was conclusive of the facts it recited and that on that ground the Act was valid but that, treating the preamble as conclusive only as to the existence of the legislative opinions it disclosed and of the reasons it indicated for passing the Act, the validity of the Act was to be sustained. On the part of the plaintiffs and interveners who impugned the validity of the Act, the invalidity of the Act was said to appear irrespective of the truth of the facts recited. But the plaintiffs were prepared to fall back if need be upon an issue as to the correctness of the facts recited. On the other hand, the defendants made no proposal to establish facts by evidence in order to provide a sufficient connection between the defence power and the Act, whether facts stated in the recitals or other facts. (at p191)

34. It will be seen from an examination of the recitals that, in spite of the initial reference to the possession of a power to make laws with respect to defence there is no direct allusion to any apprehension of external danger. The validity of the Act must be tested as at the date of the royal assent, 20th October 1950; and, so far as public events may be noticed and relied upon, what has happened since cannot be used in support of the validity of the Act. (at p192)

35. The sixth recital associates espionage, sabotage and subversive activities in the King's dominions

and elsewhere with a world communist movement of which the Australian Communist Party is stated to be an integral part. The eighth recital refers to obstructions to vital industries which the seventh recital says are vital to the security and defence of Australia. There is nothing among the matters recited closer to defence in relation to dangers from outside the Commonwealth than the references in the sixth, seventh and eighth recitals. This may be of some significance if, as I think must be the case, the power to legislate against subversive conduct and designs, whether it be based on s. 51(xxxix.) or on wider considerations, will not suffice to sustain the validity of the Act on the footing that the operation of ss. 4, 5 and 9 is against communist bodies and communists and that because of the precepts, purposes and actions of such bodies and such persons they become ex sua natura subject to the power. If the Act can be supported by a train of reasoning of such a kind it must be under the defence power or not at all. The other power is concerned primarily with the protection of Federal authority against action or utterance by which it may be overthrown, thwarted or undermined. It covers, needless to say, conduct antagonistic to the maintenance of Federal institutions and authority, whether its source is abroad or at home, but its central purpose is to allow the legislature to deal with manifestations of subversive conduct within Australia. Wide as may be the scope of such an ancillary or incidental power, I do not think it extends to legislation which is not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by name or classification or characterization, whether or not there be the intervention of an Executive discretion or determination, and does so not tentatively or provisionally but so as to affect adversely their status, rights and liabilities once for all. It must be borne in mind that it is an incidental or ancillary power, not a power defined according to subject matter. I have said before that in most of the paragraphs of s. 51 of the Constitution the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy): Stenhouse v. Coleman (1944) 69 CLR, at p 471 . In a law operating upon or affecting such a given subject matter or fulfilling such a given description, as the case may be, the legislature is at large in the course it takes, that is provided it observes the restrictions arising from specific constitutional provisions such as s. 55, Chapter III., ss. 92, 99 and 116. But, in considering whether a law is incidental to an end or operation, no such test is supplied. It would, for example, be quite erroneous to say first that communism is within the incidental power and next that therefore any law affecting communism is valid. The power is ancillary or incidental to sustaining and carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth. Indeed, upon the very matters upon which the question whether the bodies or persons have brought themselves within a possible exercise of the power depends, it may be said that the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power. Nor do I think that if a wider basis for the power than s. 51(xxxix.) is accepted, the power itself would extend to a law like the present Act, using as it does, the legislature's characterization of the persons and bodies adversely affected and no factual tests of liability and containing no provision which independently of that characterization would amount intrinsically to an exercise of the power. To deal specifically with named or identifiable bodies or persons independently of any objective standard of

responsibility or liability might perhaps be possible under the power in the case of an actual or threatened outburst of violence or the like, but that is a question depending upon different considerations. (at p194)

36. The foregoing discussion narrows the inquiry as to possible support for the validity of the legislation to what may briefly be described as the use of the defence power against communism as such, that is treating communistic character and connections as at once the sufficient and the sole substantial ground for invoking the defence power for the purpose of a declaration by statute that the Party was unlawful and dissolved and, subject to the Executive discretion, for a similar declaration concerning affiliated bodies and a declaration of disqualification for individuals. The central purpose of the legislative power in respect of defence is the protection of the Commonwealth from external enemies and it necessarily receives its fullest application in time of war. It is a legislative power and therefore affords but the means of establishing all the legal machinery and making all the legal provisions considered necessary and appropriate for the purpose. The responsibility for the practical measures taken in order to protect the country must belong to the Executive. The prosecution of a war is of necessity an executive function and has always been so conceived. It is needless after our recent experiences of war to enlarge upon the extent to which it is necessary in modern war to transfer both power and responsibility to the Executive. The conduct of such a war carries with it the direction and control of men and their affairs in every aspect capable of affecting in any degree the prosecution of the war. A conspicuous purpose of legislation in exercise of the defence power must be to invest the Executive. for the purpose of carrying on a war, with the necessary powers, legislative and administrative. The delegation of legislative power has involved no difficulty because, as I have already said, not only is there a definite war but any exercise of the delegated power, is examinable against s. 51 (vi.). But, under the delegated power, and sometimes by direct enactment, the very widest discretions are vested in ministers, administrative boards and officers and in officers of the armed services. Common experience, therefore, shows that, in time of war at all events, a provision made by or under statute is not regarded as necessarily outside power because a minister or an agency of the Executive is authorized according to his or its opinion of the relation of some act, matter or thing to defence or some aspect of defence to give directions or determinations in derogation of the freedom of action and the personal rights of men and of associations of men. For example, I think that at this date it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of person whom he believes to be disafected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth: see Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299; (1915) VLR 476 ; Ex parte Walsh (1942) ALR 350 ; and Little v. The Commonwealth (1947) 75 CLR, at pp 102-104 . The reason is because administrative control of the liberty of the individual in aspects considered material to the prosecution of a war is regarded as a necessary or proper incident of conducting the war. One man may be compelled to fight, another to perform directed work, a third may be suspected of treasonable propensities and restrained. But what the defence power will enable the Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant. The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the everchanging course of events, the practical application of the power will vary accordingly. Hitherto a marked distinction has been observed between the use of the power in war and in peace. "But this Court has never subscribed to the view that the continued existence of a formal state of war is enough in itself, after the enemy has surrendered, to bring or retain within the legislative power over defence the same wide field of civil regulation and control as fell within it while the country was engaged in a conflict with powerful enemies" (R. v. Foster (1949) 79 CLR, at pp 83, 84). Correspondingly it is no doubt true that a mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand. Throughout

this case I have been impressed with the view that the validity of the Act must depend upon the possibility of bringing into application as at the date of the assent to the Act the conceptions as to the operation of the defence power which hitherto have been generally regarded as appropriate only to a time of serious armed conflict. Unless this were possible I have failed to see a way of reconciling it with constitutional principle. (at p195)

37. At the date of the royal assent Australian forces were involved in the hostilities in Korea, but the country was not of course upon a war footing, and, though the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Executive Government has become responsible for the conduct of a war. I think that the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed. It is possible, however, to sustain the Act on the ground that under the influence of events the practical reach and operation of the defence power had grown to such a degree as to cover legislation providing no objective standard of liability relevant to the subject of the power but proceeding directly first by the pronouncement of a judgment by means of recitals and then in pursuance of the recitals acting directly against a body named, and bodies and persons described, in derogation of civil and proprietary rights? (at p196)

38. Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians (cf. Read v. Bishop of Lincoln (1892) AC 644, at p 653 , and the note to Evans v. Getting [1835] EngR 88; (1834) 6 Car & P 537 (172 ER 1376)), and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like (cf. Darby v. Ouseley [1856] EngR 390; (1857) 1 H & N 1, at pp 8 (arguendo) and 12 (156 ER1093, at pp 1096, 1098) .), so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And, with respect to our own country, matters of common knowledge and experience are open to us (cf. Ex parte Liebmann (1916) 1 KB 268). But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics, per Slesser L.J., A/S Rendal v. Arcos, Ltd. (1936) 1 All ER 623, at pp 630, 631 ; and per Lord Wright s.c. (1937) 3 All ER 577, at pp 582, 583 . (at p196)

39. It is needless to enter into a discussion of the avowed principles of communism, whether in earlier stages of development or in their present state. In a political theory based upon the supposed irreconcilable antagonisms inherent in a capitalistic system, the inevitability of its decomposition, the necessity of a period of revolutionary transformation from a capitalist to a communist society, the struggle between bourgeoisie and proletariat, the dictatorship of the proletariat during a longer or shorter period of further evolution, the progressive extension of the revolutionary process over the earth and the need to assist and expedite its spread not merely that its supposed benefits may be more widely enjoyed but for the protection of existing systems of communism from counter action and the revolutionary process of development from delay and temporary defeat; in such a political theory there are beliefs calculated to produce action and the interpretation which a parliamentary government places upon events domestic and foreign will be affected by the complexion it gives to the tenets and precepts of the adherents of the philosophy. That complexion need not be the same as the adherents themselves would claim for their doctrines. A harsher or more sinister interpretation may be placed upon some of the sentiments than communists themselves may say is correct. But that is beside the point. The significance of such things must be judged by the Government in the light of all the circumstances of which it is informed. (at p197)

40. If it is unnecessary to discuss the principles of communism, it is even less necessary to examine notorious international events. The communist seizure of Czecho-Slovakia, the Brussels Pact of

Western Union, the blockade of Berlin and the airlift, the Atlantic Pact, the passing of China into communist control, the events in reference to the problem of Formosa, the entry of the North Korean forces into South Korea and the consequent course of action adopted by the United Nations, and the sustained diplomatic conflict between communist powers and the Anglo-American countries and other western powers at meetings of the Security Council and the General Assembly are all too recent. So far as the internal affairs of this country enter into the question whether events had extended the operation of the defence power, it is enough to refer to the serious dislocations of industry that have occurred - a matter the significance of which it would be within the province of the Government to judge, availing itself of its sources of information. (at p197)

41. It ought not, I think, to be denied that the events of the time, some of which I have briefly enumerated, bring within the practical application of the defence power measures which would not have been considered competent - for example, in the state of affairs prevailing when this Court held its first sittings. But hitherto it has been supposed that only the supreme emergency of war itself would extend the operation of the power so far as to support a legislative provision which on a subject not by its own nature within the defence power affects the status, property and civil rights of persons nominatim or by other identification without any external test of liability upon which the connection of the provisions with power will depend. (at p198)

42. The question remains, however, whether nevertheless, by reason of the application of s. 4 and s. 5(2) and s. 9(2) to the Communist Party, affiliated bodies and communists as such, a sufficient connection with the defence power can be established on the footing that recent events had at the date of the Act called the defence power into such wide play as to supply a constitutional justification for the form of the Act. Although this question was not developed in the argument before us, it must be decided. In deciding it there are three considerations to be urged in support of an affirmative answer. They complement one another. In the first place it may be said that the proper view of the defence power is that in a situation such as events had created when the Act became law the power places within the authority of the legislature the decision of all the questions concerned with the defence of the country which may determine legislative action, questions affecting the extent of the operation of the constitutional power. It may be said, further, that public events of common knowledge, without more, made it a matter for the decision of the Parliament what was the real nature of the activities and designs of the Australian Communist Party, of kindred bodies and of communists, what part they played in the dangers considered to threaten the country and what and how great those dangers were. In such a view the decision of the Parliament is to be seen in the recitals and in the provisions of the Act. The decision it would be said leaves no room for any question of power. In the second place it is a commonplace that while the extent of the operation and the application of a power, including the defence power, must be decided by the Court, the reasons why it is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court. In the third place, in all matters relating to defence, not only does the responsibility lie with the Executive Government and thus ultimately with Parliament, but the information at the command of the Government, which often cannot be made public, places it in a special position to judge of what the public interest requires. (at p198)

43. In all the cases concerning the validity of statutory regulations made for the war of 1914-1918 and for the war of 1939-1945 the principle was acknowledged or assumed that it was for the Executive Government to decide what was necessary or expedient for the purpose of the war and in doing so to act upon its opinion of the circumstances and conditions that existed and of the policy or course of action that should be followed. Variously formulated as the tests have been for deciding whether regulations made under the war powers were within the power to make laws with respect to defence, they have uniformly been based upon the principle that there is to be no inquiry into the actual effect the regulation would have or be calculated to have in conducing to an end likely to advance the

prosecution of the war and that it was at least enough if it tended or might reasonably be thought conducive or relevant to such an end. (at p199)

44. But, in Farey v. Burvett (1916) 21 CLR, at p 442 Griffith C.J. said: "In making the inquiry the Court cannot shut its eyes to the fact that what could not rationally be regarded as a measure of defence in time of peace may be obviously a measure of defence in time of war." Barton J. said: "It is argued that the defence power has the same meaning at all times, whether in peace or in war. I doubt that, but it may not be necessary to determine it, for the true question is whether many things that cannot aid defence in peace and when no enemy is in view, are not urgently necessary when an enemy has arisen who must be defeated if the nation, or family of nations, is to live" (1916) 21 CLR, at p 448 . His Honour's view treated the power as possessing a fixed meaning with a changing application, as a fixed concept with a changing content. (at p199)

45. It would, I think, be an error to draw a definite line between a period after the commencement of actual hostilities and the period before they commence. It is inappropriate to the altered character of war and the changes that appear to have taken place in the manner of commencing war. Imminence of war will enlarge the application of the fixed concept of defence. (at p199)

46. I have now completed my statement of the train of reasoning in support of the Act based upon ss. 4, 5(2) and 9(2) as laws with respect to communism. I believe that, from the form in which I have stated the reasoning, its full force will appear. But, after giving much consideration to the question whether it will suffice to sustain the Act I have reached the conclusion that it will not. The reasons for that conclusion may be briefly given. When s. 4 names a voluntary association, declares it unlawful and by force of the Act dissolves it, and when ss. 8 and 15(1) attach the consequence of deprivation of property and s. 7 attaches the consequence of a restriction of the civil rights of the members, it provides for matters which, considered as specific subjects, are not of their own nature within any of the enumerated powers of the Commonwealth Parliament and prima facie lie only within the province of the States. If the operation of the law upon the right of association, the common property and the civil rights of the members were made by the statute to depend upon the actual existence or occurrence of any act, matter or thing having a specific relation to the purposes of the power with respect to defence, then, notwithstanding that the immediate subject of the provision did not of its own nature form part of the subject matter of the power, the provision would be brought within it as ancillary to the main purpose of the power. Again, prima facie no opinion of the Parliament as to the actual existence or occurrence of some matter or event which would provide a specific relation of the subject of a law with power can suffice to give the law that relation. It would, for example, be impossible for the Parliament by reciting that a society for research in radio physics planned or carried on experiments causing or likely to cause an interference with wireless transmission to bring within s. 51(v.) (postal, telegraphic, &c. services) an enactment naming the society and dissolving it brevi manu. It would be impossible to bring under s. 51(xviii.) (patents) a direct grant of a monopoly for a specified manufacturing process by reciting that it was an invention. The pronouncements by Parliament which the recitals in the Act contain, combined with the declaration of unlawfulness and decree of dissolution made by s. 5 and the forfeiture imposed by s. 15(1), were said by the plaintiffs to amount together to an invasion or usurpation of judicial power. In the case of s. 15(1) it was also said that, except by a lawful exercise of judicial power, such a forfeiture could not be imposed by reason of s. 51(xxxi.) of the Constitution. As I am deciding the case on the ground of want of affirmative legislative power, I shall not deal with these arguments, but I mention them because they illustrate the substantial effect and nature of the provisions in question. There should be no confusion about the essential nature of the connection with the defence power which the recitals seek to supply. Essentially it consists in the past acts, the tenets and opinions and the present propensities or tendencies of persons and associations of persons. (at p200)

47. Where legislation, subordinate or principal, purporting to exercise the defence power has stated

the purpose for which it was enacted or adopted, this expression of purpose has received effect. In relation to a power largely directed to purpose its importance is evident. It is true that the expression of the nature and existence of the purpose has left open the question whether nevertheless the legislation failed as an exercise of the defence power, because of the nature of the provisions, the prevailing situation, the facts, the remoteness of the means adopted from the avowed object, or some other consideration. But here, so far as the preambles express the existence and the nature of the purpose animating the legislation, that may be conceded. It is, however, but a small step. What is in question is so much of the recitals as concern not the opinions and purposes of the legislature, but the opinions and purposes of the persons against whom the provisions are directed and their past actions. Again, the case is not one where a course of conduct is required or forbidden but only a knowledge of facts outside judicial notice would enable the Court to see how the pursuit of that course of conduct would promote or prejudice, as the case may be, an object within the defence power. It is enough to mention Sloan v. Pollard [1947] HCA 51; (1947) 75 CLR 445 and Jenkins v. The Commonwealth (1947) 74 CLR, at p 402 , the facts of which provide sufficient illustrations. In such a case the result which the rule laid down produces or is calculated to produce is within the defence power and all that is lacking is an understanding of the process of causation between the conduct prescribed or prohibited and the result. That can be proved. There is no need to stop to inquire precisely how much effect a recital by the legislature of facts of such a nature should receive; for it is not this case. But, to my mind, recitals of such a character, stating how a law will operate, or for that matter recitals stating the purpose for which an enactment is made, stand on an altogether different footing from what is the essential matter here. The essential matter here is a statement to the effect that persons or bodies of persons have been guilty of acts which might have been penalized in advance under the defence power and have a propensity to commit like acts, this being recited as affording a supposed connection between the defence power and the operative provisions enacted, provisions dealing with the persons or bodies directly by name or description. (at p201)

48. At the risk of repetition it is perhaps desirable to add that the case is not one where the legislation is dealing with a subject matter undeniably within power. If the legislature directly dissolved a marriage between named parties, it would at all events be dealing with divorce, whatever other objections might be found to the Act. If it directly enacted that a named alien should be deemed naturalized or that a person or persons named or described should be denied the use of the postal, telegraphic and telephonic services, it would likewise be upon the very subject of power. Whatever recitals it thought fit to make would have such effect as it was taken to intend, and whatever conditions it imposed would be valid, subject always, of course, to the relevance of positive restrictions that might be found elsewhere in the Constitution. (at p202)

49. It must be evident that nothing but an extreme and exceptional extension of the operation or application of the defence power will support provisions upon a matter of its own nature prima facie outside Federal power, containing nothing in themselves disclosing a connection with Federal power and depending upon a recital of facts and opinions concerning the actions, aims and propensities of bodies and persons to be affected in order to make it ancillary to defence. (at p202)

50. It may be conceded that such an extreme and exceptional extension may result from the necessities of war and, perhaps it may be right to add, of the imminence of war. But the reasons for this are to be found chiefly in the very nature of war and of the responsibility borne by the government charged with the prosecution of a war. "The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim salus populi suprema lex, the courts may concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm" -per Williams J., Victorian Chamber of Manufactures v. The Commonwealth (1943) 67 CLR, at p 400 . (at p202)

51. A war of any magnitude now imposes upon the Government the necessity of organizing the

resources of the nation in men and materials, of controlling the economy of the country, of employing the full strength of the nation and co-ordinating its use, of raising, equipping and maintaining forces on a scale formerly unknown and of exercising the ultimate authority in all that the conduct of hostilities implies. These necessities make it imperative that the defence power should provide a source whence the Government may draw authority over an immense field and a most ample discretion. But they are necessities that cannot exist in the same form in a period of ostensible peace. Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting. (at p203)

52. The considerations I have enumerated must, of course, have their effect upon the operation to be attributed to the power, but what I have described as the extreme or exceptional extension of the operation or application of the power necessary to support the Act in virtue of ss. 4, 5(1) and 9(1) cannot, I think, be justified. (at p203)

53. In the result I am of opinion that ss. 4 and 5, together with ss. 6, 7, 8 and 15, are invalid. I reserved for determination a special consideration affecting s. 10(1) which might be said to suffice to sustain ss. 9, 10 (partially), 13 and 14. Subject to that matter I think that those sections cannot be supported. (at p203)

54. The special consideration affecting s. 10(1) depends upon the classes covered by paragraphs (a), (b) and (c). The Commonwealth Parliament, of course, has power to make laws governing the Federal public service and laws governing service or employment with any authority of the Commonwealth or any body corporate established by the Commonwealth. Section 10(1) (a) and (b) of the Act are as follows:- "A person in respect of whom a declaration in force under this Act -(a) shall be incapable of holding office under, or of being employed by, the Commonwealth or an authority of the Commonwealth; (b) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth. . . ." (at p203)

55. It is clear that, upon the subject of who shall hold these offices and who shall be disqualified and why, Parliament has complete legislative power in virtue of which any conditions or procedure can be prescribed, that is, subject to any specific restraints such as s. 116 of the Constitution. If s. 9 were confined to serving the purposes of s. 10(1) (a) and (b) the provisions could be sustained as legislation with respect to the public service and Commonwealth authorities, corporate or not. Section 10(1) (c) enacts that a person in respect of whom a declaration is in force under the Act shall be incapable of holding an office in an industrial organization to which the section applies or a branch of it. The industrial organizations covered include organizations registered under Part VI. of the Commonwealth Conciliation and Arbitration Act 1901-1949. Section 51 (xxxv.) of the Constitution has been interpreted as authorizing some laws affecting bodies so registered and the question arises whether s. 10(1)(c) can be thus supported in part. The question is whether by the application of s. 15A of the Acts Interpretation Act 1901-1948 it can be confined to registered organizations and upheld as an exercise of the power conferred by par. (xxxv.). (at p204)

56. It is convenient to deal with this question at once. I think that to uphold it under s. 51(xxxv.) is impossible on the simple ground that it is not with respect to the subject of that paragraph that the law is enacted, it is not a law with respect to conciliation and arbitration for the prevention and settlement of two-State industrial disputes. The only way in which the power can be made applicable is through registration. The legislature authorizing registration may, as an incident of the power in virtue of which it does so, impose conditions. But s. 10(1)(c) speaks entirely independently of registration, which it ignores as an irrelevancy. It is not addressed to the organization but to the declared person.

No condition or duty is imposed on the body in relation to registration or otherwise. It simply incapacitates the man. (at p204)

57. Paragraphs (a) and (b) of s. 10(1) stand in quite a different situation. The legislature possesses a power in relation to serving the Commonwealth and contracting with the Commonwealth which is well exercised by a law with respect to the capacity of the individual and it can place that incapacity on any ground and use any procedure. But in this instance I think that the difficulty lies in s. 9. That section ought not, in my opinion, to be sustained as a law enacted with respect to the public service or persons contracting with the Commonwealth for services to it (s. 14). It deals with persons who fall within sub-s.(1) and of whom a declaration is made according to sub-s. (2). A declaration made in pursuance of s. 9(2) about a man, if validly made, is an absolutely privileged statement in the Gazette of a most disparaging description. It must be remembered that this would be its legal and practical nature, whether the opinion of the Executive that the man falls within one of the descriptions of sub-s. (1) is correct or is shown under sub-ss. (4), (5) and (6) to be wrong. It may be published of anybody, whether or not he is in the service of the Commonwealth or an authority of the Commonwealth or whether or not there is any chance of his ever entering such a service. Such a provision cannot, in my opinion, be referred to the power over those serving the Commonwealth or Federal bodies or agencies simply because one consequence assigned to the declaration is that it disqualifies the declared man for such service. I am therefore of opinion that no sufficient support can be found for these provisions. Holding as I do that ss. 4 to 15(1) are invalid it follows that the remaining sections of the Act, which are only consequential, fall with them. This conclusion may be thought to bear out Dicey's well-known statement that Federal government means weak government: Dicey's Law of the Constitution, 1st ed. (1885), p. 157; 9th ed. (1950), p. 171. But it is necessary to remember that we are not here concerned with the extent to which the defence power allows of the suppression of definite conduct as distinguished from definite people and of the dissolution of bodies offending against definite prohibitions or failing to conform to definite requirements as distinguished from bodies made definite by the identification of the legislature or of the Executive. Nor is there any question here of the validity of provisions regulating the burden of proof in legal proceedings. (at p205)

58. For the foregoing reasons I answer questions (1)(a) and (b) No and question (2) Yes. (at p205)

McTIERNAN J. This stated case raises the question whether the Communist Party Dissolution Act 1950 is valid or invalid and also a preliminary question which relates to the recitals forming the part of the preamble of the Act beginning with the fourth recital. This preliminary question is whether the decision of the main question depends on the judicial determination or ascertainment of the facts stated in those recitals. Neither of these judicial processes is a prerequisite to the Court's noticing the recitals. The Court gives to recitals the effect which they have as such and no judicial inquiry into the facts stated in them is necessary to determine that matter, the effect of the recitals. Their effect is that they contain Parliament's reasons for passing the Act; express the opinions which Parliament held; they conclusively show Parliament held those opinions and believed, presumably, that what is recited is true. The recitals are in no way decisive of the question whether the Act is valid or invalid, for that is a judicial question which only the judicature has the power to decide finally and conclusively. If any fact stated in a recital is material to the question whether the Act is valid or invalid, the fact would need to be judicially determined or ascertained. The recitals are not judicial findings and do not bind the judicature on any question within its own exclusive province. The judicature, of course, treats the recitals with respect and regards the views which they express as possible but cannot concede that they are probative of any matter of fact which is material to the question whether the Parliament had or had not the power to pass this Act. The Constitution does not allow the judicature to concede the principle that the Parliament can conclusively "recite itself" into power. (at p206)

2. It is not the case that the decision of the validity of an Act can never depend upon the judicial finding of any fact. If the Court has not judicial notice, without proof, of the circumstances in

reference to which an Act is passed or of the characteristic of some material thing to which an Act applies, evidence of these circumstances or those characteristics, as the case may be, is admissible to show in either case that the Act has, for example, a purpose which is connected with defence. The Communist Party Dissolution Act applies to a class of persons upon the assumption that merely as members of that class they have a connection with defence. It cannot be assumed that every person, like every specimen of a material thing, has particular characteristics, although, of course, different persons may do the same class of acts. These acts may be of such a kind that persons who do them come within the range of the defence power or of some other legislative power. But acts done by persons are not made the criterion of the application of the present legislation. The connection between specified conduct and the subject matter of a legislative power is capable of proof by evidence or the Court may be able to take judicial notice of the connection. But if the legislature leaves out of account the acts of persons and deals with them solely on the assumption that they are per se related to a subject matter of power it is difficult to see how evidence could establish the assumption or demonstrate that any restrictions which the Parliament imposes on the persons, as such, have any connection in fact with defence or any other subject matter of legislative power. Of course, the persons who are being discussed are not a category which is one of the specified subjects with respect to which the Constitution says that the Parliament has powers to make laws. I think, therefore, that the nature of the Communist Party Dissolution Act is such that the decision of the question of its validity or invalidity cannot be aided by evidence as to the activities alleged in the recitals. (at p206)

3. It is implicit in the Act that Parliament is of opinion that the persons to whom it applies are indiscriminately per se a danger to the Commonwealth. This opinion is insufficient to connect the Act with any subject matter of legislative power and to justify the restriction of their civil liberties. In a period of grave emergency the opinion of Parliament that any person or body of persons is a danger to the safety of the Commonwealth would be sufficient to bring his or their civil liberties under the control of the Commonwealth; but in time of peace or when there is no immediate or present danger of war, the position is otherwise because the Constitution has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purpose of defence to impose such a control in peace time. To decide that the present Act is good under the defence power would radically disturb the grant of legislative power made by the Constitution to the Commonwealth Parliament. Indeed the general control of civil liberty which the Commonwealth may be entitled to exercise in war time under the defence power is among the first of war-time powers that would be denied to it when the transition from war to peace sets in, because then there is no emergency to support the constitutional power to maintain a control of that nature. It is, of course, for Parliament to measure the emergency confronting the Commonwealth and to take the legislative measures which are required to meet it. The only question for the Court is whether the measures have a reasonable relation to the emergency, and on that question the Court naturally gives very great weight to the opinion of Parliament; but it could not allow the opinion of Parliament to be the decisive factor, that is to determine the matter finally and conclusively, without deserting its own duty under the Constitution. (at p207)

4. Parliament, however, has not declared in the Communist Party Dissolution Act that it was passed for the prosecution of any war present or future, or that there is any immediate or present danger of war. At the time the Act came into force the Commonwealth was not engaged in any hostilities except in Korea. The state of affairs was peace not war. Indeed the constitutional position was that the defence power had declined from the zenith to which it had risen in the crisis of the last war practically to the level proper to it in time of peace. The Court has frequently declared, since the end of hostilities in the last war, that the defence power stands in that position. But it was said in argument that when the present Act became law there was tension in international affairs which might suddenly lead to war and therefore there was an emergency which drew the persons dealt with by the present Act within the scope of the defence power. (at p207)

5. The Court was asked to take judicial notice of the existence of an emergency of this grave character. There was argument and counter-argument at the bar table as to the state of international relations and as to what they foreboded. A confusing mass of events from which the Court was invited to draw its conclusion was discussed. It does not seem to me that this is the proper way to establish the existence of such an emergency as that by which it was sought to support this Act. I think it would have been better if the Court had had the guidance of a formal statement made by the Executive Government of its appreciation of the international situation. The Court would be bound to give very great weight to such a statement, particularly if it positively said that there was an impending danger of war. The existence of an emergency of that nature at the time this Act was passed would contribute enormously to its validity, especially if the enemy was to be the Union of Socialist Soviet Republics, the enemy forecasted in argument. For there are a number of well-known facts relating to the Communist Party which I think are either within judicial knowledge as historical facts or so well known that the Court may take judicial notice of them. The Communist Party is the name of a world-wide movement which is organized as a political party in many countries and is the major and dominant party in the Union of Socialist Soviet Republics; the Australian Communist Party, like the communist parties in other countries, is a political party formed in accordance with Lenin's conception of a world-wide political movement which would strive to establish a proletarian dictatorship and to impose Marxism everywhere; and by reason of these circumstances the Australian Communist Party manifests strong sympathy with the foreign and domestic policy of the government of the Union of Socialist Soviet Republics. It follows that if war occurred in which that State was the enemy or there was imminent danger of such a war, the Commonwealth could take preventive measures against communists and communist bodies just as it could against alien enemies resident in this country. But I cannot agree with the view that at the time this Act was passed there was a situation which provided a constitutional foundation for this Act. It is important to notice an observation which was made by Romer L.J. in Driefontein Consolidated Gold Mines Ltd. v. Janson (1901) 2 KB 419, at pp 439, 440 : - "I think that the intention of a foreign Government at any given time ought to be treated by these Courts, for such a purpose as that I am now considering, as conclusively determined by the way in which our Government chooses or has chosen to deal with that foreign Government and its acts, and that, where our Government has not treated the foreign Government as being hostile at a particular time, our Courts ought not to try to ascertain, even by merely regarding its acts, what was then in the minds of the King, President, or responsible Ministers or authorities of the foreign Government". This observation was regarded with favour in the House of Lords (1902) AC 484 . In that case the question was as to the effect of expected hostilities on legal rights. Perhaps in the present case mere diplomatic relations should not have the same weight with the Court. But at a time when it is the policy of the Government not to treat a foreign power as hostile, that fact makes it very difficult for the Court to divine that the power, even if it is armed to the teeth, is about to show them. (at p209)

6. The substantial effects of the Communist Party Dissolution Act are produced by s. 4, then by ss. 5 and 6 and finally by ss. 9 and 10. Section 4 singles out the Australian Communist Party by name. The section applies solely to the Party, declares it to be an unlawful association, breaks up the association of persons who form it and provides for the forfeiture, upon dissolution, of all its property to the Commonwealth. The effect of the section is to deprive the members of the Party of their right of association, their interest in the property of the Party and other civil rights. Sections 5 and 6 are directed against bodies, other than trade unions, which are supposedly allied in a fashion to the Australian Communist Party or who have communist connections. These sections authorize the Government of the Commonwealth to take action against any body in these selected categories if it is satisfied that "the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth". This action has the same effect on the body against which it is taken and its members as s. 4 has on the Australian Communist Party and its members. Sections 9 and 10 authorize the Government of the Commonwealth to disqualify Communists from holding trade union office in

certain industrial spheres and all Commonwealth positions. The Government is authorized to take this action against any communist to whom s. 9 applies where it is satisfied that he "is engaged or likely to be engaged in activities", described as "prejudicial" to the above-mentioned interests of the Commonwealth. The effect of these sections is to deprive the persons and the trade unions affected by their operation of a contractual capacity and of civil rights in respect of employment. The criterion adopted by the legislature for the application of s. 4 is that the persons to whom it applies are collectively known as the Australian Communist Party. The application of the section does not depend upon anything that the association might do. The same thing is primarily true of ss. 5 and 6 and ss. 9 and 10. (at p209)

7. The recitals in the preamble set forth many activities and operations which, in the opinion of the Parliament, are pursued by the Australian Communist Party and its officers, members and other Communists. But the condition of the application of the Act to the Australian Communist Party or any association or person is merely that it is communist or has communist associations. The connection of the Act with legislative power depends upon the aims and objects which communism implies, rather than upon the actions of the Party, or of its allies, or of individual communists. The scope and operation of the principal sections of the Act determine that it is merely a law with respect to communists of the Lenin-Marx school. The Court may take judicial notice of the fact that persons of this class manifest strong sympathy with the Soviet and sharp antagonism to the existing social and political orders and are desirous of overthrowing them. But their mere aims as communists, apart from their actions, are not sufficiently substantial to give the Commonwealth Parliament a foot-hold on which to enact laws to deprive all the members of the class of civil liberties which in peace time are immune from Commonwealth control. The Commonwealth might, in an emergency of a certain kind (as I have already said) have the constitutional power to assume this control. (at p210)

8. It has been shown that ss. 5 and 6 and ss. 9 and 10 are brought into operation where the Government of the Commonwealth is satisfied of certain matters. The scope of these matters depends in the first place upon the meaning of the words security and defence. This combination of words necessarily has a wider meaning than the single word defence. The first word, security, in its application to national interests, is capable of referring to political, social, economic, financial or military security. The constitutional power of the Commonwealth extends to security through military preparedness against an enemy and in war time to other forms of security, for then it is necessary to maintain public order, social security, industrial peace, financial and economic stability for the successful prosecution of war. But, even if the words security and defence mean in the present context no more than is connoted by the word defence, and they cannot mean less, the Act leaves it to the Executive Government to interpret the meaning and scope of that subject matter in the course of executing the Act. There can be no doubt that Parliament legislated on the basis of the constitutional practice governing the performance by the Executive Government of its high duties of state. For this reason there is the strongest presumption that Parliament did not intend that the decision of the question of prejudice to security and defence which it authorized the Executive Government to make, should be examined by a court - a process which would obviously be objectionable on grounds of public policy. The very framework of the section confirms this presumption because it expressly allows the review by a court of the decision of the Executive Government on the other question, whether the body or the person as the case may be, against whom the executive action was taken, is within the scope of the Act. The result is that the Executive Government is itself the final judge of the other question, that is, of how far it may go in operating these provisions. It may be correct for Parliament to authorize the Executive to bring into operation an Act which is within legislative power, but it is clearly another thing and constitutionally wrong for Parliament to authorize the Executive to decide finally as to the extent of any legislative subject matter enumerated in s. 51 of the Constitution and to bring the Act into operation in such cases as it decides to be within the subject matter. Sections 5 and 6 and ss. 9 and 10 should fail also for the reason that in effect they constitute the Executive

Government an arbiter on constitutional power. This ground of invalidity applies with even greater force to the authority which the Act gives to the Executive Government to decide whether there is matter "prejudicial" to the "execution or maintenance of the Constitution or of the laws of the Commonwealth". It is surely for the Court to decide finally and conclusively what is meant by these expressions which indeed are copied almost verbatim from the Constitution. (at p211)

9. The Act was rested also on the power conferred upon the Parliament by par. (xxxix.) of s. 51 of the Constitution. In the case of Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. (1914) AC, at p 256; 17 CLR, at p 655 the Judicial Committee said: "These words do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law". The meaning of this paragraph is also explained in the same way in Le Mesurier v. Connor (1929) 42 CLR, at pp 497, 498 . In the present case it is necessary to apply the sub-paragraph to the power which s. 61 of the Constitution vests in the Executive Government. This section gives it power to exercise the executive power of the Commonwealth and says that this power extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. By the combined effect of the sub-paragraph and s. 61 of the Constitution the Parliament has power to punish crimes against the Commonwealth and to make laws to aid the Executive Government in the execution of its authority to protect the Commonwealth against violence or acts that would directly lead to violence (Burns v. Ransley [1949] HCA 45; (1949) 79 CLR 101 ; R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121). The present Act has not the character of a law on any matter which arises in the course of the execution of the power vested by s. 61 in the Executive Government. The Australian Communist Party and other bodies and communists are made liable or subject to the measures which it provides for dealing with them independently of any conduct which would call for the exercise of the executive power of the Commonwealth. It cannot be doubted that the Commonwealth Parliament could make laws, punitive or preventive, for dealing with them on the basis of their activities, if their activities are shown to be of the required description. The criteria upon which bodies other than the Australian Communist Party are brought within the Act and upon which persons are classified as communists are in some respects arbitrary and might strain a power, if it existed, to legislate just on communists. (at p212)

10. As regards ss. 9 and 10, I was pressed by the consideration that the exigencies of modern warfare make it necessary for the Commonwealth to rely on industrial undertakings, whether conducted by itself or privately owned, for the production of the war materials which are essential to national preparedness and the defence of the Commonwealth. The Commonwealth has an interest in protecting any industrial undertaking which is engaged or is likely to be engaged in the production of war materials for the Commonwealth and this interest attracts the defence power. The power extends to the prevention or punishment of specific acts of conduct, whether committed by communists or any other persons, which is detrimental to the safety or productiveness or efficiency of these undertakings. But I cannot see that the operation of ss. 9 and 10 is confined to industrial undertakings which positively have this character. If these sections were intended to be a law with respect to industrial undertakings within the ambit of the defence power, I am afraid that their language leaves the sections open to many objections on the score of its width and vagueness. But it seems to me that the sections, in pith and substance, are a law with respect to communists and that the criterion of industries vital to security and defence, even if it does not over-pass the limits of the subject matter of defence, is used only as a peg on which to hang the disqualification of communists from trade union office and Commonwealth employment. (at p213)

11. The legislative power which the Commonwealth has in respect of organizations registered under the Commonwealth Conciliation and Arbitration Act will not justify ss. 9 and 10, because these sections apply indiscriminately to registered and unregistered industrial organizations. (at p213)

12. Sections 9 and 10 also provide for the disqualification of communists. The Commonwealth

Parliament has ample power under s. 52 of the Constitution to make laws to bar from Commonwealth positions persons who, according to any reasonable standard which the Parliament may prescribe, are unfit for Commonwealth employment. The question whether the provision made by ss. 9 and 10 for the disqualification of communists from Commonwealth employment could be justified under s. 52, and, if valid thereunder, it could stand despite the invalidity of ss. 5 and 6 and the rest of ss. 9 and 10, was not specially argued. But s. 9 goes far beyond, dealing with persons within s. 10(1)(a) and (b). It would operate at large to enable the Governor-General in Council to declare anybody, however remote the possibility of his even seeking to become a public servant or an officer of a Commonwealth authority. It cannot be regarded as a law with respect to the public service or the service of Commonwealth authorities. It is a law with regard to the subject of "declaring" communists to have prejudicial tendencies. Section 14 is invalid for the same reasons; it depends on s. 9. (at p213)

13. All of the other provisions of the Act inevitably fall with ss. 4, 5 and 6, and 9 and 10. (at p213)

14. For these reasons I answer questions 1(a) and 1(b) No, and question 2 Yes, that is, that the Act is invalid. (at p213)

WILLIAMS J. We have before us certain questions asked in a case stated by Dixon J. in eight actions brought to obtain declarations that the provisions of the Communist Party Dissolution Act 1950, which came into force on 20th October 1950, are ultra vires the Constitution and invalid and injunctions restraining the Commonwealth and the Ministers named as defendants from acting thereunder to the prejudice of the plaintiffs. The questions asked in the case stated are as follows:- "1(a) Does the decision of the question of the validity or invalidity of the provisions of the Communist Party Dissolution Act 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth? (2) If No to either part of question 1, are the provisions of the Communist Party Dissolution Act 1950 invalid either in whole or in some part affecting the plaintiffs?" (at p214)

2. The Communist Party Dissolution Act contains a number of recitals. The first three recitals refer to the powers of the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth (s. 51(vi.) of the Constitution), the executive power of the Commonwealth (s. 61 of the Constitution) and the incidental power (s. 51(xxxix.) of the Constitution) and are of a formal nature. The next six recitals refer to the alleged aims, objects and activities of the Australian Communist Party. They allege that this Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat. They also allege that the party engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial and political ends by force, violence, intimidation or fraudulent practices. They also allege that the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature. They also allege that activities or operations of, or encouraged by the Australian Communist Party and its members or officers and other persons who are communists, are designed to cause, by means of strikes or stoppages of work, and have, by those means, caused dislocation, disruption or retardation of production or work in certain industries vital to the security and defence of Australia (including the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry and the power industry). (at p214)

3. The ninth recital states that it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the Australian Communist Party, and bodies of persons affiliated with that Party, should be dissolved and their property forfeited to the Commonwealth, and that members and officers of that Party or of any of those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry. (at p215)

4. Section 3 of the Act defines "communist" to mean a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin. It defines "the specified date" to mean the tenth day of May, One thousand nine hundred and forty-eight, being the last day of the National Congress of the Australian Communist Party by which the constitution of the Australian Communist Party was adopted. It defines "unlawful association" to mean the Australian Communist Party or a body of persons declared to be an unlawful association under this Act. (at p215)

5. The Act has three main branches. In the first branch there is s. 4, which declares the Australian Communist Party to be an unlawful association, dissolves it, and provides for the vesting of its property in a receiver. (at p215)

6. In the second branch there are ss. 5, 6 and 8. Section 5(1) provides that the section applies to any body of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State - (a) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act, was, or purported to be, affiliated with the Australian Communist Party; (b) a majority of the members of which, or a majority of the members of the committee of management or other governing body of which, were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party; (c) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time within that period, promoted, the spread of communism, as so expounded; or (d) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who - (i) were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party or of the Central Committee or other governing body of the Australian Communist Party, or are communists; and (ii) make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin. (at p216)

7. Section 5(2) provides that where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association. The words "security and defence" do not, in my opinion, connote more than defence and refer to defence against external aggression, while the words "execution or maintenance of the Constitution or of the laws of the Commonwealth" are a composite expression taken substantially from s. 61 of the Constitution and refer to the internal security of the Commonwealth. The words "the laws of the Commonwealth" refer to the system of laws enacted under the Constitution and, so to speak, to the Constitution in action. The sub-section therefore authorizes the Governor-General to make a declaration if he thinks that the continued existence of the body would be prejudicial to the external or internal security of the Commonwealth. There was some discussion during the argument as to whether the Governor-General

could make the declaration if he was satisfied that the continued existence of the body would be prejudicial to one or other of these purposes without being satisfied as to either purpose in particular. But it seems to me that before the Governor-General could make a declaration he would have to be satisfied that the body is a body of persons to whom the section applies and that he would also have to be satisfied that the continued existence of the body would be prejudicial either to the security and defence of the Commonwealth or to be satisfied that the continued existence of the body would be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth and that he could be satisfied that the continued existence of the body would be prejudicial to both these purposes. This construction fits in with s. 27 of the Act, which provides that when the continuance in operation of the Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a Proclamation accordingly and thereupon the Act shall be deemed to have been repealed. Parliament must, therefore, have intended that the Act should continue in operation until the Governor-General is satisfied that it is no longer required for either purpose. If a position should arise in the future where the Governor-General is satisfied that the Act is no longer necessary for the one purpose, but still necessary for the other, it must necessarily follow that he could only make a declaration where he is satisfied that the continued existence of the body would be prejudicial to the purpose for which it is still necessary to keep the Act on foot. But s. 5(2) does not provide that the declaration should state the ground or grounds of the Governor-General's satisfaction and all that the instrument need declare is that the body of persons is an unlawful association. (at p217)

8. Section 5(3) provides that the Executive Council shall not advise the Governor-General to make such a declaration unless the material upon which the advice is founded has first been considered by the committee therein mentioned. This committee acts in a purely executive capacity, for the threatened body of persons is not given an opportunity to appear before it or see or criticize or deny or supplement the material which the committee is considering. (at p217)

9. Section 5(4) provides that a body of persons declared to be an unlawful association may, within the specified time, apply to the appropriate court to set aside the declaration on the ground that the body is not a body to which this section applies. This sub-section confers a right to apply to the court to have the declaration set aside on one ground only and s. 5 does not confer a right to apply to the court to set aside the declaration on the ground that the continued existence of the body of persons would not in fact and law be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. (at p217)

10. Section 6 provides that a body of persons in respect of which a declaration has been made under the Act, in the absence of a successful application to a court to set aside the declaration, shall, by force of the Act, upon the expiration of twenty-eight days after the publication of the declaration in the Gazette, be dissolved. (at p217)

11. Section 8 provides that the instrument under the Act declaring a body of persons to be an unlawful association shall appoint a receiver of the property of that body and that upon the day upon which that instrument is published in the Gazette the property of that body shall, subject to the section, vest in the receiver. Section 15, which applies to the parliamentary declaration by s. 4 that the Australian Communist Party is an unlawful association and to bodies of persons declared to be unlawful associations by the Governor-General under s. 5, provides that it shall be the duty of a receiver of an unlawful association to take possession of the property of the association, to realize that property, to discharge the liabilities of the association and to pay or transfer the surplus to the Commonwealth. (at p218)

12. The third branch comprises ss. 9 to 12 inclusive and relates to individuals. Section 9(1) provides

that the section applies to any person (a) who was, at any time after the specified date and before the date upon which the Australian Communist Party is dissolved by the Act, a member or officer of the Australian Communist Party; or (b) who is, or was at any time after the specified date, a communist. (at p218)

13. Section 9(2) provides that where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, make a declaration accordingly. It seems to me, applying the same reasoning mutatis mutandis as in the case of s. 5(2), that under s. 9(2) the Governor-General, before he could make a declaration, would have to be satisfied that a person is a person to whom the section applies and that that person is engaged or likely to engage in activities which are either prejudicial to the security and defence of the Commonwealth or to be satisfied that that person is engaged or likely to engage in activities which would be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth, and that he could be satisfied that that person is engaged or likely to engage in activities prejudicial to both these purposes. The section does not prescribe the contents of the declaration, but it does provide that the Governor-General shall make a declaration accordingly. In the case of s. 9, therefore, unlike s. 5, it would be necessary for the Governor-General specifically to state the grounds of his satisfaction. (at p218)

14. Section 9(3) provides that the Executive Council shall not advise the Governor-General to make such a declaration unless the material upon which the advice is founded has first been considered by the committee therein mentioned (this is the same committee as that mentioned in s. 5(3)). Under this sub-section, as in the case of s. 5(3), the committee acts in a purely executive capacity and the threatened person is not given an opportunity to appear before it or see or criticize or deny or supplement the material on which the advice is based. (at p219)

15. Section 9(4) provides that a person in respect of whom such a declaration is made may, within the specified time, apply to the appropriate court to set aside the declaration on the ground that he is not a person to whom this section applies. This sub-section, like s. 5(4), confers a right to apply to the court to have the declaration set aside on one ground only, and s. 9 does not confer a right to apply to a court to have the declaration set aside on the ground that the person was not a person who is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. (at p219)

16. Section 10(1) provides that a person in respect of whom a declaration is in force under this Act - (a) shall be incapable of holding office under, or of being employed by, the Commonwealth or an authority of the Commonwealth; (b) shall be incapable of holding office as a member of a body corporate, being an authority of the Commonwealth; and (c) shall be incapable of holding an office in an industrial organization to which this section applies or in a branch of such an industrial organization. (at p219)

17. Section 10(3) provides that where the Governor-General is satisfied that a substantial number of the members of an industrial organization are engaged in a vital industry, that is to say, the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry or the power industry, or any other industry which, in the opinion of the Governor-General, is vital to the security and defence of Australia, the Governor-General may, by instrument published in the Gazette, declare that industrial organization to be an industrial organization to which this section applies. (at p219)

18. Section 12(1) provides that upon the publication under sub-s. (3) of s. 10 of the Act of an

instrument declaring an industrial organization to be an industrial organization to which that section applies, any office in that industrial organization or any branch thereof held by a person in respect of whom a declaration is in force under this Act shall, by force of this Act, but subject to this section, become vacant. The section goes on to provide that if the officer applies to the court to have the declaration set aside he shall be suspended from office pending the determination of the application and, if the application is dismissed, the office shall become vacant on the date of dismissal. (at p220)

19. The Act contains a number of other important provisions, but they are mostly ancillary to the provisions to which I have referred and the latter provisions are sufficient, I think, to indicate the manner in which the Act operates in its three main branches. The outstanding character of the Act is that, in the words of Knox C.J. in Ex parte Walsh and Johnson (1925) 37 CLR, at p 69 , the enactment in its main provisions "prohibits no act, enjoins no duty, creates no offence, imposes no sanction for disobedience to any command, prescribes no standard or rule of conduct". It operates to dissolve the Australian Communist Party and to forfeit its property to the Commonwealth, and to make other bodies of persons who were in the prescribed period or are likely to be tainted with communism, corporate or unincorporate, liable to be dissolved and their property forfeited to the Commonwealth, and to make persons who were in the prescribed period or are communists liable to be deprived of important contractual rights without creating any offence the commission of which will entail such consequences, and indeed without proof that they have committed any offence against any law of the Commonwealth, without a trial in any court, and without such bodies or persons having any right to prove that they have not done anything prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. In the case of s. 5(2), it is provided that the Governor-General must be satisfied that a body of persons is a body to which the section applies and that the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or the execution or maintenance of the Constitution or of the laws of the Commonwealth. In the case of s. 9(2), it is provided that the Governor-General must be satisfied that the person is a person to whom the section applies and that that person is engaged in, or is likely to engage in, activities prejudicial to such security and defence or to the execution or maintenance of the Constitution and of such laws. In the case of s. 4 there need be no similar satisfaction and the basis of the section is that Parliament is satisfied from material within its knowledge, as the ninth recital indicates, that it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth that the Australian Communist Party should be dissolved and its property forfeited to the Commonwealth. Accordingly the Act is in effect an assertion by Parliament that it can decide for itself or leave it to some authority other than a judicial organ of the Commonwealth to decide that facts exist which are sufficient in law to create a nexus between the particular legislation and such one or more of the constitutional legislative powers of the Commonwealth as are relied upon to support the legislation. Such an assertion raises a constitutional question of profound importance. (at p221)

20. It was contended on behalf of the defendants that such an assertion does not arise in the case of ss. 5(2) and 9(2) because these sub-sections on their true construction impose a condition which does not make the satisfaction of the Governor-General conclusive as to the whole proposition formulated in sub-s. (2), but makes it necessary that certain elements should exist in fact and in law. Thus according to the contention it would be necessary in the case of s. 5(2) that the continued existence of the body of persons would be in fact and law prejudicial to what is defence in fact and law, and in the case of s. 9(2) that the persons are engaged or are likely to engage in activities which are in fact and law prejudicial to what is defence in fact and law. In my opinion it is impossible to place such a construction on the sub-sections. The plain grammatical meaning of their provisions is that the Governor-General is to have an unfettered administrative discretion to decide whether the continued existence of the body of persons would be prejudicial or the person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or

maintenance of the Constitution or of the laws of the Commonwealth. Further, if there could be any doubt, it is entirely removed by the provisions of ss. 5(4) and 9(4), giving the declared bodies of persons and persons the right to have the declarations set aside on the ground that they are not bodies or persons to whom the sections respectively apply. It would be altogether unreasonable to attribute to Parliament an intention that the satisfaction of the Governor-General should be open to review to this limited extent if it were intended that it was to be open to review in other respects. The words are apt and apt only to leave the whole decision to the Governor-General without any qualification. See the illustrations of the effect of similar expressions given by Lord Atkin in Liversidge v. Anderson (1942) AC, at pp 232, 233 . The effect of such a discretion in the case of a Minister of the Crown is described by Lord Greene M.R. in B. Johnson & Co. (Builders) Ltd. v. Minister of Health (1947) 177 LT 455, at p 459 as follows: "every Minister of the Crown is under a duty, constitutionally, to the King, to perform his functions honestly and fairly, and to the best of his ability; but his failure to do so, speaking quite generally, is not a matter with which the courts are concerned at all. As a Minister, if he acts unfairly, his action may be challenged and criticized in Parliament". This description would, I should think, apply a fortiori to a discretion given to the Governor-General, that is, to the Governor-General acting with the advice of the Federal Executive Council. Sections 5 and 9 express a plain intention to keep the courts out of the arena except to the limited extent prescribed. Parliament has sought to decide for itself or to confer on the Governor-General power to decide whether the continued existence of certain bodies of persons or the activities of certain individuals is prejudicial to the security and defence of the Commonwealth or the execution and maintenance of the Constitution or of the laws of the Commonwealth. But it is clear to my mind that it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation. In the case of some legislative powers it may only be necessary that one fact should exist. In the case of s. 51(xix.) it is sufficient that a person is in fact and law an alien to authorize the Parliament to subject him to a law which is in character and effect a law with respect to aliens. In the case of s. 51(xxvii.), it is sufficient that a person is in fact and law an immigrant to authorize the Parliament to subject him to a law which is in character and effect a law with respect to immigration. In the case of s. 51(xxxv.), there must be an industrial dispute which is in fact and law an industrial dispute extending beyond the limits of any one State before the Parliament can legislate under this paragraph. The principle is the same in the case of the defence power, s. 51(vi.). If legislation under this power is challenged, the Court must be satisfied that the fact or facts exist which bring the legislation within the scope of the power. As the power is one of indefinite extent and expands and contracts according to the dangers to the security of Australia that exist from time to time, the power is peculiarly one with respect to which it is the duty of the Court to be satisfied of such facts. The commencement of hostilities, especially if the conflagration is widespread and in close proximity to Australia, authorizes legislation which would not be justified in times of peace. In recent years it has been the duty of the Court during the second world war and its aftermath to decide on numerous occasions whether legislation was within the scope of the defence power. In those years the problem was to determine its extent during hostilities and during the period of transition from hostilities to peace. In times of peace Parliament can pass all legislation reasonably necessary to prepare for war, and it is clear, I think, that the extent of the power will increase in times of peace where the international situation is such that it can reasonably be apprehended that hostilities, especially hostilities on a large scale, are likely to break out in the near future. As Dixon J. succinctly said in Sloan v. Pollard (1947) 75 CLR, at p 471 , the operation of the defence power and the ascertainment of the practical measures which it authorizes "must continue to depend upon the facts as they exist from time to time". It is not the function of the Court to decide what measures are required from time to time. Questions of policy are not for the Court but for the Parliament and the Executive. But it is the imperative duty of the Court to examine the character and effect of the law and decide whether it is a law with respect to the naval and military defence of the Commonwealth. During hostilities there are many facts which in the public interest cannot be disclosed, and it is necessary that the Parliament and the Executive charged with the defence of the nation should be accorded the widest

possible latitude of discretion. In this period the Court should, in my opinion, uphold the legislation if, in accordance with the test laid down in Farey v. Burvett (1916) 21 CLR, at p 455 , per Isaacs J., "the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence". In peace time the public interest is not usually such that the relevant facts cannot be disclosed and the test may possibly be more aptly described by substituting the word "reasonably" for the word "conceivably", and in peace time the legislation, to be reasonably capable of aiding defence, must be reasonably necessary for the purpose of preparing for war. But the distinction is a slight one (Peacock's Case (1943) 67 CLR, at pp 48, 49). (at p223)

21. It follows from what I have said that, in order that s. 4 of the Communist Party Dissolution Act could be authorized by the defence power, it must be proved that facts existed on 20th October 1950 which made it reasonably necessary in order to prepare for the defence of Australia that as a preventive measure the Australian Communist Party should be dissolved and its property forfeited to the Commonwealth. The validity of this section raises a problem which is, I think, similar to those which arise with respect to ss. 5 and 9 of the Act, for there is in essence no distinction between Parliament acting in this way on its own initiative and Parliament delegating the initiative to some person or body. This leads to a consideration of the effect of the recitals. In a valid Act recitals should have, in my opinion, the effect that Parliament intends them to have. Parliament can, if it expresses a clear intention, make the facts narrated in the recitals conclusive for the purposes of the Act whether such facts are correct or not. But ordinarily recitals would at most be taken for truth until contradicted and are therefore only prima-facie evidence of the facts: Halsbury's Laws of England, 2nd ed., Vol. 31, pp. 568, 569; Maxwell on The Interpretation of Statutes, 9th ed. (1946), p. 319; Craies on Statute Law, 4th ed. (1936), pp. 41-44. But where the constitutional validity of an Act is impeached, it is difficult to see how the recitals could be in any different position to the operative part of the Act. In Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. (1914) AC, at pp 254, 255; 17 CLR, at p 653 , the Privy Council pointed out that the burden rests on those who affirm that the capacity to pass an Act was put within the powers of the Commonwealth Parliament to show that this was done. The Commonwealth Parliament cannot by including recitals in an Act discharge this burden. Accordingly, where the constitutional validity of an Act is in issue, the recitals cannot, in my opinion, be more than a statement of the reasons why Parliament enacted the law. They indicate to the Court what Parliament believes to be the constitutional basis of the Act. (at p224)

22. As the Chief Justice said in the Uniform Tax Case (1942) 65 CLR, at p 432 , "The Court should treat this expression of the view of Parliament with respect . . . But such a declaration cannot be regarded as conclusive". Where the constitutional validity of an Act is challenged, it is the actual facts and only the actual facts which count and the real question that arises is as to the actual facts which are relevant and the legal effect of those facts. During the recent hostilities the only facts before the Court were, in most of the cases, notorious public facts of which the Court could take judicial notice. They were few in number and were confined to such facts as that hostilities were raging, the proximity to Australia of the conflict from time to time, the need for production of war materials, the necessity of making the best use of the available manpower, and the effect upon the national economy of the large number of men and women engaged in the armed forces and the production of munitions and the shortage of essential civilian requirements, particularly houses and certain kinds of goods. It was the existence of these facts or some of them which induced the Court to hold that many regulations under the National Security Act were valid during hostilities which in times of peace would be beyond the scope of the defence power. But it does not seem to me that the Court should be confined to notorious public facts of which it can take judicial notice. All the facts which are relevant to the decision of the constitutional issue must be admissible in evidence and the fact that the Court can take judicial notice of some facts merely expedites the manner of their proof. The facts which are not capable of proof in this way must be proved in such other ways as the laws of evidence allow. Such facts were proved and acted upon in Jenkins v. The Commonwealth [1947] HCA 41; (1947) 74

CLR 400 and in Sloan v. Pollard [1947] HCA 51; (1947) 75 CLR 445 . (at p225)

23. Could there be any relevant facts, notorious or otherwise, sufficient to bring the Communist Party Dissolution Act within the scope of the defence power on 20th October 1950? In my opinion there could not. The defence power in peace time authorizes any legislation which is reasonably necessary to prepare for war, including, as I have said, any legislation which would be authorized by an expansion of the power in view of the increasing probability of imminent war. Any conduct which is reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power. Amongst such conduct there could be included, I should think, most, if not all, of the serious misdoings with which communist bodies and communists are charged in the recitals. But the legislation would have to define the nature of the conduct and the means adopted to combat it, so that the Court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose. The Communist Party Dissolution Act does none of these things. On the basis of an assertion by Parliament or the Executive that communist bodies and communists are acting and are likely to act in a manner prejudicial to security and defence the Act proceeds to dissolve these bodies and deprive communists of certain contractual rights. Section 4 of the Communist Party Dissolution Act is in substance simply a law for the winding up of the Australian Communist Party and distribution of its assets. Section 5 is in substance simply a law for the winding up of the bodies therein mentioned and distribution of their assets. Sections 9, 10 and 14, which are interdependent and must be read together, are in substance simply a law for the deprivation of certain individuals of certain contractual rights. Legislation for the winding up of bodies corporate and unincorporate and the distribution of their assets and for the deprivation of individuals of contractual rights is not legislation which in general falls within the sphere of the Commonwealth Parliament but is reserved to the States. As was said by this Court in R. v. Foster (1949) 79 CLR, at p 81 in analogous circumstances, "apart from the defence power, control of these matters is in most respects outside Commonwealth legislative power and within State legislative power. Such matters come within Federal power because legislation with respect to them is legislation upon incidents in the exercise of the power with respect to defence". See also The University Case (1943) 67 CLR, at pp 113-115 ; The Industrial Lighting Regulations Case (1943) 67 CLR, at pp 427, 428 ; Crouch v. The Commonwealth (1948) 77 CLR, at p 350 . Sections 4, 5, 9 and 10 of the Communist Party Dissolution Act can only come within the defence power if legislation with respect to them is legislation upon incidents in the exercise of the defence power. The defence power can only invade subjects which are in most respects within the domain of State legislation to the extent to which it is reasonably necessary to do so for the purposes of defence. It is therefore largely a matter of degree. The overt acts set out in the recitals alleged to be prejudicial to the security and defence of Australia are that the Australian Communist Party is part of a world communist revolutionary movement which engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature and promotes strikes and stoppages of work and so retards production in vital industries and by inference interferes with preparing Australia for war. But none of this conduct is prevented or prohibited or made an offence by the operative provisions of the Act. If the Act did this, the Court could consider the conduct prohibited and decide whether it was capable of being so prejudicial and, if it considered that it was, pronounce in favour of the constitutional validity of the Act. As a preventive measure the Act could then provide that injunctions should be granted restraining bodies of persons or persons so conducting themselves and as a punishment the Act could provide that bodies of persons or persons convicted of such conduct in a court should be punished, inter alia, in the manner provided by the Communist Party Dissolution Act or in some other manner. In my opinion legislation to wind up bodies corporate or unincorporate and to dispose of their assets or to deprive individuals of their civil rights or liberties on the mere assertion of Parliament or the Executive that they are conducting themselves in a manner prejudicial to security and defence, is not authorized by the defence power or the incidental power in

peace time. Legislation of this nature can only be valid in times of grave crisis during hostilities waged on a large scale, and it must, even then, be limited to such preventive steps as are reasonably necessary to protect the nation during the crisis. (at p227)

24. Two cases which were much canvassed during the argument were Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 and Ex parte Walsh (1942) ALR 359 . In my opinion the legislation there upheld is legislation which could only be justified during such a crisis. In Lloyd v. Wallach (1915) 20 CLR, at p 307 Isaacs J. said that the essence of the regulation was the power of detention in military control of naturalized persons where there was reason to believe they were disaffected or disloyal. This regulation was limited to naturalized persons, but the regulation in Ex parte Walsh (1942) ALR 359 extended to any person with respect to whom the Minister was satisfied that he should be detained with a view to preventing that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth. These cases are strictly only decisions that the regulations there in question were authorized by the War Precautions Act and the National Security Act respectively, and the nature and extent of the defence power itself was not discussed. But it necessarily follows, I think, from these decisions that it is incidental to defence that during such a crisis a person should be detained without a trial and without having been charged with any offence where a minister is satisfied that he is disloyal (Little v. The Commonwealth [1947] HCA 24; (1947) 75 CLR 94). The case of Welsbach Light Co. of Australasia Ltd. v. The Commonwealth [1916] HCA 59; (1916) 22 CLR 268 was also much canvassed during the argument. The Court was there concerned with certain provisions of the Trading with the Enemy Act 1914. Legislation which prohibits or regulates trading with the enemy in war time is obviously within the defence power. It is unnecessary for me to express any opinion upon the correctness of the views expressed by the Court upon the points under the Trading with the Enemy Act which actually arose during the argument. Assuming the case was rightly decided, it is not a case that has any bearing upon the extent of the defence power in peace time. It deals with matters which may be left to the judgment of the Executive during hostilities. I cannot, however, agree with the statement of Isaacs J. (1916) 22 CLR, at p 280 that defence includes every act which, in the opinion of the proper authority, is conducive to the public security. Such a principle was consistently repudiated by this Court in all the cases with respect to the defence power decided during the recent hostilities. Section 13A of the National Security Act 1939-1940 authorized the Governor-General to make such regulations making provision for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth as appeared to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which his Majesty was or might be engaged. The Court never considered itself bound by any such opinion of the Governor-General, but examined the operation of the regulations which were made pursuant to that opinion and itself determined whether the regulations were in their operation justified as delegated legislation under the defence power. See, for instance, Reid v. Sinderberry (1942) 68 CLR, at pp 511, 515, 516, 521 . The Trading with the Enemy Act at least laid down a standard of conduct because s. 3 provided that any person who traded with the enemy should be guilty of an offence. It is impossible, in my opinion, to rely on any of these cases when examining the scope of the defence power in peace time and, in any event, the legislation there discussed was legislation of a different character because in Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 and In re Walsh (1942) ALR 359 the persons detained were not deprived of their contractual or proprietary rights and in the Welsbach Case [1916] HCA 59; (1916) 22 CLR 268 the person had to be convicted of an offence against the Act before he could be imprisoned or fined or his property confiscated. (at p228)

25. The case of Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth [1943] HCA 12; (1943) 67 CLR 116 was also much canvassed during the argument. In that case regs. 3 to 6B, both inclusive, of the National Security (Subversive Associations) Regulations were held by Rich J. and myself to be beyond the powers conferred by s. 51 (vi.) of the Constitution and the National Security

Act respectively. Starke J. held that the regulations as a whole were inseverable and wholly invalid because they were beyond the powers conferred by the National Security Act. His Honour said "Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the Executive Government. The operative clauses of the regulations, such as the provision relating to bank credits, forfeitures and unlawful doctrines have little, if any, real connection with the defence of the Commonwealth or the efficient prosecution of the war. Accordingly, in my judgment, the regulations are beyond the power conferred upon the Governor-General in Council by the National Security Act 1939-1940, and, even if enacted by the Parliament itself, they would, I venture to think, transcend the powers conferred upon the Parliament by the Constitution" (1943) 67 CLR, at p 154 . (The italics are mine.) The regulations there in question provided that any body corporate or unincorporate, the existence of which the Governor-General, by order published in the Gazette, declared to be in his opinion prejudicial to the defence of the Commonwealth or the efficient prosecution of the war was thereby declared to be unlawful. The regulations declared such a body to be dissolved and authorized the seizure of its property and its forfeiture to the King for the use of the Commonwealth. The effect of the forfeiture was to destroy even the rights of creditors against the forfeited property. The power of the Governor-General to make the declaration did not depend upon the body carrying on activities which were in fact prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. It depended upon his mere opinion that the existence of the body had this effect. My own opinion was, and still is, that during the emergency created by a world war the defence power is wide enough to authorize a law empowering Parliament or the Executive to place such a body like an individual in a state of preventive detention, but that the power is not wide enough to authorize a law empowering Parliament or the Executive on its mere ipse dixit to liquidate an individual or body or forfeit his or its assets to the Crown. I repeat the views expressed that "For the purposes of defence the Commonwealth can in times of war pass legislation affecting the rights of the States and of their citizens and corporations under State laws to a greater extent than it can in times of peace (South Australia v. The Commonwealth (1942) 65 CLR, at p 468). But the extent to which it can entrench upon these rights is limited by the reasonable necessities of defence during the period of the war. If it is necessary for the Commonwealth to acquire such property, it can do so subject to s. 51(xxxi.) of the Constitution. But the mere fact that the corporation or individual or body of individuals is carrying on some activity, which, in the opinion of Parliament or of some Minister, is prejudicial to the defence of the Commonwealth, cannot, in my opinion, conceivably require that the Commonwealth should enact that the property of such corporation or individual or body should be forfeited to the Crown, and the rights of all corporators and creditors in that property under State laws completely destroyed." (1943) 67 CLR, at p 163 . (at p230)

26. The fact that the Communist Party Dissolution Act preserves the rights of creditors would not, in my opinion, distinguish this Act from the Subversive Associations Regulations. Further, the Act was not passed during hostilities but in peace time and my remarks apply a fortiori in times of peace. There is a wide gulf between the reasonable necessities of defence in peace time, even where there is an imminent threat of hostilities, but hostilities have not begun, and during war time. An imminent threat of hostilities would no doubt authorize many precautionary measures, but could not authorize measures which would be beyond the scope of the defence power after hostilities had broken out. Before ss. 4, 5, 9 and 10 of the Communist Party Dissolution Act could be held to be valid, the Jehovah's Witnesses Case [1943] HCA 12; (1943) 67 CLR 116 would need to be in effect overruled. They are not, in my opinion, valid exercises of the defence power or the incidental power in relation thereto. (at p230)

27. The next question is whether the three main branches of the Act are authorized by s. 61 of the Constitution and the incidental power s. 51(xxxix.) of the Constitution. Section 61 provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-

General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The execution of the Constitution in the section "means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation" (The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd. (1922) 31 CLR, at p 432). The maintenance of the Constitution therefore means the protection and safeguarding of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation. The execution and maintenance of the laws of the Commonwealth must mean the doing and the protection and safeguarding of something authorized by some law of the Commonwealth made under the Constitution. The executive power of the Commonwealth at the date of the Constitution presumably included such of the then existing prerogative powers of the King in England as were applicable to a body politic with limited powers. But it is clear that at the date of the Constitution the King had no power by the exercise of his prerogative to dissolve bodies corporate or unincorporate or forfeit their assets to the Crown or to deprive his subjects of their contractual or proprietary rights. Such action on his part would have been contrary to Magna Carta and the subsequent Acts re-affirming Magna Carta referred to in Halsbury's Laws of England, 2nd ed., vol. 6, p. 450. Such powers to be valid would have to be conferred upon the Executive by a valid law of the Commonwealth Parliament. In Burns v. Ransley (1949) 79 CLR, at pp 109, 110 Latham C.J. said that s. 51(xxxix.) of the Constitution authorizes the Commonwealth Parliament "to make laws with respect to matters incidental to the execution of any power vested by the Constitution . . . in the Government of the Commonwealth . . . or in any department or officer of the Commonwealth. Under this provision the Commonwealth Parliament may make laws to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers (see R. v. Kidman (1915) 20 CLR, at p 440)." Most, if not all, of the conduct referred to in the recitals could, I should think, be classed as conduct reasonably capable of obstructing the government in its powers and duties of executing and maintaining the Constitution and the laws of the Commonwealth, so that it would be an exercise of the incidental power to pass laws preventing or prohibiting or regulating such conduct. But the same difficulty again arises as that discussed in dealing with the defence power and the incidental power in relation thereto that ss. 4, 5, 9 and 10 of the Communist Party Dissolution Act do not define the conduct alleged to be prejudicial to the execution or maintenance of the Constitution or the laws of the Commonwealth or the means of combating it. In this respect they differ from the legislation under discussion in Burns v. Ransley [1949] HCA 45; (1949) 79 CLR 101 and R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121 because that legislation defined conduct the prevention of which could be seen to be reasonably incidental to combating obstructions to the execution of powers vested by the Constitution in the Parliament and the Government of the Commonwealth so that the legislation was authorized by the incidental power. All that the sections do is to provide for the winding up of certain bodies, and the forfeiture of their assets to the Commonwealth, and for the deprivation from certain persons of certain contractual rights because Parliament or the Governor-General is satisfied the further existence of those bodies or the activities or likely activities of those persons would be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth. But it is the function of the Court and not of Parliament or the Executive to decide whether the conduct complained of is of such a nature that it could reasonably be capable of interfering prejudicially with the powers and duties of the Executive under s. 61 and therefore be conduct with respect to which Parliament could legislate under s. 51(xxxix.). Accordingly, these sections are not valid exercises of that power in relation to s. 61 of the Constitution. (at p232)

28. From what I have said it naturally follows that, in my opinion, the provisions of the Communist Party Dissolution Act are invalid except possibly so far as a declaration could be made under s. 9 which would be effective with respect to s. 10(1)(a) and (b) of the Act and also s. 14, which provides that an agreement shall not be made by the Commonwealth or by an authority of the Commonwealth with a person in respect of whom a declaration is in force under the Act under which a fee or other

remuneration is payable in respect of the services of that person. Section 9 could only apply even to this limited extent to a person who, in accordance with s. 9(1)(b), is or was at any time after the specified date a communist, because s. 9(1)(a) could have no meaning, since the Act fails to dissolve the Australian Communist Party. The Act purports, as I have said, to rely on the constitutional powers contained in s. 51(vi.) and (xxxix.) and s. 61 of the Constitution, but this would not prevent the Act being valid to the extent to which it could be upheld by any other constitutional power (Moore v. Attorney General of the Irish Free State (1935) AC 484, at p 498). The Commonwealth has full power under the Constitution to determine whom it shall employ and with whom it shall enter into contracts, so that it would seem that the Act may be valid to this extent. But no civil servant employed by the Commonwealth or any authority of the Commonwealth was represented before us and the question of the validity of these provisions should, I think, be reserved. (at p232)

29. I would therefore answer questions 1(a) and (b) in the negative, and question 2 that the whole of the provisions of the Communist Party Dissolution Act are invalid except the sections subject to this reservation. (at p232)

WEBB J. Section 4 of the Communist Party Dissolution Act declares the Australian Communist Party unlawful for the reasons stated by Parliament in the recitals, which link that Party with, among other things, espionage, sabotage and other treasonable activities. Sections 5(2) and 9(2) provide for declarations against bodies of persons, other than registered industrial organizations, whose existence is, and against individuals whose activities are, or are likely to be, shown, to the satisfaction of the Governor-General, to be prejudicial to (1) the security and defence of the Commonwealth; or (2) the execution or maintenance of the Constitution or of the laws of the Commonwealth; and who in effect are bodies dominated by, or are under the influence of the Australian Communist Party, or who are communists, or were such after 10th May 1948. Such declarations are followed by the dissolution (ss. 4 and 6) and the forfeiture of the property of such bodies (s. 15), and, in the case of individuals, by the disqualification from office or employment in the Commonwealth public service, including the defence force, and from office in industrial organizations associated with vital industries, including coal-mining, iron and steel, engineering, building, transport and power (ss. 10 and 14). Section 7 is directed to preventing the activities of the dissolved bodies from being continued by individuals. A declared body or person is given a right to apply to a court to show the section does not apply to it or him (s. 5(4) and s. 9(4)). (at p233)

2. Section 27 indicates that the Act may continue in force when it is required for (1) or (2) above; not because it ceases to be within power, but because of the absence of any further necessity for it in the opinion of the Governor-General. That distinction between the power and the necessity is immaterial in ascertaining the intention of Parliament in s. 27. The conclusion I draw from that section and the recitals is, that if the Act is to have full operation it must be shown to be supported both by the defence power in s. 51(vi.) and by the incidental power in s. 51(xxxix.) of the commonwealth Constitution. If it is valid as an exercise of one power, but not of the other, the question of severability arises. (at p233)

3. It may be that in some circumstances legislation for the execution and maintenance of the Constitution and of the laws of the Commonwealth would be within the defence power, and not within the incidental power; although I find it difficult to see how the power to legislate to protect the Constitution and the laws of the Commonwealth can be greater under the defence power than under the incidental power. What is incidental is a question of degree, which might be greater in war time but is still within the incidental power. A different position would arise if the words in ss. 5(2) and 9(2) "prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth" constituted a single composite expression. If they did either power could support both sections, as the class of conduct would then be so limited as to come within either power. As regards the defence power the requirement that the conduct should

also be prejudicial to the execution or maintenance of the Constitution or of the laws of the Commonwealth would be a mere limitation. So, too, as regards the incidental power, the requirement that the conduct should also be prejudicial to the security and defence of the Commonwealth would be a mere limitation: see Ex parte Walsh and Johnson; In re Yates [1925] HCA 53; (1925) 37 CLR 36 . However, s. 27 shows that there are at least two composite expressions in the words quoted. This was accepted by the defendants. (at p234)

4. Before dealing separately with these two powers I propose to consider three submissions of the plaintiffs: (1) that the Act is an infringement of s. 71 of the Constitution, which section requires the judicial power of the Commonwealth to be exercised only by the courts it specifies, and does not permit of its exercise by Parliament or the Governor-General; (2) that ss. 5(2) and 9(2) purport to give the Governor-General power by his unexaminable satisfaction, to enlarge the limits of the legislative power in s. 51(vi.) and s. 51(xxxix.), and so are invalid; and (3) that the Act infringes s. 92 of the Commonwealth Constitution, and is invalid. (at p234)

5. I do not think that the Communist Party Dissolution Act is, or provides for, an exercise of the judicial power contrary to s. 71 of the Commonwealth Constitution. The parts of the Act which the plaintiffs submit constitute an infringement of s. 71 are the recitals, the declaration that the Australian Communist Party is unlawful and the provision for declarations in the case of certain other bodies, corporate and unincorporate, and individuals, the dissolution of such party and bodies and the appointment of receivers and forfeiture of their property, and the permanent disqualification of declared persons from Commonwealth offices and employment and from holding office in industrial organizations associated with vital industries. With the exception of the recitals and disqualifications of individuals, these provisions were included in the National Security (Subversive Associations) Regulations, which this Court dealt with in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth (1943) 67 CLR 166 . In that case Latham C.J. (1943) 67 CLR, at p 138 , Starke J. (1943) 67 CLR, at p 155 and McTiernan J. (1943) 67 CLR, at p 157 held that s. 71 was not infringed by those regulations. Williams J., with whom Rich J. (1943) 67 CLR, at p 150 said he was disposed to agree, thought that certain provisions of the regulations which, however, are not repeated in the Communist Party Dissolution Act, infringed s. 71. As already stated, there were no recitals to those regulations or disqualifications of persons similar to the recitals to, and disqualifications provided for in this Act: but I do not think that that is a material difference, as I am not prepared to hold that the recitals to this Act are actually an indictment, or a series of charges, and findings of fact, and reveal the attempted exercise of judicial power by Parliament; or that the disqualifications reveal any exercise of judicial power, if without them there is no such indication. There is nothing in the form of the recitals which suggests that they are anything more than Parliament's reasons for the enactment. That is the usual purpose of recitals, and we are not warranted in gratuitously treating them as an indictment and findings, so as to bring about the invalidity of the Act, or part of it, as being an infringement of s. 71 of the Constitution. (at p235)

6. Nor do I think that the Act, or part of it, is invalid as purporting to confer on the Governor-General an unexaminable, and so uncontrollable, discretion to extend the limits of the legislative powers of the Commonwealth, more particularly by s. 5(2) and s. 9(2). (at p235)

7. Section 5(2) provides:- "Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association." (at p235)

8. Section 9(2) provides:- "Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to

the security and defence of the Commonwealth, or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, make a declaration accordingly." (at p235)

9. In each of these sub-sections the Governor-General has to be satisfied that the continued existence of the body is, or the activities of the person are, or are likely to be, prejudicial in the way indicated. If the powers of the Federal Parliament were unlimited this satisfaction would, I think, be unexaminable. I draw that conclusion from the reasoning of their Lordships, including Lord Atkin, in Liversidge v. Anderson [1941] UKHL 1; (1942) AC 206 . It is not necessary for the plaintiffs to rely, as they do, on any approval of the dissenting speech of Lord Atkin that may appear in the judgment of Lord Radcliffe for the Privy Council in Nakkudda Ali v. Jayaratne (1951) AC 66 . But, as the powers of the Federal Parliament are limited, to make the Governor-General's satisfaction unexaminable as to whether such existence is, or such activities are, or are likely to be, prejudicial in the way indicated would purport to place him in the position of being able to exceed, without check, the limits of the powers of Parliament. Such legislation would be invalid. See In re Walsh and Johnson; Ex parte Yates [1925] HCA 53; (1925) 37 CLR 36 . In that case, however, the words in s. 8AA(2) of the Immigration Act, "any person not born in Australia", were held by the whole Court to be confined to immigrants. For this construction Isaacs J. (1925) 37 CLR, at p 93 relied on the maxim ut res magis valeat quam pereat and on Macleod v. Attorney-General (1891) AC 455 . But his Honour (1925) 37 CLR, at pp 96, 97 also applied that maxim and decision to the part of s. 8AA(2), which would make it an attempt to enlarge the constitutional area of the subject matter, i.e., the trade and commerce power in s. 51(i.) of the Constitution; although a majority of the Court appear to me to have thought that that part of s. 8AA was invalid, except under the immigration power, because the Minister's opinion was made unexaminable. (at p236)

10. However, in Reid v. Sinderberry [1944] HCA 15; (1944) 68 CLR 504 this Court had to consider s. 13A of the National Security Act 1939-1943. Section 13A provided that:- ". . . the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth, as appears to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth . . . or the efficient prosecution of any war in which His Majesty is or may be engaged." (at p236)

11. In a joint judgment Latham C.J. and McTiernan J. said:- "It is not necessary to construe the section as intended to provide that the opinion of the Governor-General should be made a criterion of constitutional validity. Regulations made under s. 13A cannot be valid unless they appear in the opinion of the Governor-General to be necessary or expedient for what may be described as purposes of defence. But the fact that the Governor-General has such an opinion still leaves open all questions of constitutional validity. A regulation, though complying in terms with the section as being necessary for defence purposes, in the opinion of the Governor-General, could nevertheless not be held to be valid if it was shown that the Governor-General could not reasonably be of opinion that the regulation was necessary or expedient for such purposes. It was not the intention of Parliament when it enacted s. 13A to authorize the making of regulations upon the basis of an opinion which no reasonable man could hold." (1944) 68 CLR, at p 512 . (at p237)

12. Williams J., with whom Rich J. agreed, had no doubt that s. 13A was valid. The validity of the regulations - and necessarily of s. 13A - was unanimously upheld by the Court consisting of five Justices. (at p237)

13. In Stenhouse v. Coleman [1944] HCA 36; (1944) 69 CLR 457 the Court consisting of five Justices unanimously upheld a Minister's order under reg. 59 of the National Security (General) Regulations made under s. 5 of the National Security Act 1939-1943. Section 5 provided:- "The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth . . . and for

prescribing all matters which . . . are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged." (at p237)

14. Regulation 59 provided:- " (1944) 68 CLR, at p 512 A Minister, so far as appears to him to be necessary in the interests of the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide - (a) for regulating, restricting or prohibiting the production, . . . movement . . . distribution, sale, purchase . . . of essential articles" ("essential articles" was defined as meaning: "appearing to a Minister to be essential for the defence of the Commonwealth or the efficient prosecution of the war, or to be essential to the life of the community"). (at p237)

15. An order by the Minister under this regulation requiring bakers and others to be licensed was held valid. (at p237)

16. Latham C.J. said (1944) 69 CLR, at p 463 :- "An identical argument was considered by this Court in Reid v. Sinderberry [1944] HCA 15; (1944) 68 CLR 504 . There the Court considered s. 13A. . . . It was argued that this section was invalid because it purported to authorize the making of regulations which, though in the opinion of the Governor-General might be necessary for the purposes stated, yet were not in fact necessary for those purposes. My brother McTiernan J. and I . . . pointed out that the power of the Commonwealth Parliament in relation to defence was a power to make laws with respect to naval and military defence, and not a power to make laws with respect to any matter which in the opinion of a Parliament or of an authority to which Parliament might confide a power of subordinate legislation was naval or military defence. But we proceeded to say that the section should not be construed as intended to provide that the opinion of the Governor-General should be made a criterion of constitutional validity. . . ." (at p238)

17. Dixon J., who was not a member of the Court in Reid v. Sinderberry [1944] HCA 15; (1944) 68 CLR 504 , referring to s. 13A, said:- "But that is an enactment made under the constitutional power with respect to defence and cannot extend the power or affect the criteria or the materials that must be used in judging whether a regulation made by the Governor-General in Council falls outside the ambit of the constitutional power itself" (1944) 69 CLR, at p 470 . (at p238)

18. It follows, I think, that if s. 13A was not invalid because of the scope it gave to the opinion of the Governor-General, s. 5(2) and s. 9(2) are not invalid because of the scope they give to the Governor-General's satisfaction. If the Governor-General's opinion was examinable for power under s. 13A his satisfaction is examinable for power under s. 5(2) and s. 9(2). (at p238)

19. It is true that the Governor-General has to be satisfied of two things: (1) that the particular body or person is within s. 5(1) or s. 9(1), as the case may be; and (1944) 69 CLR, at p 470 that the existence of the body is, or that the activities of the person are, or are likely to be, prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or laws of the Commonwealth. It is also true that the right to apply to a court is given as to (1), while the Act is silent as to (1944) 69 CLR, at p 470 . However, as the decision of the Governor-General is always examinable for constitutional power, as Parliament knows, an express provision in the Act is not required for that purpose; and so, I think, no implication arises from the apparently limited right to apply to a court given by s. 5(4) and s. 9(4) that excludes the application of any doctrine or rule of construction intended to sustain the constitutionality of statutes of legislatures with limited powers. Really the right to apply to a court is intended to liberalize the statute, i.e., to give such right when the declaration is within power. This does not, I think, render it more vulnerable to attack on constitutional grounds. (at p238)

20. It may be thought that there are not only two but three matters on which the Governor-General

must be satisfied in the case of persons under s. 9, the further matter being that the person is engaged, or likely to be engaged, in certain activities, apart from their prejudicial character; but that would be, I think, a refinement having no effect on the inference to be drawn from the omission of this additional matter as a subject of a right to apply to a court. It would be like drawing a distinction between an offence and the acts which constitute it, and making them separate issues. In any event it would not apply to bodies under s. 5: a right to apply to a court on the question whether the applicant existed would be a quaint provision. (at p239)

21. In the Jehovah's Witnesses Case (1943) 67 CLR, at p 152 Starke J. thought that a regulation declaring unlawful any body, corporate or unincorporate, the existence of which the Governor-General declared to be in his opinion prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, standing alone, was not invalid. (at p239)

22. In Ex parte Walsh (1942) ALR 359 this Court, consisting of five Justices, in refusing special leave to appeal, unanimously treated reg. 26(1) of the National Security (General) Regulations as valid. (at p239)

23. Regulation 26 reads:- "The Minister may if satisfied with respect to any particular person that with a view to prevent that person acting in any manner prejudicial to the safety or the defence of the Commonwealth it is necessary to do so make an order (c) directing that he be detained in such place and under such circumstances as the Minister from time to time determines and any persons shall while detained, . . . be deemed to be in legal custody". (at p239)

24. In that case the Court applied Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 , where, however, the regulation provided: "Where the Minister has reason to believe that any naturalized person is disaffected or disloyal he may . . . order him to be detained . . . ". (at p239)

25. It will be observed that this regulation did not give the Minister power to explore and determine the limits of the defence power: disaffected and disloyal naturalized persons were clearly within the power. But the fact remains that reg. 26(1) was unanimously treated as valid. (at p239)

26. Ex parte walsh (1942) ALR 359 , the Jehovah's Witnesses Case [1943] HCA 12; (1943) 67 CLR 116 , Reid v. Sinderberry [1944] HCA 15; (1944) 68 CLR 504 and Stenhouse v. Coleman [1944] HCA 36; (1944) 69 CLR 457 were decided in war time. But a state of war does not enable the limits of the defence power itself to be extended by Parliament or its delegate. War does not change the meaning of words or the rules of construction. In my opinion, although the content of the defence power increases in war time according to the needs of the situation, there is no alteration by war of the concept of the power. (at p239)

27. In none of the four last-mentioned cases did their Honours find it necessary to state their reasons for what appears to me to have been a rejection of the views of the majority in Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 . I respectfully suggest that their Honours impliedly adopted the reasoning of Isaacs J. in that case, and applied the maxim ut res magis valeat quam pereat and Macleod v. Attorney-General (1891) AC 455 . But, whatever may have been their Honours' reasons, I intend to follow these four decisions as I understand them. (at p240)

28. Then as to s. 92: it affords protection to industrial organizations and their officials and employees; but it cannot prevent the operation of the defence power or the incidental power under s. 51, for the same reasons that it cannot prevent the operation of the Crimes Act. The effect on inter-State trade, commerce or intercourse of laws made under the defence power or the incidental power is remote. Such laws do not regulate or prohibit inter-State trade, commerce or intercourse contrary to s. 92. They are not laws about inter-State movements or operations. The Banks Case [1949] HCA 47; (1950)

AC 235; 79 CLR 497 is distinguishable. (at p240)

29. Dealing next with the defence power: the dissolution of bodies corporate and unincorporate, and the forfeiture of their property, are, the plaintiffs submit, such extreme measures as to be unrelated to the defence power and invalid in the absence of proof, or of judicial notice, of the matters in the recitals involving the Australian Communist Party. If Parliament had made offences of the things it seeks to prevent by this Act the extreme nature of any penalty it might have attached to those offences would not have been a ground for holding that the creation of the offences was beyond power; but that, I suggest, would be because legal punishment is retributive as well as deterrent. If this Act is to be held valid it is because it is only preventive. If the measures taken by this Act were punitive they would call for the exercises of judicial power. (at p240)

30. In the Jehovah's Witnesses Case [1943] HCA 12; (1943) 67 CLR 116 a majority of the Court held that certain regulations made under the National Security Act were beyond the defence power and invalid because they were, in their Honours' opinion, of such an extreme nature as to be unrelated to the power: they did not have a real connection with defence. The test of validity of Federal legislation is, I think, its real connection with the power of Parliament to legislate. See Victoria v. The Commonwealth (1942) 66 CLR, at p 508 , per Latham C.J. (at p240)

31. In the Jehovah's Witnesses Case, Starke J. said:- "Any body in respect of which a declaration is made is, by force of the declaration, dissolved. A regulation providing for the precautionary detention of individuals has been upheld under provisions such as in the National Security Act. . . . And, so I apprehend, could regulations controlling the activities or operations of any body mentioned in the Subversive Associations Regulations, as was done in the case of enemy subjects by the Trading with the Enemy Act. . . . But here are regulations of a temporary character which dissolve the body and wind it up. . . . And any property . . . is forfeited to the King. . . . It is not a precautionary detention of property, but a forfeiture of property to the Crown, though no offence is created. . . . A regulation might be legitimate if merely precautionary, but the operation of the Regulations . . . is to forfeit property to the Crown, even though the property be not that of the declared body but only used on behalf of or in its interests . . . Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the executive Government. The operative clauses . . . such as the provision relating to . . . forfeitures . . . have little, if any, real connection with the defence of the Commonwealth" (1943) 67 CLR, at pp 152-154 . Williams J. said: " . . . the mere fact that the corporation or individual or body of individuals is carrying on some activity, which in the opinion of Parliament or of some Minister is prejudicial to the defence of the Commonwealth, cannot, in my opinion, conceivably require that the Commonwealth should enact that the property of such corporation or individual or body should be forfeited to the Crown and the rights of all corporators and creditors . . . destroyed" (1943) 67 CLR, at p 163 . (at p241)

32. Rich J. said he was disposed to agree with the views of Williams J. Starke and Williams JJ. did not rely merely on the dissolution of bodies corporate and unincorporate, and on the forfeiture of their property: they relied also on the disregard of the rights of creditors and others. But I think it is fair to conclude from their reasoning that they would still have held the regulation bad even if the dissolutions and forfeitures had been prescribed without prejudice to the rights of creditors and other third parties. Their Honours contrasted the temporary war situation with the permanent consequences attached to the prejudicial conduct. This was, I think, the main line of their Honours' reasoning, and the real ground of their decision. (at p241)

33. Without the assistance of their Honours' judgments I would, I think, have come to a different conclusion on the ground that, once conduct comes within the defence power, Parliament is at liberty to attach to it whatever consequences it sees fit. In attaching extremely severe consequences Parliament might be guilty of an abuse of power. But the courts are not at liberty to forestall abuses of

power by holding the legislation invalid. They can interfere only to prevent a usurpation of power. However, in this matter of reconciling defence requirements with the rights and liberties of individuals, I am satisfied to act upon the reasons shared by a majority of this Court in a relevant case, as I understand those reasons. Moreover, those reasons prevent a conclusion that mere suspects can lawfully be liquidated and their property confiscated. Further, I respectfully suggest that one should hesitate long before rejecting the reasoning of a majority for a decision of this Court in a case in point. That would be warranted if he were one of a majority holding the view that such reasoning was unsound; but there is, as far as I am aware, no such majority in this case. (at p242)

34. If, then, the Communist Party Dissolution Act can be connected only with a temporary situation, I think that the Jehovah's Witnesses Case [1943] HCA 12; (1943) 67 CLR 116 shows that ss. 4, 5, 6, 9, 10, 11 and 15, and indeed the rest of the Act, are beyond power and invalid. But if it can be connected with a more or less permanent state of things, then I see no reason why permanent consequences cannot validly be attached to the prejudicial conduct with which it deals, without recourse to punishment and the judicial power. If the Australian Communist Party can be shown to be what the recitals say it is, then it is an evil which constantly threatens, in peace as well as in war, the security and defence of the Commonwealth, as well as the maintenance and execution of the Constitution and of the laws of the Commonwealth; and so it can validly be declared unlawful and dissolved and its property can validly be forfeited to the Commonwealth. (at p242)

35. In Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 the deportation of an immigrant, even of a British subject, was held to be within the immigration power. That was because Parliament had plenary power to deal with immigration. It was also held that deportation was a preventive measure, and not punitive. But the defence power is also plenary. Moreover, the dissolution of bodies, whether corporate or unincorporate, and even the forfeiture of their property, are mild steps as compared with deportation. Dissolution of a subversive body is an effective means of preventing meetings of the body, and the forfeiture of its property prevents the property from being used by the body for subversive purposes. (at p243)

36. Subject to what I have to say later about s. 4 and ss. 5 and 9, I think the Communist Party Dissolution Act can validly be enacted in peace time. In peace time it is lawful to have a defence establishment and to take steps to protect it against spies, saboteurs, fifth columnists and the like. In other words, it is lawful to prepare for war, and the extent to which such preparations should be made is a matter of policy depending upon the judgment of Parliament on the information it has from time to time. A court is not at liberty, and is not in any case qualified, to revise that judgment of Parliament, which probably would be made, and properly so, on materials not admissible in evidence. And it is open to Parliament to legislate to prevent interference with those preparations by spies, saboteurs, fifth columnists and the like. The greater the preparations the more active are such persons likely to become. Parliament is not obliged to rely solely on the Crimes Act in dealing with them. It could, I think, legislate for the deportation of a spy, a saboteur, or a fifth columnist as a preventive step: see Ex parte Walsh and Johnson [1925] HCA 53; (1925) 37 CLR 36 , per Isaacs J. (1925) 37 CLR, at p 97 , and per Starke J. (1925) 37 CLR, at pp 132, 133 . As an immigrant is at all times within the immigration power, so too is a spy, saboteur, or fifth columnist within the defence power at all times, even if he is a British subject. (at p243)

37. I have already held that the satisfaction of the Governor-General under ss. 5(2) and 9(2) is examinable to see whether in the particular case there is a real connection with the power. The action of Parliament already taken in s. 4 against the Australian Communist Party is also examinable for power, and must be shown to have such real connection if it is to be held valid. Parliament having already acted in s. 4, it is for the Court now to see whether s. 4 has a real connection with the defence power. (at p243)

38. Section 4 declares the Australian Communist Party unlawful, dissolves it and appoints a receiver of its property, with the consequence that the property is forfeited to the Commonwealth by s. 15. The reason for this action appears in the recitals; but the recitals alone do not establish a real connection with the power, although they give the reasons of Parliament for the legislation, and the Court must take these to be the true reasons. In a statute of a parliament of unlimited powers recitals are also prima-facie evidence. (Craies on Statute Law, 4th ed. (1936), p. 39, and Maxwell on The Interpretation of Statutes, 7th ed. (1929), p. 269.) And I think they are prima-facie evidence in a statute of a parliament of limited powers where the statute deals with a matter within power. But the onus of proving that a statute of the Commonwealth Parliament, being a parliament of limited powers, is within power is on those who affirm its validity, where, as here, the Parliament assumes to exercise what are ordinarily State powers, i.e., the dissolution of a body and the forfeiture of its property, not being a corporation created by or under a statute of the Parliament (Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. (1914) AC, at p 255; 17 CLR, at p 653). This burden of proof of constitutionality cannot be shifted by resorting to recitals: by putting the evidence and argument in recitals instead of to the courts. It is for the courts to examine and determine the question of constitutionality when that is challenged and for those who affirm constitutionality to prove it in the ordinary way. (at p244)

39. I am not prepared to hold that the statements in the recitals involving the Australian Communist Party are notoriously true and judicially noticed. It is, I think, incontestable that when this Act was passed war among the Great Powers, with the Union of Socialist Soviet Republics on one side and the United Kingdom and the United States on the other side, was a distinct possibility within a few years; and, further, that if it occurred it was not unlikely that Australia would become a belligerent on the side of the United Kingdom. It is also incontestable that communists generally were suspected by a large section of the community of the things imputed in the recitals to the Australian Communist Party. Such being the case it would have been reasonable that Australia should prepare for war on a vast scale, and take all precautions to protect those preparations, by legislation and otherwise, against espionage, sabotage and fifth-column and such like activities. The defence power, being plenary, authorizes measures of prevention as well as of punishment; of prevention in the case of bodies and persons suspected of subversive conduct, and of prevention and punishment in the case of those proved to be so. In the recitals, however, no reference is made to the possibility of war; nor is there any such reference in the enacting part of the Act. But that does not prevent this Court, in determining whether the Act is valid, from paying regard to a public situation or emergency, so far as it is judicially noticed, and its effect on the contents of the defence power. However, the possibility or probability of war among the Great Powers, involving Australia as a belligerent, is not a more or less permanent state of affairs calling for action having permanent consequences against mere suspects, such as dissolutions and forfeitures, and disqualifications from office in industrial organizations. Disqualification for the Federal public service and defence force is a matter within power in any circumstances. (at p245)

40. As I understand that the defendants do not intend to offer evidence to support s. 4, I hold it is invalid, and so the question of severability arises, unless that intention is changed. (at p245)

41. Section 15A of the Acts Interpretation Act 1901-1948 provides that: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." (at p245)

42. Before the enactment of s. 15A, if part of a statute was found to be outside power the whole Act would be invalid, if different consequences from what the legislature intended would result to persons and things affected by the part within power (see Vacuum Oil Co. Pty. Ltd. v. Queensland (No. 2)

[1935] HCA 9; (1935) 51 CLR 677, at p 692 per Dixon J.). It might appear that s. 15A means that the intention of Parliament as to such persons and things is to be disregarded if, nevertheless, the power exists to pass the enactment so far as it affects such persons and things: that the question is to be decided as one of power and not of the intention of Parliament. Of course, Parliament could not require the Court to become its draftsman and reframe the statute; but that is not involved if, when the section beyond power is eliminated, the remaining sections do not require redrafting to be made intelligible. Now if s. 4 is struck out as invalid the remaining sections are intelligible as they stand. But, before coming to any conclusion from this, it is desirable to consider the views expressed in judgments of this Court as to the effect of s. 15A. (at p245)

43. In Bank of New South Wales v. The Commonwealth (1948) 76 CLR, at p 371 Dixon J. said:- "The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail. To displace the application of this new presumption to any given situation arising under the statute by reason of the invalidation of part, it must sufficiently appear that the invalid provision forms part of an inseparable context. The general provision contained in s. 15A . . . produces this effect. . . . But in applying s. 15A . . . the courts have insisted that a provision, though in itself unobjectionable constitutionally, must share the fate of so much of the statute . . . as is found to be invalid, once it appears that the rejection of the invalid part would mean that the otherwise unobjectionable provision would operate differently upon the persons, matters or things falling under it or in some other way would produce a different result. This consideration supplies a strong logical ground for holding provisions to be inseverable. . . . For the inference in such a case is strong that provisions so associated form an entire law and that no legislative intention existed that anything less should operate as a law. Further, where severance would produce a result upon the persons and matters affected different from that which the entire enactment would have produced upon them, had it been valid, it might be said with justice that unless the legislature had specifically assented to that result, contingently on the failure of its primary intent, it could not amount to a law." (at p246)

44. It is remarkable if the Australian Communist Party is what the recitals say it is and yet remains free to continue its traitorous activities, whilst bodies dominated or influenced by it are declared unlawful and dissolved and their property forfeited, and individuals are declared subversive and disqualified for office or employment in the Commonwealth public service and the defence force, and for office in industrial organizations in vital industries. Yet that follows if s. 4 is invalid and ss. 5 and 9 are not invalid. But the Act without s. 4 does not increase the liabilities of, or the consequences to, bodies or persons coming within other sections. They are exposed to no greater risk of action or to more serious consequences. (at p246)

45. However, there is a further test suggested by Dixon J. in Vacuum Oil Co. Pty. Ltd. v. Queensland (No. 2) (1935) 51 CLR, at p 692 , i.e., did uniformity of treatment enter into the determination of the legislative will? The answer is, I think, that there is no principle of construction favouring uniformity of treatment among spies, saboteurs, fifth columnists or subversive or traitorous persons. (at p246)

46. I think the decisions on s. 15A, more particularly the two judgments referred to, though helpful, do not dispose of the problem, which is sui generis, due to the fact that Parliament has taken the unusual course of dealing directly with the Australian Com munist Party. Parliament being in possession of information concerning the Party, as the recitals indicate, the Act may, perhaps, be regarded as providing merely for a division of responsibility between Parliament and the Governor-General, in which no legislative intention can be found inconsistent with that expressed in s. 15A. But it may also be taken to reveal that so determined was Parliament that the Australian Communist Party should be destroyed that it took the unusual course of itself declaring it unlawful, dissolving it and forfeiting its property; that it went to the source of the evil to eradicate it as an essential step in coping with the

situation, leaving to the Governor-General the task of dealing with contaminated bodies and individuals. And if the destruction of the Party was regarded by Parliament as essential it is impossible to impute to Parliament the intention that, even if the Party should survive, its satellites should succumb. However, when Parliament, believing it is dealing with an evil, seeks to eradicate it, a court should be slow to attribute to Parliament the intention, in the absence of a clear indication to the contrary, that if its action against the evil fails in part it should wholly fail. Nevertheless, having regard to the Act as a whole, and more particularly to the recitals and to the fact that s. 5(2) and s. 9(2) are based on the assumption, express in the latter sub-section, and implied in the former, that the Australian Communist Party has been dissolved, I am unable to resist the conclusion that the dissolution of the Party was thought by Parliament to be essential, and such dissolution being of the essence of the scheme, that the operation of s. 15A is excluded. (at p247)

47. It becomes unnecessary for me to deal further with the incidental power or with other matters argued but not dealt with above. However, I desire to state three propositions, based mainly on the plenary nature of the defence power, which, in my opinion, are incontestable: (1) that the purpose of Parliament may be expressed in a recital or preamble, as well as in the enacting part of a statute; (2) that in a preventive as distinct from a punitive statute a rule of conduct is not required (Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 and Ex parte Walsh (1942) ALR 359); (2) that Parliament, as well as its delegate, may deal with a particular case, subject to the examination by the courts of the facts of the case for constitutional power; otherwise Parliament would have less power than its delegate. (at p247)

48. By enacting a general statute, whilst having in mind the activities of the Australian Communist Party in particular, the Parliament might have empowered the Governor-General to deal with the Party among others, and in so doing ensured that any contest as to constitutional power would not be on the Act itself but on the action of the Governor-General under the Act. That, however, would have been a matter of choice and not of necessity. (at p248)

49. I think the questions stated by Dixon J. should be answered:- (at p248)

50. Question 1(a). The decision of the question of the validity or invalidity of s. 4 of the Act depends upon a judicial determination or ascertainment of the facts without any limitation by the recitals. (at p248)

51. Question 1(b). The plaintiffs are entitled to adduce evidence to establish that s. 4 is outside the legislative power of the Commonwealth. (at p248)

52. Question 2. In the absence of evidence by the defendants in support of s. 4 the whole Act is invalid. (at p248)

FULLAGAR J. The Communist Party Dissolution Act 1950 received the Royal Assent on 20th October 1950. Immediately after its enactment a number of actions were commenced in this Court by persons and bodies of persons affected by its provisions. The object of the actions is to obtain declarations that the Act is invalid and injunctions to prevent action being taken under it to the prejudice of the plaintiffs. Applications for interlocutory injunctions came on for hearing before Dixon J., who granted certain injunctions and refused others, and stated a case for the opinion of the Full Court on certain questions, the answers to which may or may not finally dispose of the actions. The Act contains a preamble consisting of nine "recitals", as they have been called. The plaintiffs deny the truth or accuracy of what is stated in a number of these recitals. They submit that the Act is invalid irrespective of the truth or accuracy of any of the recitals, but they maintain, alternatively, that its validity can only be supported on the footing that statements of fact contained in the recitals are true, and on this basis they desire to call evidence with a view to establishing that those statements are

untrue or inaccurate. The questions stated for the opinion of the Full Court are -
"1(a) Does the decision of the question of the validity or invalidity of the provisions of the Communist Party Dissolution Act 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and (b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth?
2. If no to either part of question 1, are the provisions of the Communist Party Dissolution Act invalid either in whole or in some part affecting the plaintiffs?" (at p249)

2. Before considering any of these questions, or even the proper approach to them, it is necessary to obtain a clear view of the substance of the provisions of the Act. Those provisions fall into three groups. (at p249)

3. The central section of the first group is s. 4, which deals directly with the Australian Communist Party. The Australian Communist Party is defined by s. 3 as meaning the organization having that name on the specified date, which is 10th May 1948, "being the last day of the National Congress of the Australian Communist Party by which the constitution of the Australian Communist Party was adopted". Section 4 declares that the Australian Communist Party is an unlawful association and is by force of the Act itself dissolved. A receiver is to be appointed by the Governor-General and all the property of the Australian Communist Party is vested in the receiver so appointed. The powers and duties of the receiver are prescribed by s. 15, and a number of sections follow, which contain ancillary provisions dealing with his position. His primary duty is to take possession of the property of the Party, to realize that property, to discharge the liabilities of the Party, and to pay or transfer the surplus to the Commonwealth. Section 7(1) prohibits, under penalty of imprisonment, the doing of a number of specified acts by way of adherence to, or in support of, the Australian Communist Party. (at p249)

4. The central section of the second group of provisions is s. 5. The terms of this section are elaborate. It is enough to say that it does not apply to any industrial organization registered under Commonwealth or State law, but does apply to all other bodies of persons corporate or unincorporate which (to put it extremely shortly and without any pretence to accuracy) are dominated by communists or by communist doctrine. Sub-section (2) provides that where the Governor-General is satisfied that a body of persons is a body of persons to which s. 5 applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association. The Executive Council is not to advise the Governor-General to make a declaration unless the material upon which the advice is founded has first been considered by a committee consisting of certain designated persons. There is provision for an application to a court to set aside the declaration on the ground that the body is not a body to which s. 5 applies, but not on the ground that the continued existence of the body would be prejudicial to the matters mentioned in sub-s. (2). There is provision for the suspension of the consequences of the declaration pending the determination of the application. Section 6 provides that the effect of the declaration is to dissolve the body. Section 8 provides that the instrument making the declaration is to appoint a receiver of the property of the body, in whom the property of the body is to vest. Thereupon s. 15 and the other sections relating to receivers (to which I have already referred in connection with the first group of provisions) come into operation. Section 7, to which I have also already referred, also comes into operation in relation to the declared and dissolved body. (at p250)

5. The centre of the third group of sections is s. 9. This section deals with individual persons, whereas s. 5 deals with bodies of persons. Section 9 applies to any person who was, after 10th May 1948 and before the dissolution of the Party by the Act, a member or officer of the Australian Communist Party

or who is or was at any time after the specified date a communist. Sub-section (2) provides that where the Governor-General is satisfied that a person is a person to whom s. 9 applies and that that person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, make a declaration accordingly. The Executive Council is not to advise the Governor-General to make a declaration unless the material upon which the advice is founded has first been considered by a committee consisting of the same persons as are designated in s. 5. Again, there is provision for an application to a court to set aside the declaration on the ground that the applicant is not a person to whom s. 9 applies, but not on the ground that he is not a person engaged or likely to engage in activities prejudicial to defence or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. There is also again provision for the suspension of the consequences of the declaration pending the determination of the application. Sections 10 and 14 provide for the consequences of the declaration. Section 10 provides that a declared person shall be incapable of holding office under or of being employed by the Commonwealth or an authority of the Commonwealth or of holding office as a member of an incorporated authority of the Commonwealth. He is also to be incapable of holding office in an industrial organization (whether registered under Commonwealth or State law or not) to which s. 10 applies. Section 10 applies to industrial organizations declared by the Governor-General to be industrial organizations to which the section applies, and the Governor-General may make such a declaration in any case where he is satisfied that a substantial number of members of the organization are engaged in one of a number of industries specified as vital industries or in any other industry which, in the opinion of the Governor-General, is vital to the security and defence of Australia. Sections 11 and 12 contain ancillary provisions in connection with the vacating of offices in cases to which s. 10 applies. Section 14 provides that no contract or agreement shall be made by the Commonwealth or by an authority of the Commonwealth with a person, in respect of whom a declaration under s. 9 is in force, under which a fee or other remuneration is payable in respect of the services of that person. (at p251)

6. The provisions of s. 27 should be noted in conclusion. Section 27 provides that where the Governor-General is satisfied that the continuance in operation of the Act is no longer necessary either for the security and defence of Australia or for the execution and maintenance of the Constitution and of the laws of the Commonwealth, the Governor-General shall make a proclamation accordingly and thereupon the Act shall be deemed to have been repealed. There is an obvious ambiguity about this provision, but I should think it reasonably clear that what it really means is that the proclamation is to be made if, but not unless, the Governor-General is satisfied that neither the security and defence of Australia nor the execution and maintenance of the Constitution and of the laws of the Commonwealth require the continuance in operation of the Act. (at p251)

7. The above brief analysis of the operative part of the Act discloses that there is a difference (which may turn out to be radical or may turn out to be of no substantial importance) between the first group of provisions on the one hand and the second and third groups on the other hand. Section 5 (2) and s. 9 (2), which are the respective keystones of the second and third groups, seem to invoke in terms two undoubted powers of the Parliament. There is a direct reference to the power given by s. 51 (vi.) of the Constitution to make laws with respect to defence, and there is a less direct reference to the power given by s. 51 (xxxix.) to make laws with respect to matters incidental to the execution of the powers vested by the Constitution in the Government of the Commonwealth. With regard to s. 4, however, which is the keystone of the first group, it seems quite clear that, if it be regarded in vacuo and without reference to extrinsic facts, it cannot be supported as an exercise of any power conferred by the Constitution on the Parliament. It is not possible by means of anything that appears on its face to relate it to any subject matter which is not left by the Constitution exclusively within the legislative powers of the States. In the argument before us much more time and attention were devoted to the

second and third groups than to the first group. But both the long title and the short title of the Act, the preamble and the place of s. 4 in the forefront, show that the whole Act is directed primarily at the Australian Communist Party and communists, and one's first impression of the Act is that the fate of s. 4 is likely to seal, for weal or woe, the fate of the second and third groups of provisions. (at p252)

8. The obvious need of s. 4 of legs upon which to walk, and the possible similar need of s. 5 (2) and s. 9 (2), did not, of course, go unnoticed by those who framed the Act, and it is the obvious purpose of the preamble, to which I have referred in passing, to supply the legs. The preamble, as I have said, contains nine "recitals". These fall into three classes. The first three recitals constitute the first class. They refer to the legislative powers of the Parliament. They recite (1) the legislative power given to the Parliament by s. 51 (vi.), the "defence power", (2) the conferring of executive power in the terms of s. 61, and (3) the conferring of the "incidental" legislative power in the terms of s. 51 (xxxix.) so far as it relates to the execution of powers vested by the Constitution in the Parliament of the Commonwealth or in the Government of the Commonwealth. The next five assert certain doctrines, aims and activities as doctrines, aims and activities of the Australian Communist Party and communists. The ninth and last purports to relate the enactment to the powers invoked by virtue of what is asserted in the fourth, fifth, sixth, seventh and eighth recitals. The aims and activities asserted in those recitals include the overthrow of established government in Australia by means of force, violence, intimidation and fraudulent practices, espionage and sabotage, and deliberate dislocation, disruption and reduction and retardation of production in industries vital to the security and defence of Australia. That such activities could be the subject of valid Commonwealth laws could, one would think, not be doubted. Some of them are indeed dealt with in Part IIA of the Crimes Act 1914-1946. But the great difficulty of the present case lies in the fact that the Act in question does not set out to deal with those activities as such. It has an actual direct operation upon a particular association of persons specified by name, and a potential direct operation upon other associations and individuals who become subject to it by virtue of an expression of opinion by the Governor-General. (at p253)

9. I think that the questions in the case are best approached by a general consideration of the powers invoked. It will be convenient to take the defence power first, because it has been much explored in recent years, and it possesses, I think, certain features which differentiate it from all or most of the other legislative powers. (at p253)

10. In the first place, the power given by s. 51(vi.) of the Constitution is given by reference to the purpose or object of the law and not by reference to some concrete subject matter. Perhaps the best-known statement to this effect is to be found in the judgment of Dixon J. in Stenhouse v. Coleman (1944) 69 CLR, at p 471 , where his Honour said that the power given by s. 51(vi.) "involves the notion of purpose or object". He said that the connection of any law with defence "can scarcely be other than purposive, if it is within the power". He added: "No doubt it is possible that the 'purpose' here may be another example of what Lord Sumner described as 'one of those so-called intentions which the law imputes: it is the legal construction put on something done in fact' (Commissioners of Inland Revenue v. Blott (1921) 2 AC 171, at p 218). For apparently the purpose must be collected from the instrument in question, the facts to which it applies, and the circumstances which called it forth." Here the obvious purpose of the preamble is to put forward facts to which the power applies and circumstances which call it forth. Whether it can achieve this purpose remains to be seen. (at p253)

11. In the second place, and perhaps partly because of its "purposive" character, the power given by s. 51(vi.) has two aspects. The tendency of the decisions of this Court, given in the course of two great wars and during the aftermath of each, has been to hold up the two aspects in sharp contrast one to another, and the dividing line between them has hitherto been regarded as sharp and clear - perhaps as sharper and clearer than it will ultimately be found to be. In its first aspect, s. 51(vi.) authorizes the making of laws which have, as their direct and immediate object, the naval and military defence of the

Commonwealth and of the several States. This power is clearly not confined to time of war: see, e.g., Farey v. Burvett (1916) 21 CLR, at p 453 , per Isaacs J.; Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth (1943) 67 CLR, at pp 132, 133 , per Latham C.J.; Hume v. Higgins (1949) 78 CLR, at pp 133, 134 , per Dixon J.; and cf. the reference by Williams J. in Koon Wing Lau v. Calwell (1949) 80 CLR, at p 585 to matters "which could reasonably be considered to be a threat to the safety of Australia in the event of some future war." It is obvious that such matters as the enlistment (compulsory or voluntary) and training and equipment of men and women in navy, army and air force, the provision of ships and munitions, the manufacture of weapons and the erection of fortifications, fall within this primary aspect of the defence power. These things can be undertaken by the Commonwealth as well in peace as in war, because they are ex facie connected with "naval and military defence". From any legitimate point of view of a court their only possible purpose or object is naval and military defence. An interesting (and perhaps border-line) example of this primary aspect of the defence power is to be found in Attorney-General (Vict.) v. The Commonwealth [1935] HCA 31; (1935) 52 CLR 533 . But (with or without the aid of s. 51(xxxix.)) the defence power in its primary aspect includes much more than the things I have mentioned. It could not, I think, be doubted that it includes a power to make laws for the prevention or prohibition and punishment of activities obstructive of the preparation by such means as I have mentioned of the nation for war - and this whether war appears to be imminent or the international sky to be completely serene. Here again, from any legitimate point of view of a court, the only possible purpose or object of such a law is naval and military defence. The possibility of some extrinsic purpose or ulterior motive cannot be investigated by a court (Stenhouse v. Coleman (1944) 69 CLR, at p 471). The law is a law with respect to defence. (at p254)

12. What I have called the secondary aspect of the defence power has so far only been invoked and expounded in connection with an actual state of war in which Australia has been involved. It has hitherto, I think, been treated in the cases as coming into existence upon the commencement or immediate apprehension of war and continuing during war and the period necessary for post-war readjustment. In a world of uncertain and rapidly changing international situations it may well be held to arise in some degree upon circumstances which fall short of an immediate apprehension of war. In its secondary aspect the power extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence. Examples now familiar are the prices of goods and the rationing of goods, rents and the eviction of tenants, the transfer of interests in land, and the conditions of employment in industry generally. It may be that, on its true analysis, this secondary aspect of the defence power depends wholly on s. 51(xxxix.) of the Constitution. On this view, the effect of a national emergency is that the matters which I have mentioned, and very many others, become "matters incidental to the execution" of the power of the Executive to deal with the emergency. Having in mind this secondary or extended aspect of the power, Dixon J., in Andrews v. Howell (1941) 65 CLR, at p 278 , said of the power given by s. 51(vi.):- "Though its meaning does not change, yet, unlike some other powers, its application depends upon facts, and, as those facts change, so may its actual operation as a power enabling the legislature to make a particular law. . . . The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power." Other passages to a similar effect could be cited. In such passages the "facts" referred to are the basic facts which give rise to the extension of the power. Such facts have always hitherto been matters of public general knowledge, and matters, therefore, of which a court can and will take judicial notice. But, given the basic fact of (say) war, the question will still arise, whenever the validity of a particular law is in question, whether that law can be related to the extended power, or whether it is a law with respect to a matter incidental to the power of the Executive to wage war. The matter is, in effect, taken in two stages. At the first stage, the existence of war or national emergency is recognized as bringing into play the secondary or extended aspect of the defence power. This is done simply as a matter of judicial notice, and it provides the justification for a presumption of validity which might not

otherwise exist in the case of an enactment which on its face bore no relation to any constitutional power. At the second stage the enactment in question is examined with regard to its character as a step to assist in dealing with the emergency, and "the presumption is, so to speak, reinforced by the respect which the court pays to the opinion or judgment of the other organs of government, with whom the responsibility for carrying on the war rests. When, for example, it appears that a challenged regulation is a means adopted to secure some end relating to the prosecution of the war, the court does not substitute for that of the Executive its own opinion of the appropriateness or sufficiency of the means to promote the desired end" (per Dixon J. in Stenhouse v. Coleman (1944) 69 CLR, at p 470). The question which arises at this second stage may itself turn on particular facts as distinct from the overriding general fact of war or national emergency. Such facts may relate to the operation of the law in question or to a state of affairs which calls for its enactment. Whether any and what evidence of such facts is admissible must depend on the circumstances of each particular case. In Jenkins v. The Commonwealth [1947] HCA 41; (1947) 74 CLR 400 , and in Sloan v. Pollard [1947] HCA 51; (1947) 75 CLR 445 , evidence was admitted. On the other hand, affidavits were rejected in the Uniform Tax Case (1942) 65 CLR, at pp 384, 385, 409 and in R. v. Foster; Ex parte Rural Bank of New South Wales (1949) 79 CLR, at pp 51, 52 , the Court in each case confining itself to matters of which judicial notice could be taken. The Court will normally, I think, so confine itself. In Stenhouse v. Coleman (1944) 69 CLR, at p 469 Dixon J. said:- "Ordinarily the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge." The reasons why this must generally be so are stated in his Honour's judgment. The taking of evidence might often involve disclosures which would be prejudicial to the steps being taken by the Executive to deal with the emergency. The Court, in any case, is bound by the legal rules of evidence, and there are thus limitations upon the material which it can receive or take into account. It may perhaps be added that the "facts" will in many cases be of such a general character as to be difficult or impossible to prove or disprove by legally admissible evidence, while quite capable of being judicially noticed. It is indeed a characteristic of a large class of matters which are judicially noticed that they are of this general character. In Holland v. Jones (1917) 23 CLR, at p 153 , Isaacs J. said:- "Wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court 'notices' it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt. The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not 'general' but 'particular' facts. . . . But, if the fact is of such 'general' character as to give rise to the presumption mentioned, then a Judge is justified in 'noticing' it." (at p256)

13. Closely connected with the foregoing and with each other are two other features of the defence power in its wider aspect. It is well established that the so-called separation of powers under the Constitution does not preclude the Parliament from authorizing in the widest and most general terms subordinate legislation under any of the heads of its legislative power (Victorian Stevedoring and General Contracting Co. Ltd. and Meakes v. Dignan [1931] HCA 34; (1931) 46 CLR 73). But the scope of permissible "delegation" of legislative power to the Executive is almost certainly wider in the case of the defence power than in the case of any of the other powers. Thus an Act giving a power "to make regulations with respect to bankruptcy", not given in aid of specific legislation by the Parliament, might well be held not to be a law with respect to bankruptcy. But an Act giving to the Governor-General a power "to make regulations for securing the public safety and the defence of the Commonwealth" is a valid law with respect to the defence of the Commonwealth in time of war (Wishart v. Fraser [1941] HCA 8; (1941) 64 CLR 470). In that case Dixon J. said: "The defence of a country is particularly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent, that width and generality are a characteristic of the powers which it must exercise" (1941) 64 CLR, at pp 484, 485 . Further - and more important for present purposes - power may

validly be given by an Act, or by a regulation under an Act, to a designated person or authority to make orders, declarations and proclamations which are not themselves of a legislative character but which carry legal consequences by virtue of the Act or regulation under which they are made. And such orders, declarations or proclamations may be authorized to be made on no more specific basis than the opinion of the donee of the power that they are necessary or desirable for securing the public safety and the defence of the Commonwealth. There could be no more striking illustration of the exceptional status of the defence power. For "when the operation of a law is made conditional upon the opinion, as to certain matters, of some person named or described, or on proof of certain matters to his satisfaction, the question whether his opinion is justified, or whether he should have been satisfied on the materials before him, is not examinable by the Courts. The only question which can be examined is whether, acting bona fide, he formed the opinion or was satisfied with the proof" (Ex parte Walsh and Johnson (1925) 37 CLR, at p 67 , (per Knox C.J.)). If the opinion is to be that of the Governor-General, it cannot, in my opinion, be examined at all, for it is not open to impute mala fides with respect to an act of the King by himself or his representative (Duncan v. Theodore (1917) 23 CLR, at p 544 (per Isaacs and Powers JJ.)). (at p258)

14. That under the defence power a law may, at least in time of war, be made to operate upon the opinion of a designated person, and that that opinion may supply the only link between the defence power and the legal effect of the opinion is well established. It is sufficient to refer to Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 (cf. Liversidge v. Anderson [1941] UKHL 1; (1942) AC 206 ; Ex parte Walsh (1942) ALR 359 ; Little v. The Commonwealth [1947] HCA 24; (1947) 75 CLR 94 ; and Reid v. Sinderberry [1944] HCA 15 ; (1944) 68 CLR 504). It may be thought that herein lies an exception to an elementary rule of constitutional law which has been expressed metaphorically by saying that a stream cannot rise higher than its source. It was stated in Shrimpton v. The Commonwealth (1945) 69 CLR, per Dixon J, at pp 629, 630 in these terms:- "Finality, in the sense of complete freedom from legal control, is a quality which cannot be given under our Constitution to a discretion, if . . . it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force." Cf. Dawson v. The Commonwealth (1946) 73 CLR, per Dixon J, at pp 181, 182 . The "discretion" may, of course, be the discretion of the legislature itself, exercised by the very fact of the enactment of a law. Or it may be the discretion of the Governor-General or a Minister, intended to be legally effective by the operation of an enacted law upon it. The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse. A power to make a proclamation carrying legal consequences with respect to a lighthouse is one thing: a power to make a similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing. Whether the rule exemplified by Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 constitutes a real or only an apparent exception to the general rule is a matter which need not be considered here. It is enough to say that, on the one hand, it is established beyond all doubt, while, on the other hand, it has never yet been invoked except in connection with that secondary aspect of the defence power which has so far been regarded as depending upon a basic fact of emergency and ceasing when conditions created by the emergency have passed (R. v. Foster; Ex parte Rural Bank of New South Wales; Wagner v. Gall; Collins v. Hunter [1949] HCA 16; (1949) 79 CLR 43). (at p259)

15. The "defence" to which s. 51(vi.) refers is the defence of Australia against external enemies: it is concerned with war and the possibility of war with an extra-Australian nation or organism. But it cannot, in my opinion, be doubted that there exists also a legislative power in the Parliament, which it is not easy to define in precise terms, to make laws for the protection of itself and the Constitution

against domestic attack. In R. v. Kidman (1915) 20 CLR, at p 441 Isaacs J. said that the legislative power "may say that any attempted invasion by force on the field of Commonwealth executive powers may not only be resisted and prevented, but also punished." In the same case his Honour said (1915) 20 CLR, at p 440 that the Commonwealth has "an inherent right of self-protection" and (1915) 20 CLR, at pp 444, 445 that it "carries with it - except where expressly prohibited - all necessary powers to protect itself and punish those who endeavour to obstruct it." In Ex parte Walsh and Johnson (1925) 37 CLR, at p 94 the same learned Justice, speaking of "deportation as a means of self-protection in relation to constitutional functions", said:- "This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party, who associate themselves voluntarily for mutual benefit, to eliminate from their communal society any element considered inimical to its existence or welfare". In R. v. Hush; Ex parte Devanny (1932) 48 CLR, at p 506 Rich J. said:- ". . . it is impossible to doubt the legislative power to prohibit associations which by their constitutions or propaganda advocate or encourage the overthrow of the Constitution of the Commonwealth by revolution or of the established government of the Commonwealth by force or violence. Section 51(xxxix.) of the Constitution includes matters incidental to the execution of powers vested by the Constitution in the organs of government. The survival of the Constitution appears to me to be a matter most incidental to the execution of power under it. But, apart from this, s. 61 of the Constitution expressly enacts that the executive power shall extend to the execution and maintenance of the Constitution. To prevent persons associating together for the purpose of destroying the Constitution is a matter incidental to maintaining it." In that case Rich J. took a different view of the facts from that taken by the other justices, who did not find it necessary to consider the question of constitutional power, though Evatt J. expressed doubt as to the existence of the power. But in Burns v. Ransley [1949] HCA 45; (1949) 79 CLR 101 its existence was, I think, placed beyond doubt. The relevant passages are of great importance, but they are already recorded, and I will quote only two brief extracts. Latham C.J. said:- "Protection against fifth-column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers and operations of governmental agencies and the existence of government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organized societies" (1949) 79 CLR, at p 110 . Dixon J. (1949) 79 CLR, at p 116 said:- "I do not suppose that it would be denied that the legislative power of the Commonwealth extends to measures for the suppression of incitements to the actual use of violence for the purpose of resisting the authority of the Commonwealth or effecting a revolutionary change in the form of government. In the same way I think that the legislative power authorizes measures against incitements to the use of violence for the purpose of effecting a change in our constitutional position under the Crown or in relation to the United Kingdom or in the Constitution or form of government in the United Kingdom. Our institutions may be changed by laws adopted peaceably by the appropriate legislative authority. It follows almost necessarily from their existence that to preserve them from violent subversion is a matter within the legislative power." Not less important are the statements to be found in R. v. Sharkey (1949) 79 CLR, at p 148 per Dixon J; at pp 157, 158, per McTiernan J, and at p. 163, per Webb J. . The source of part of the power which I have been discussing may be found in s. 51(xxxix.), read with s. 61 of the Constitution, and it is here that the framers of the second and third recitals in the preamble to the Communist Party Dissolution Act have found it. But I think that, if it ever becomes necessary to examine it closely, it may well be found to depend really on an essential and inescapable implication which must be involved in the legal constitution of any polity. The validity of the Act, however, if it could be supported by the power, would not be affected by the fact that its framers had taken too narrow a view of the source of the power. (at p260)

16. There has never yet been occasion to examine closely the scope of this power. It may be that it is elastic in the same sense in which the defence power is elastic. But I do not think that the principle of Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 and Ex parte Walsh (1942) ALR 359 can be

applied to it. That is to say, while it may be found to expand very considerably in time of domestic emergency, I think that it is so far of a different nature from the defence power that a law cannot be made under it imposing legal consequences on a legislative or executive opinion which itself supplies the only link between the power and the legal consequences of the opinion. (at p261)

17. I come now to the Act itself. The most conspicuous feature of the Act is s. 4, and the most conspicuous feature of s. 4 is that it does not purport to impose duties or confer rights or prohibit acts or omissions, but purports simply to declare a particular unincorporated voluntary association unlawful and to dissolve it. It is, one supposes, to be classed as a public enactment as distinct from a private enactment, but it is, or at least is extremely like, what the Romans would have called a privilegium. Such a law (for I would not deny to it the character of a law) may well be within the competence of the Commonwealth legislative power, which is, within its constitutional limits, plenary (cf. Abitibi Power & Paper Co. Ltd. v. Montreal Trust Co. (1943) AC, at p 548). It would be impossible, I should think, to challenge s. 4 if the Parliament had power to make laws with respect to voluntary associations or with respect to communists. It would be a law "with respect to" each of those "matters". So an Act of the Parliament dissolving the marriage of A with B would be a law with respect to divorce. It would be a privilegium, but what the Act actually did would be a thing which fell within a class of subject matter on which the Parliament was authorized to legislate. The Parliament has power to make laws with respect to divorce, and the Act is a law which effects a divorce. It is a privilegium, but it is a good law. But, if the Parliament enacts a privilegium which on its face bears no relation to any head of legislative power, it is likely to be extremely difficult to justify it under any head of power. In such a case (and s. 4 is an example of such a case) there can, in my opinion, be no presumption of validity, and the Act, if it is to be upheld at all, can only be upheld on the basis of special and particular facts relating to the person or class who or which is the subject of the privilegium. Suppose, for example, an Act of the Parliament providing that all the property of AB should be delivered to a receiver X and realized and that the proceeds should be distributed among the creditors of AB. Such an Act might (I do not say it would) be a good law with respect to bankruptcy if the liabilities of AB at the commencement of the Act exceeded his assets, but it could not possibly otherwise be a law with respect to bankruptcy. It seems to me that there could not in such a case by any presumption of validity, for the simple reason that there could not be any presumption that the liabilities of AB exceeded his assets. I am only, of course, using the case for purposes of illustration, and it does not matter for this purpose whether excess of liabilities over assets would really be the correct test to apply. What seems clear is that the supposed Act could not be held valid except on the basis of facts, proved or judicially noticed, to connect it with power. The present case is not exactly parallel to the case which I have supposed, because in the present case a real question of judicial notice arises, which would not arise in the example I have taken. But it is desirable, in a case of such importance, to proceed step by step, and we begin, I think, with this, that there can be no presumption of the validity of s. 4, for the simple reason that there can be no presumption that the Australian Communist Party has done or is likely to do anything which would bring it within the defence power or the constitution-preservation power (to give it a short name at some sacrifice of accuracy). (at p262)

18. It should be observed at this stage that nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is clear, its merits and demerits are alike beside the point. It is the law, and that is all. Such a law as the Communist Party Dissolution Act could clearly be passed by the Parliament of the United Kingdom or of any of the Australian States. It is only because the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority that it arises in the case of the Commonwealth Parliament. If the great case of Marbury v. Madison [1803] USSC 12; (1803) 1 Cr 137 (2 Law Ed 118) had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; and there are those, even to-day, who disapprove of the doctrine of Marbury v. Madison [1803] USSC 12; (1803) 1

Cr 137 (2 Law Ed 118) , and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of Marbury v. Madison [1803] USSC 12; (1803) 1 Cr 137 (2 Law Ed 118) is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs. (at p263)

19. I have said that there can, in my opinion, be no presumption of the validity of s. 4. But I have been considering the matter so far without reference to the preamble. How, if at all, is the position affected by the recitals contained in the preamble? In the case of a legislature of limited powers, can such recitals be used to bring within power a privilegium which cannot be related by anything that appears on its face to any power of that legislature? One thing seems very clear to me, and that is that no declaration containing allegations in favour of, or against, the object of the privilegium could be conclusive for or against that object. To go back to my bankruptcy example, if the Court were to hold that AB was not entitled to adduce evidence in denial of a recital in the Act that his liabilities exceeded his assets, the Court would be not merely paying respect to the opinion of the legislature but simply abdicating its function. And the position is prima facie similar in the present case. Parliament cannot recite itself into a field the gates of which are locked against it by superior law. The example which I am at the moment considering is a fortiori to that which Latham C.J. was considering in South Australia v. The Commonwealth (1942) 65 CLR, at p 432 , and the learned Chief Justice there said: "Such a declaration cannot be regarded as conclusive. A Parliament of limited powers cannot arrogate a power to itself by attaching a label to a statute." (at p263)

20. I am of opinion, indeed, that, in such a case as the present, such recitals cannot be regarded as affording even prima-facie evidence of the truth of what is recited. I do not think that there is any rule of the common law which compels us so to regard them, though the English Courts generally regard recitals of facts in a statute as equivalent to prima-facie evidence of the truth of those facts. But the matter is primarily one of the construction of the statute in each particular case, and the position may be affected by circumstances. The reasoning of Lord Ellenborough and Bayley J. in R. v. Sutton [1816] EngR 278; (1816) 4 M & S 532 (105 ER 931) would indeed seem to lead to the conclusion that such recitals must amount to conclusive evidence, since those learned judges appear to treat the recitals as standing on the same level as the operative part of the statute and as being in effect part of the law enacted. But, as is pointed out in Craies on Statute Law, 4th ed. (1936), p. 41, recitals as such are not part of the law enacted on the subject, and the most that can be said is, I think, that such statements are generally to be regarded by a court as prima-facie true. In Earl of Leicester v. Heydon (1561) 1 Plowd 384 (75 ER 582) the argument of counsel (1561) 1 Plowd, at p 398 (75 ER, at p 603) that "the recital in our case, which is false, and founded upon a false information, shall not conclude the plaintiff to say the truth" appears to have been accepted by the Court of King's Bench. In R. v. Greene [1837] EngR 654; (1837) 6 Ad & E 548 (112 ER 210) Lord Denman C.J. agreed that mention in a statute of a certain body of persons as a corporation "made a prima-facie case" that the body was incorporated, but held the prima-facie case displaced by other evidence which was admitted. Patteson J. and Coleridge J. concurred. No doubt, in the case of a legislature of unlimited powers, a statement of fact or law could be made conclusive. So, in R. v. Inhabitants of Haughton [1853] EngR 43; (1853) 1 El & Bl 501, at pp 515, 516 [1853] EngR 43; (118 ER, 523, at p 528) , Lord Campbell C.J. said that a recital in a statute that a certain road was in Denton might be considered evidence that the road was in Denton but could not prevail against an estoppel, and he added: "Had there been anything amounting to an enactment that the road should be considered in Denton, this would have prevailed over the estoppel: but a mere recital is an Act of Parliament, either of fact or of law, is not conclusive: and we are at liberty to consider the fact or the law to be different from the statement in the recital." (The latter part of this passage was quoted with approval by Lord Chelmsford in Mersey Docks and Harbour Board Trustees v. Cameron [1865] EngR 610; (1864) 11 HLC 443, at p 518 [1865] EngR

610; (11 ER 1405, at p 1434) .) The whole position seems to be summed up by Knight Bruce L.J. when, in Norton v. Spooner [1854] EngR 703; (1854) 9 Moo PC 103, at p 129 [1854] EngR 703; (14 ER 237, at p 246) , speaking for the Privy Council, he says that " a recital in an act of legislation, . . . may, according to circumstances, be of more or less weight, and be often not conclusive". (at p264)

21. But, whatever may be the general position, it seems to me that it would be contrary to principle to allow even prima-facie probative force to recitals of facts 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. But to allow any probative force to such recitals would, it seems to me, be to say the same thing - and not less because the entry into the field might be only provisional. This view is not, in my opinion, inconsistent with the many statements to be found in cases arising on the defence power to the effect that the Court will pay great respect to statements of Parliament in an Act or of the Governor-General in a regulation. This has been put strongly on occasions - nowhere, perhaps, more strongly than by Higgins J. in Pankhurst v. Kiernan (1917) 24 CLR, at p 134 , where his Honour said that, if Parliament treated the fixing of prices as conducing to the defence of the Commonwealth, "we are bound to accept the statement of Parliament that it does so conduce unless we can see that the statement is obviously untrue or absurd." A somewhat similar approach is indicated when Lord Atkin, in Abitibi Power & Paper Co. Ltd. v. Montreal Trust Co. (1943) AC, at p 548 says:- "Their Lordships see no reason to reject the statement of the Ontario legislature, contained in the preamble." But neither Higgins J. nor Lord Atkin was thinking of a case in which the "statement" of Parliament was a statement of particular facts relating to a particular individual or body of individuals, although the Ontario statute in the latter case was a special Act relating to the appellant company. And, in so far as effect has been given to such statements of Parliament as bearing on the connection between enactment and legislative power, the cases have all been cases in which the basic fact of war has been judicially noticed at the outset. That basic fact brings into existence the secondary aspect of the defence power, to which, as I have pointed out, exceptional considerations apply. (at p265)

22. I have thought it right to consider with some care whether any and what probative force could be attributed to the fourth, fifth, sixth, seventh and eighth recitals in the preamble to the Act, regarded as statements of fact, because a good deal of the argument for the Australian Communist Party was devoted to this question, and it is a question of general interest and importance. But the truth is that I do not think that those recitals can be properly regarded at all as statements of fact having a potential probative force by virtue of their presence in an Act of Parliament. It is more or less involved in what I have said that I am disposed to regard such a view as a begging of the question. It is as if one should say: "The Act is valid because the statements contained in it are true, and the statements are true because they are contained in a valid Act." The true view is, I think, that the recitals in the preamble are to be regarded as statements of opinion or belief as to facts, inserted to explain the occasion of what is enacted and to provide justification for it. I do not think that any further or other effect can be given to the preamble in this case. It does not necessarily follow that the recitals are of no importance, because, if one condition, to which I will refer in a moment, were fulfilled, they would be very important indeed and probably decisive. (at p266)

23. Nor does it necessarily follow from what I have just been saying that both questions 1(a) and 1(b) in the case stated by Dixon J. should be answered in the negative, because the Commonwealth might still maintain that the validity of the Act depends on facts asserted in the preamble and capable of judicial ascertainment, and might seek to tender evidence to establish the facts which it regarded as essential. And, if the Commonwealth were to be permitted to tender such evidence, the plaintiffs would, as a matter of course, be entitled to adduce evidence in rebuttal. But the Commonwealth has not sought to adduce evidence, and it has, in my opinion been right in not seeking to do so, because I do not think that the validity of this Act depends on evidence. (at p266)

24. This Act can, in my opinion, only be supported, if it can be supported at all, as an exercise of the defence power in what I have called its extended or secondary aspect. I do not think it can be supported under the other power invoked, whether that power be regarded as based on the joint operation of s. 61 and s. 51(xxxix.) of the Constitution or on an implication from the existence and nature of the Constitution as the foundation of a body politic. The reason for this is that the provisions of the Act operate on opinions, and those opinions include an opinion as to matters on which the validity of those provisions depends. There is, as I have pointed out, a notable difference between the first group of provisions (headed by s. 4) on the one hand and the second and third groups of provisions (headed by ss. 5 and 9) on the other hand. But, in the last analysis, they stand on the same footing, and their validity depends on the same considerations. Section 4 is a directly enacted privilegium based on announced opinions of the Parliament, which involve an opinion as to matters on which power depends. Sections 5 and 9 operate on opinions of the Governor-General, which involve an opinion as to matters on which power depends. The decisions of this Court establish that such enactments may (not that they always will) be valid in cases where the secondary aspect of the defence power comes into existence by virtue of a judicially noticed emergency. No decision establishes that such enactments may be valid as exercises of the other power invoked by the Parliament in this case, and I have already expressed my opinion that there is no secondary aspect of this other power corresponding to the secondary aspect of the defence power. (at p266)

25. The question whether the Act can be supported as an exercise of the defence power in its secondary aspect must, in my opinion, depend entirely on judicial notice. The coming into existence of this secondary aspect has never been treated as depending on anything else. Nor could it, in my opinion, be treated as depending on anything else. It is only when the existence of the secondary aspect has been established by judicial notice of an emergency that evidence has ever been admitted to connect the enactment in question with power. This I have already pointed out. I think that it is only in exceptional cases, where a simple fact is readily susceptible of proof or disproof, that evidence can, even then, be admitted. I have cited what Dixon J. said in Stenhouse v. Coleman (1944) 69 CLR, at pp 469, 470 . "Ordinarily the Court does not go beyond matters of which it may take judicial notice." The present case seems to me to be pre-eminently a case in which the Court would have to confine itself, even if it were satisfied that the Act was capable of being supported under the defence power in its secondary aspect, to matters of which it could take judicial notice. Apart from the considerations mentioned in Stenhouse v. Coleman (1944) 69 CLR, at p 469 , one has only to glance at the relevant recitals in the Communist Party Dissolution Act to see that they could hardly be made the subject of proof or disproof by evidence in the ordinary way in which facts are proved and disproved. They relate to a particular association, but no specific act or fact is asserted, and what is asserted is of that "general" character on which Isaacs J. laid so much stress in Holland v. Jones (1917) 23 CLR, at p 153 . Such matters in a constitutional case are matters for judicial notice or they are nothing. (at p267)

26. The elimination of the second power on which it is sought to support the Act is, I think, important, because matters of which judicial notice could, as I think, be taken would come nearer to justifying the Act as an exercise of this power than as an exercise of the defence power. It must, however, in my opinion, be eliminated, and we are thus brought to what I regard as the ultimate problem in this difficult case. That ultimate problem lies, I think, in the question whether judicial notice can be taken of matters sufficient to bring into operation that extended aspect of the defence power which was the basis of the decisions in Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 ; Ex parte Walsh (1942) ALR 359 , and Little v. The Commonwealth [1947] HCA 24; (1947) 75 CLR 94 . On the whole I do not think that it can. (at p267)

27. Four things are to be remembered throughout. The first, which may or may not by itself be of vital importance, is that the date as at which the matter must be considered is 20th October 1950. The second is that the Parliament had, and has, undoubted powers to deal with such a situation as is

envisaged by the preamble. The only question is whether it has power to deal with it by the particular means adopted. The third is that the particular means adopted is a means which has hitherto been recognized as valid only in time of, and by virtue of, a clear and great national danger. It is a means, moreover, which may - from a practical, though not perhaps from a technical and analytical, point of view - be thought to involve a degree of relaxation of a fundamental constitutional rule. Finally, it must not be forgotten that the defence power is, as I have said, a power concerned with protection against external enemies. If, therefore, a situation is to be found which will justify the Act in question as an exercise of an extended defence power, it must be an international situation. It is necessary to be on guard against letting in considerations appropriate only to the other power on which reliance is placed and which I have felt must be rejected. (at p268)

28. On the one hand, I am not prepared to hold that nothing short of war or an immediate threat of war can bring into play a fully extended defence power. Each situation which arises must be examined as and when it arises. On the other hand, I think that the Court would be justified in taking judicial notice of a good many of the matters suggested by Mr. Barwick as proper matters for judicial notice. But I have come to the conclusion that, if one keeps steadily in mind the important factors which I have enumerated, one cannot judicially notice in this case a state of affairs which would justify holding a measure having the peculiar features of the Communist Party Dissolution Act valid as an exercise of an extended defence power. (at p268)

29. It was argued that the Parliament had, by enacting s. 4, assumed itself to exercise judicial power in contravention of the Constitution, which by s. 71 entrusts the judicial power of the Commonwealth to organs other than the Parliament. I am quite unable to accept such a view. In enacting s. 4 the Parliament was making a law, or making what would be a law if it were "with respect to" some subject matter of legislative power. It neither did nor purported to do anything other than to make a law. And making laws is not a judicial function. The power to make Rules of Court, as incidental to the exercise of the judicial function, is, of course, beside the point here. Making laws as such is not a judicial function, and, when Parliament makes a law - any kind of law - it is not exercising judicial power. The "law" may be valid or invalid, but, if it is invalid, it will not be because Parliament has attempted to invade the judicial sphere. (at p269)

30. The conclusion which I have set out above is sufficient, in my opinion, to dispose of all three groups of provisions contained in the Act. It seems clear that it establishes the invalidity of the first two groups, which hinge respectively on s. 4 and s. 5(2). A further question arises, however, with regard to the third group of provisions, those which hinge upon s. 9(2). It is arguable that the consequences attached to a declaration under s. 9(2) do not necessarily depend for their validity upon the power to make laws with respect to defence or the power to make laws with respect to matters incidental to the execution of the executive power. Those consequences are attached by ss. 10 and 14 and may be shortly stated as being that a person declared under s. 9(2) shall be incapable of (a) holding office under or being employed by the Commonwealth or an authority of the Commonwealth, or (b) holding office as a member of a body corporate being an authority of the Commonwealth, or (c) holding office in certain industrial organizations, and that no contract for remuneration shall be made with a declared person. The Commonwealth has clearly power to make laws disqualifying any person or class of persons from being employed by the Commonwealth or an authority of the Commonwealth or from being a member of a corporate authority of the Commonwealth or from contracting with the Commonwealth. A law imposing such a disqualification may select any criterion whatever as the basis of the disqualification, even an irrational or absurd criterion, because the law will be a law with respect to a matter within the legislative power, and indeed within the exclusive legislative power, of the Commonwealth. And the view suggested by Higgins J. in several cases that there was an analogy between legislative powers and powers of appointment, and that it must appear on the face of a statute that the legislature intended to exercise a power invoked to support it, has never, I think, been

accepted as sound. Starke J. said, in Ex parte Walsh and Johnson (1925) 37 CLR, at p 135 :- "A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source derived." (at p269)

31. A similar view might be put with regard to s. 10(1)(c), which disqualifies declared persons from holding office in certain industrial organizations. Clearly, of course, s. 10(1)(c) cannot be so supported in its entirety on this basis, because industrial organizations with respect to which the Commonwealth has no legislative power are included. It might, however, be suggested that it was valid in a limited application to organizations registered under the Commonwealth Conciliation and Arbitration Act. I should certainly suppose that the Commonwealth Parliament could validly make it a condition of registration that any particular person or class of persons should be disqualified from holding office in any such organization; or could provide that the rules of any organization registered under the Act must contain provisions that no person of any specified class shall be eligible for office in the organization; or could provide that the holding of an office in an organization by a person of any specified class should be a ground for deregistration of the organization. The power to do these things rests on s. 51(xxxv.) and (xxxix.) of the Constitution: see Jumbunna Coal Mine v. Victorian Coal Miners' Association (1908) 6 CLR 309 (at p270)

32. I am of opinion, however, that s. 10(1) and s. 14 cannot be supported on this basis. This basis necessarily assumes either that s. 9(2) is in itself a valid enactment or that it has no operative effect but serves merely to describe a class. I have already said that I do not think that s. 9(2) is a valid enactment, and it cannot, in my opinion, be regarded as merely serving to describe a class. It is an enabling law, and the declaration could be made of any person irrespective of whether he were in the Commonwealth public service or a member of an industrial organization or a candidate for membership of the Commonwealth public service or for office in an industrial organization. (at p270)

33. Apart from legal consequences, such a declaration could have a most damaging effect, and, in my opinion, s. 9(2) must be regarded as a law and an invalid law. On this view the basis of the arguments under consideration disappears. (at p270)

34. In the case of s. 10(1)(c) there is, I think, another reason for rejecting the argument in its favour, and this is that it is impossible to "sever" or "read down" s. 10(1)(c) so as to make it apply only to industrial organizations registered under the Arbitration Act and then treat it as a law valid to that extent under the power to make laws with respect to a matter incidental to the execution of the power to make laws with respect to conciliation and arbitration under s. 51(xxxv.). Intention to exercise a power is not, I think, important in connection with s. 10(1)(a) or (b) or s. 14, because no question of "reading down" arises. But such a question does arise in connection with s. 10(1)(c), and intention may be important in such a case. The characteristic regarded by Parliament as the essential characteristic of the industrial organizations with which it is dealing is clearly indicated in s. 10(3). To select arbitrarily some other and unrelated characteristic such as being registered under the Arbitration Act or being engaged on Commonwealth public works or defence projects is really to assume the function of legislation, and this is not authorized either by any common-law rule or by s. 13A of the Acts Interpretation Act. Cf. Victorian Chamber of Manufacturers v. The Commonwealth (1943) 67 CLR, at pp 418, 419 , per Latham C.J. and (1943) 67 CLR, at p 424 per McTiernan J. (at p271)

35. For the above reasons I am of opinion that the questions asked by the case stated must be answered as follows:-

1 (a) No. (b) No.
2. The Act is wholly invalid. (at p271)

KITTO J. The questions raised by the case stated require a decision to be given as to the validity or

invalidity of the Communist Party Dissolution Act 1950 unless the Court considers that such a decision must depend upon a judicial ascertainment upon evidence of the truth or untruth of certain statements contained in the preamble to the Act. (at p271)

2. The statements made in the preamble are the pronouncement of a legislature to which power is given by the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the Government of the Commonwealth. The executive power of the Government extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth: Constitution, s. 61. (at p271)

3. The recitals in the preamble reveal that the Parliament, which is entrusted with these legislative powers and which must bear the corresponding responsibility, has formed a judgment as to the existence and nature of a menace to the safety of Australia. In a unitary system of government no challenge could be successfully offered to any legislation passed in consequence of such a judgment; but under a Federal system the central legislature is equipped with limited powers only, and the duty is cast upon the courts to determine whether laws which that legislature thinks necessary for the security of the country are within the scope of its powers. (at p271)

4. It should not be held, in my opinion, that a judgment of the Parliament of the Commonwealth as to the existence of a danger to the safety of the nation can enlarge the scope of any of its powers. So far as the defence power is concerned, such a proposition could not be supported except upon the view that the conception of "the naval and military defence of the Commonwealth and of the several States" is such that its limits must be taken to have been left by the Constitution for final determination by the authorities which are in the best position to determine them, namely the Parliament and the Executive which it controls, and that therefore the courts must accept as conclusive of power a Parliamentary decision that particular legislation is in the circumstances within the ambit of the power to make laws with respect to defence. (at p272)

5. This Court has always recognized that the Parliament and the Executive are equipped, as judges cannot be, to decide whether a measure will in practical result contribute to the defence of the country, and that such a question must of necessity be left to those organs of government to decide. But the necessity arises, not simply because of the peculiar position in relation to defence which those organs occupy; it arises from the consideration that the limits which the Constitution sets to the defence power are not limits which have to do with the results which legislation may be believed likely to produce. They are limits defined by reference to the nature and character of legislation; it must be "with respect to" defence; and that means that its operation by way of altering the law must be seen to give it such a relevance to the subject of defence that its true character is that of legislation with respect to the subject. If a measure, having regard to what it does "in the way of changing or creating or destroying duties or rights or powers" (as Latham C.J. expressed it in South Australia v. The Commonwealth (1942) 65 CLR, at p 424), can be seen to be really and substantially capable in the existing circumstances of contributing specifically to defence, it possesses the necessary kind and degree of relevance to the subject. But, while it is certain that the necessity or desirability of the measure, if it be within power, is a matter with which the courts have no concern, it is equally certain that the question whether the legal operation of the measure has such a capability of aiding defence as gives it that character which alone will sustain it as an exercise of the defence power is a matter which no judgment of the Parliament can conclusively decide. It is inherent in the system of government which the Constitution establishes that the Court must make its own decision on that point. (at p273)

6. This conclusion is entirely consistent with a full acceptance of the doctrines, made familiar in judgments delivered during the second world war, that the defence power is purposive, and that, while

it possesses a constant meaning, its application is of greater or less width according to circumstances. As to the first of these doctrines, it was pointed out by Dixon J. in Stenhouse v. Coleman (1944) 69 CLR, at p 471 that "the naval and military defence of the Commonwealth and of the several States" is a subject which differs in one important respect from most of the others mentioned in s. 51, namely, that it is not a class of transaction or activity, or a class of public service, undertaking or operation, or a recognized category of legislation, but is a purpose. The word "purpose" in this connection has nothing to do with the motives or the policy lying behind legislation (Australian Textiles Pty. Ltd. v. The Commonwealth (1945) 71 CLR, at p 178). It refers to an end or object which legislation may serve; and the consequence which follows from a recognition of defence as a "purpose" in this sense of the word is that the relevance to defence which stamps a measure with the character of a law with respect to defence is to be found in a capacity to assist that purpose. But that capacity must be discernible by the Court, since it is the Court which must decide whether the measure possesses the requisite character. As to the second doctrine, the important point for present purposes is that the circumstances to which it refers are the circumstances of a public nature existing at any given time. Thus, in time of peace, when there is no special reason to apprehend a war, the class of laws which can be seen to possess a defence character is much more limited than it is when a danger of hostilities arises; it becomes wider still when war breaks out; it reaches its maximum amplitude when a war is raging which is of so serious a character as to call for the devotion to its prosecution of the entire resources and activities of the nation; it fluctuates according to "the nature and dimensions of the conflict . . . the actual and apprehended dangers, exigencies and course of the war, and . . . matters that are incident thereto" (Andrews v. Howell (1941) 65 CLR, at p 278); it contracts again when hostilities cease, but even then remains sufficient to include laws to wind up after the war and to restore conditions of peace (Dawson v. The Commonwealth (1946) 73 CLR, at p 176 ; Miller v. The Commonwealth [1946] HCA 42; (1946) 73 CLR 187 ; Real Estate Institute of New South Wales v. Blair [1946] HCA 43; (1946) 73 CLR 213 ; Hume v. Higgins [1949] HCA 5; (1949) 78 CLR 116 ; R. v. Foster [1949] HCA 16; (1949) 79 CLR 43). All these stages in the waxing and waning of the defence power have been witnessed in recent years. In all of them the meaning of the power has been recognized to be unchanging; but "its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law" (Andrews v. Howell (1941) 65 CLR, at p 278). The "very nature" of the power "means that its strength is commensurate with the exigency or danger which calls for its exercise" (Australian Textiles Pty. Ltd. v. The Commonwealth (1945) 71 CLR, at p 178). But "the exigency" and "the danger" by reference to which the reach of the power is to be determined are objective facts, which the tribunal which has the constitutional duty of comparing challenged legislation with the power must be able to perceive. To allow that their existence may be conclusively affirmed by the Parliament according to its own judgment would be to treat the exigency and the danger as matters of subjective opinion and, in effect, to alter the Constitution by substituting for the power to make laws with respect to defence, a power to make laws which would be with respect to defence if the situation were such as the Parliament adjudges it to be. Such an alteration would involve a fundamental departure from the principle of the Constitution that the legislative power of the Commonwealth is subject to legal limitations, and not merely to limitations arising from political or practical considerations or the limitations, depending upon the character of legislators, which Dicey called internal. It is no doubt true that legislative or executive actions may themselves create situations in which the scope of the defence power is wider than it would have been if these actions had not been taken. A declaration of war is an obvious example. This is so because the determinant of the ambit of the defence power at a given point of time is the situation, however it may have been brought about, in which Australia finds itself at that time. But the responsibility of ascertaining the ambit of the power rests upon the Court, and therefore the Court must of necessity decide for itself what features relevant to the power the existing situation presents. (at p274)

7. If the defence power does not enable a measure to be upheld by reason of an opinion formed by the

Parliament that the safety of the Commonwealth calls for or justifies that measure, it is even clearer, I think, that the scope of the other powers of legislation relied upon by the Commonwealth in the argument in this case must be unaffected by any opinion of the Parliament as to the need for legislative action. The incidental power conferred by s. 51 (xxxix.) in association with s. 61 is, like the defence power, a power to make laws of a specified character, determined by the relevance of their operation to a particular matter. The reasons of the legislature for enacting a law, though they be reasons based upon its belief as to the existence of a state of facts connected with the execution and maintenance of the Constitution and of the laws of the Commonwealth, do not enter into the character of the law itself, and therefore do not bear upon the question of its validity. As for the implied power to legislate for the protection of the Commonwealth against subversive activities, which was referred to by Dixon J. in Burns v. Ransley (1949) 79 CLR, at p 116 , and in R. v. Sharkey (1949) 79 CLR, at p 148 , all I need say is that to treat that power as extending to any activities to which the Parliament sees fit to ascribe a subversive character, would be to transform the power into one far wider than can be justified by the reasoning upon which the implication of the power depends. (at p275)

8. The problem which the Court must face, in my view, is whether the Communist Party Dissolution Act 1950 can be seen to fall within any of the legislative powers which are relied upon in support of it, irrespectively of the disclosed opinion of the Parliament. In preceding judgments the provisions of the Act have been analysed and their operation described. I need not repeat the process. Three major questions emerge: (1) whether s. 4, which dissolves the Australian Communist Party, is valid; (2) whether the provisions which commence with s. 5, and relate to bodies of persons to which that section applies, are valid; and (3) whether the provisions which commence with s. 9, and relate to persons to whom that section applies, are valid. (at p275)

9. The defence power is relied upon as supporting each of these portions of the Act, either wholly or in part. Whether that power suffices for the purpose must depend upon the range of its application at the date when assent was given to the Act, which was 20th October 1950. This in turn must depend upon such facts, existing at that date and relevant to the defence of the Commonwealth, as are or may be brought within the knowledge of the Court; for the Court must necessarily deny the validity under the defence power of any measure passed by the Parliament of the Commonwealth, unless it is able to see with reasonable clearness how the measure is incidental to that power (R. v. Foster (1949) 79 CLR, at p 84). Facts which, to use the language of Stephen's Commentaries, 16th ed. (1914), vol. 3, p. 568, are "matters of common and certain knowledge", may be judicially noticed without proof; but the Court has in some cases taken into account, in considering the validity of legislation under the defence power, facts outside the range of judicial notice. In Jenkins v. The Commonwealth [1947] HCA 41; (1947) 74 CLR 400 , and in Sloan v. Pollard [1947] HCA 51; (1947) 75 CLR 445 , for example, legislation was found to be within power upon consideration of facts established by evidence. It does not follow, however, that there is no limit to the kind of facts which evidence may be adduced to prove in support of, or in answer to, a challenge to legislation which is rested on the defence power. (at p276)

10. Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce. The question is whether the legislation forms part of the law of the Commonwealth. Since it is impossible to affirm the validity of a measure upon a particular basis of fact unless that basis of fact can be seen to be common to all persons, it cannot be material, for the purpose of considering validity, to decide an issue of fact which is of such a nature as to admit of different findings in different cases. (at p276)

11. Moreover, in connection with the defence power, three classes of facts may be distinguished, namely, those which bear upon the degree of national danger by reference to which the extent of the power at the relevant time must be determined; those which relate to the existence of a particular

purpose, within the wider purpose of defence, which the measure in question is capable of aiding; and those which are relevant only to the question whether the measure is likely to produce results of advantage to the defence of the country. Evidence may be needed to establish facts of the first two classes, but such facts are not likely to be disputable. Facts of the third class may often be open to controversy; but even if capable of conclusive proof, the Court is not concerned with them. They have nothing to do with any question of power; they relate to a question which is essentially one for the consideration of the Parliament on the assumption that the measure is within power as having an operation in law which is capable of serving an end within the purpose of defence. (at p276)

12. It is true also with respect to the incidental power in association with s. 61, and the limited power of making laws for the protection of the Commonwealth against subversion, that, in considering whether these powers are wide enough to support a given measure, it is necessary to recognize as irrelevant such facts as have significance in relation only to the practical effect likely to be achieved by the measure. These facts are proper to be considered by the Parliament in determining legislative policy. The courts have nothing to do with policy, and they cannot be assisted in performing their function by any facts save those which, being ascertained with certainty, affect the scope of legislative power. (at p277)

13. A recognition of the distinction between the classes of facts I have mentioned goes far towards providing the solution of the problems involved in the present case. Indeed it appears to me to lead inevitably to the answer to the question whether the provisions of the Act relating to the Australian Communist Party are valid. These provisions purport to dissolve the Party and to forfeit what remains of its property after its liabilities are provided for. There is no general power in the Parliament to deal with associations in such a manner; and the powers I have mentioned, which alone are relied upon as sufficient for the purpose, plainly cannot suffice unless facts existing at the passing of the Act gave them a wide enough range. The Court can take judicial notice of the fact that in October 1950 international tension had reached a point of real danger to Australia. The possibility of a war breaking out in the near future was by no means to be overlooked. In that situation the defence power, at least, had a wider application than it has at times when no danger of war appears; but, even so, it was not possible to see, in the light only of that situation, a relation between any of the powers referred to and a law dissolving a specified association and confiscating its property. The question therefore is whether additional facts, relating to the Australian Communist Party, may be taken into account as relevant to the ambit of power. (at p277)

14. Some facts relating to the Australian Communist Party are alleged in the recitals in the preamble to the Act, and others may be said to be implied by the word "Communist" in the name of the Party. Such facts are in their nature controversial, and evidence which might be adduced with respect to them in the present litigation could not enable findings to be made which would necessarily be proper in other litigation challenging the validity of the Act. But facts of this kind, even if they could be conclusively established, do not go to the question of power, but go only to the question whether this legislation would, in practical result, conduce to an end within power. There is an essential difference between, on the one hand, a law providing for the dissolution of associations as to which specified facts exist and, on the other hand, a law providing specially for the dissolution of a particular association. The first law may be supportable, under the defence power for example, for the reason that a relevance to the subject of the power, sufficient to give the law the character which attracts validity, is to be seen by considering the nature of the specified facts which the law makes the condition of its operation. The other law cannot be upheld, because the operation of the law is independent of any facts peculiar to the association, and a consideration of its legal effect does not disclose any relevance to the subject of the power. The point of fundamental importance is that, before a measure can be pronounced valid, a capacity to assist defence, or a sufficient relevance to another subject of power, must be perceivable in what the law itself does, not in what will follow when it does

it. Turn to facts concerning the character, objects, activities or propensities of an association which is made the specific subject of a law, and you turn away from the relevant inquiry; you are looking no longer at the legal operation of the law but at the practical results likely to follow in the train of its operation; you are concerning yourself, not with power, but with matters which provide a reason for a purported exercise of power. (at p278)

15. It follows that, in my opinion, the Court cannot be assisted in this case by taking into its consideration, either with or without evidence, facts of the kinds alleged in the recitals or any facts as to the nature of communist doctrines or the tendencies which espousal of them may induce. It must take the powers of the Parliament as they stood in October 1950, having regard, so far as the defence power is concerned at least, to the danger of war as it could then be seen to exist, and it must compare with those powers the character of the Act as disclosed by nothing else than its operation in law. If this be done, the provisions applying to the Australian Communist Party must be held, in my opinion, to be invalid, whatever may be the truth as to matters with which that Party is or may be charged. (at p278)

16. I turn now to the provisions of the Act as to bodies of persons to which s. 5 applies. Their operation is to dissolve any such body of persons and forfeit its property if the Governor-General declares the body an unlawful association. He is authorized to do so if satisfied that the body answers one or more of the descriptions contained in s. 5(1) and that the continued existence of the body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. (at p279)

17. The descriptions provided in s. 5(1) all involve some form or degree of connection with the Australian Communist Party or with communism, but they contain nothing else which could be suggested to have any relevance to any head of legislative power. Considerations similar to those which lead me to the conclusions I have stated in relation to the provisions concerning the Australian Communist Party lead me to the conclusion that none of the powers relied upon to support the Act is attracted by the descriptions which s. 5 contains of the bodies of persons to whom that section applies. Since the Commonwealth Parliament has no power under the Constitution to legislate upon the general topic of the dissolution of voluntary associations, it follows from the conclusion stated that if the provisions in question are to be upheld it must be upon the ground that they are brought within power by the stipulation for the Governor-General's satisfaction that the continued existence of the body would be prejudicial to the matters referred to in s. 5(2). (at p279)

18. Section 5 provides for what is in effect a right of appeal from the Governor-General's satisfaction that the body is one which answers any of the descriptions in s. 5(1), but it does not provide for any form of challenge to his satisfaction as to the prejudicial character of the continued existence of the body. In the absence of any such provision, a declaration of this satisfaction is, in my opinion, immune from challenge or examination in any court upon any ground. It was strongly urged on behalf of the defendants that if it were shown that the Governor-General, upon the materials before him in relation to a body which he declares an unlawful association under the section, could not have the necessary satisfaction without misconceiving the legal significance of the expression "activities prejudicial to the security and defence of the Commonwealth" &c., it would be competent for the Court to hold his declaration to be unauthorized and of no effect. I find it impossible to accede to this argument. The section on its face will bear no other meaning than that the Governor-General is to form an unchallengeable judgment as to whether the continued existence of the body will have the necessary tendency. In sharp contradistinction to the provision for judicial review of his opinion as to whether a body is one to which the section applies, is the very limited provision that the Executive Council shall not advise the Governor-General to make a declaration unless the material upon which the advice is founded has first been considered by a statutory committee. It is not required that the advice tendered to the Governor-General shall be consistent with the opinion formed by the committee. In the face of

this contrast, the inference is irresistible that it is left to the Executive Council to give such advice as it thinks proper, being assisted but not controlled by the views of the committee. To hold that nevertheless a court may review the legal conceptions which underlie the advice would be to ignore the plain meaning of the legislation. Moreover, it is in the nature of things practically, if not totally, impossible for a court to know in a given case either what those legal conceptions were or to what facts they were applied; and I find it impossible to attribute to the legislation any other intention than that the Governor-General may exercise his power with complete immunity from judicial interference. Finally, it must be remembered that the satisfaction with which alone the section is concerned is the satisfaction of the Governor-General acting with the advice of the Executive Council. So acting he has not to consider for himself either questions of fact or questions of law, but will be satisfied as he may be advised. (at p280)

19. The effect of s. 5(2), therefore, is that if the Governor-General is satisfied that a body of persons is one to which the section applies and the appropriate court does not decide that it is not such a body, the Governor-General is empowered to declare that body an unlawful association subject only to his being satisfied upon the advice of the Executive Council (as to the correctness of which in law or in fact no sort of challenge can be made) that the continued existence of the body would be prejudicial to certain matters as to which the Parliament has legislative power; and after the lapse of a specified period from the publication of that declaration the statute operates by its own force to dissolve the body and expropriate its property. I have stated the effect of the legislation in this way in order to draw attention to what I consider a crucial distinction between this enactment and certain other kinds of legislation by which powers are made exercisable conditionally upon the formation of an opinion as to the scope of a subject upon which the Constitution enables the Parliament to make laws. Such measures frequently have this in common with the provisions I am considering, that the opinion formed is unexaminable for error of fact or of law; yet though, for this reason, they enable the authority who forms the opinion to act upon his own conception of the scope of a parliamentary power, they may themselves be valid exercises of that power. That is so in two classes of cases, namely, those in which the authority conferred is a power of subordinate legislation, and those in which the authority conferred is expressly or impliedly limited by reference to the purpose with which it may be exercised. (at p281)

20. It has been held repeatedly that the Governor-General may be validly authorized to make such regulations as appear to him to be necessary or expedient for the defence of the Commonwealth, and yet that the Court may declare any regulations he makes to be invalid if they exceed the scope of the defence power. The reasoning which produces this result appears to me to involve the following steps: (i) a law conferring a power to promulgate subordinate legislation within the limits of legislative powers possessed by the Parliament is valid as being itself within those limits (Roche v. Kronheimer [1921] HCA 25; (1921) 29 CLR 329 ; Huddart Parker Ltd. v. The Commonwealth (1931) 44 CLR, at p 512) but it cannot be within those limits if it purports to authorize subordinate legislation transcending them; (ii) therefore a law which confers power on the Governor-General to make regulations if he is of a specified opinion, must be construed as authorizing only legislation as to which two conditions are satisfied, namely that the Governor-General holds the required opinion and that the legislation is such as would be valid if enacted by the Parliament itself; (iii) therefore a regulation as to which the Governor-General holds the specified opinion is nevertheless open to be tested for validity by considering what it says and does, and applying to it the same test as would be applied to a statute in similar terms. The point to be observed is that the law conferring the regulation-making power is not construed as making it a condition of the validity of regulations that the Governor-General shall have observed the proper limits of the defence power in forming his opinion. Consequently the Court has to consider, not the soundness, reasonableness or factual basis of the Governor-General's opinion, but only whether the regulations fall outside the ambit of the constitutional power itself (Stenhouse v. Coleman (1944) 69 CLR, at p 470). (at p281)

21. Again, it is true that laws conferring administrative or executive powers upon designated persons have been upheld in certain cases, notwithstanding that the powers have been made exercisable in consequence of the formation of an opinion as to what is necessary or expedient for the defence of the Commonwealth. This has been held, I think, only in cases where the relevant legislation could not be properly construed as authorizing acts of a nature or for a purpose unrelated to the defence power. The Court cannot examine acts done under such legislation for the purpose of considering whether the person entrusted with authority correctly understood and observed the limits of the defence power in forming his opinion, for no condition that he shall do so is read into the legislation; but there is nothing to preclude the Court from considering whether the designated person in truth held the requisite opinion, or whether his acts were of the nature, and were done for the purpose, which alone the legislation can be held to authorize consistently with the limits of the defence power. (at p282)

22. This seems to me to be the principle underlying the cases of Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 , In re Walsh (1942) ALR 359 and Little v. The Commonwealth [1947] HCA 24; (1947) 75 CLR 94 . The legislation considered in each of those cases came into operation in time of war, when much more might be validly authorized under the defence power than at other times. The consequence of this was that the kinds of acts which might be authorized under that power, and the purposes for which under that power they might be authorized to be done, covered a large field. In none of the cases cited was it attempted to be shown that the purpose for which the executive acts in question were done was foreign to the purpose of defence as it existed at the relevant time; but none of them suggests that their purpose was unexaminable for relevance to the defence power. The basis of those cases appears to me to have been that the defence power was wide enough at the time to support legislation authorizing the acts in question to be done for a defence purpose. If the acts had been of such a nature, or such consequences had been attached to them by legislation, that even the existence of a defence purpose would not give them or their consequences a sufficient relevance to defence, the reasoning of those members of the Court who held invalid regs. 3 to 6B in the Jehovah's Witnesses Case [1943] HCA 12; (1943) 67 CLR 116 , would have applied to invalidate the legislation authorizing them or the legislation attaching consequences to them. And if the acts authorized, though of such a nature as to be capable of assisting defence, if done for a defence purpose, had been authorized to be done for purposes extraneous to the power of defence, the legislation authorizing them must have been held invalid, as is shown by Shrimpton v. The Commonwealth [1945] HCA 4; (1945) 69 CLR 613 . (at p282)

23. The case is very different where that which a measure purports to do is not within any power of the Parliament unless a sufficient connection with power is supplied by making the operation of the measure conditional upon an executive judgment which is unexaminable and involves the formation of an opinion as to the scope of a legislative power. In such a case the condition cannot bring the statute within power, for ex hypothesi the condition may be satisfied, and the statute according to its terms may operate, in consequence of a wrong opinion as to the scope of the selected power. Thus, under the Act now in question, notwithstanding that the Parliament has no general power to dissolve associations and forfeit their property, a body of persons to whom s. 5 applies might become dissolved and its property forfeited in consequence of an executive judgment based upon an unexaminable opinion as to what is capable of being considered prejudicial to a matter within the scope of the defence power or the incidental power, even though the opinion may be completely erroneous. I find it impossible to refer to any head of power legislation of which that can be said. (at p283)

24. The provisions of the Act relating to individuals resemble in some respects those which apply to bodies of persons. Section 9 applies to a person who answers any of several descriptions which s. 9(1) contains. A person to whom the Governor-General is satisfied that s. 9 applies, and as to whom an appropriate Court does not make any contrary finding, is subjected by the Act to a variety of consequences if the Governor-General, being satisfied that that person is engaged or is likely to be

engaged in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, makes a declaration accordingly under s. 9(2). For reasons similar to those I have stated in connection with s. 5(2), I am of opinion that s. 9(2) is not a valid exercise of the defence power, the incidental power, or the implied power to legislate against subversive activities. It cannot be upheld unless as incidental to a power which will support some one or more of the provisions by which consequences are attached to the making of a declaration by the Governor-General. (at p283)

25. One of those consequences, created by s. 10(1)(c), is incapacity to hold an office in an industrial organization to which the section applies or in a branch of such an organization. The organizations to which the section applies are such as the Governor-General declares. He is authorized to make a declaration in respect of any industrial organization if he is satisfied that a substantial number of its members are engaged in a vital industry; and the industries referred to as vital are certain named industries and any others which in the opinion of the Governor-General are vital to the security and defence of Australia: s. 10(3). It is not within Commonwealth legislative competence to make laws upon the subject of capacity to hold office in industrial organizations generally, and the definition of "industrial organizations" in s. 3 make it clear that that expression in s. 10(1)(c) is not limited to organizations registered under the Commonwealth Conciliation and Arbitration Act. Nor is it possible, I think, consistently with the scheme of the legislation, to apply the presumption of severability created by s. 15A of the Acts Interpretation Act 1901-1948 so as to import such a limitation. Section 10(1)(c) therefore cannot be supported under par. (xxxv.) of s. 51 of the Constitution. Nor can it be supported under the defence power by reason of the fact that it operates only with respect to industrial organizations as to which the Governor-General has the satisfaction prescribed by s. 10(3). The considerations I have stated in relation to s. 5(2) apply in this connection also. There is therefore no power of the Parliament which will support s. 10(1)(c). (at p284)

26. The other disabilities which are made statutory consequences of a declaration under s. 9(2) relate to matters which are clearly within Commonwealth legislative power. These disabilities are imposed by s. 10(1)(a) and (b) and s. 14. It may be accepted as a general proposition that if the Parliament has power to impose a disability in relation to a particular matter, e.g. ineligibility for employment in the Commonwealth public service, it may do so upon any condition it may see fit to select. But it does not follow that, if the condition selected depends upon the doing of some act, such as the making of a declaration, which requires statutory authorization, the power which supports the imposition of disabilities will also support a provision authorizing the act to be done. I should think it clear that the Governor-General's declaration provided for by s. 9(2) requires statutory authorization in order to be privileged under the law of defamation, having regard to the grave imputations it must contain; and in my opinion the statement of the Governor-General's satisfaction which s. 9(2) authorizes to be made in the declaration lacks such a specific connection with any of the powers under which disabilities of the kind in question might be imposed to be capable of authorization in exercise of those powers. (at p284)

27. I am therefore of opinion that s. 9(2) is invalid; and if it is, ss. 10(1) and 14, the operation of which is conditional upon a declaration being in force under s. 9(2), must fall with it. (at p284)

28. The remaining sections of the Act cannot stand by themselves and are therefore invalid. (at p284)

29. The result is that in my opinion Question 1 should be answered: (a) No, and (b) No; and Question 2 should be answered: The whole Act is invalid. (at p285)

ORDER

Questions in case answered as follows:-

1. (a) No. 1. (b) No. 2. Yes - wholly invalid. Defendants to pay costs of plaintiffs Gibson and Campbell in action No. 11 of 1950 and of plaintiffs in the other actions in which this case has been stated. Case remitted to Dixon J.
