

[HIGH COURT OF AUSTRALIA.]

ARNOLD APPELLANT ;
INFORMANT,

AND

HUNT RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF
VICTORIA.

National Security—Regulations—Declared goods—Spirituuous liquors—Maximum price—Fixation—Not effected in order—Reference to extraneous document—Compliance with regulation—Orders—Legislative or executive in character—National Security Act 1939-1940 (No. 15 of 1939—No. 44 of 1940), s. 5—National Security (Prices) Regulations (S.R. 1940 No. 176—1942 No. 513), reg. 23 (1), (1A).

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Reg. 23 of the *National Security (Prices) Regulations* empowers the Commonwealth Prices Commissioner by order published in the *Gazette* to fix and declare the maximum price of any declared goods.

Held, by Rich, McTiernan and Williams JJ., that the price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order.

Held, by Starke J., that the order in question in this case did not fix and declare a maximum price as required by the Regulations.

Semble, per Rich and Williams JJ. (*McTiernan J. contra*): An order made under reg. 23 of the *National Security (Prices) Regulations* is executive, and not legislative, in character.

McIver v. Allen, (1943) 43 S.R. (N.S.W.) 266 ; 60 W.N. 158, referred to.

ORDER NISI to review.

An information was laid in the Court of Petty Sessions, Collingwood, Victoria, by Rupert Henry Arnold, a senior constable of police, against Bridget Hunt, under reg. 29 of the *National Security (Prices) Regulations* (Statutory Rules 1940 No. 176 as amended)

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averring that she had contravened the said regulation in that she sold at a hotel at Collingwood within a radius of twenty miles from the General Post Office, Melbourne, one bottle of Corio Special Whisky being declared goods by reason of Declaration No. 96 made by the Minister of State for Trade and Customs on 13th April 1942, and published in the *Commonwealth Gazette* on 15th April 1942, at a price of two pounds, being greater than the price of 12s. 9d. per bottle which was the price set out for one bottle of Corio Special Whisky in the amended retail price list issued by the Victorian Associated Brewers as operating on and after 1st December 1942, which was by virtue of the terms and conditions of Prices Regulation Orders numbered 911 and 937 made by the Commonwealth Prices Commissioner on 19th January 1943 and 5th February 1943 respectively and published in the *Commonwealth Gazette* on 26th January 1943 and 9th February 1943 respectively the maximum price fixed in relation to the said bottle of whisky under the Regulations aforesaid.

The list was in the following form.—“THE VICTORIAN ASSOCIATED BREWERS. AMENDED RETAIL PRICE LIST—ON AND AFTER 1ST DECEMBER, 1942.—To be read with and deemed incorporated in the Notice from time to time sent you by or on behalf of The Victorian Associated Brewers stating the conditions on which Bulk and Bottled Beer will be sold. The Prices set out are those approved by the Commonwealth Prices Commissioner as Maximum Metropolitan Prices. Approval No. 1434. The prices set out in this list are also the Minimum Prices agreed upon by the United Licensed Victuallers' Association of the Commonwealth of Australia (Victoria Branch), and the Licensed Grocers' Committee in accordance with past practice.” Then followed four pages of prices under various headings such as “Indoor Trade,” “Indoor Trade by the Bottle,” “Outdoor Trade,” “Australian Wines,” “Spirits—Bottle Prices.” And under this last heading was “Whisky—Australian Corio Special, Bottle 12/9.” And there was added at the end of the list the following paragraph:—“Where freight is paid, the same must be added to the above prices. (This does not apply to spirits retailed at per nobbler.)”

The evidence showed that at Collingwood on 25th February 1943, Hunt sold a bottle of Corio Special Whisky for two pounds. Reg. 23 of the *National Security (Prices) Regulations*, so far as material, empowers the Commissioner with respect to any declared goods by order published in the *Gazette* to fix and declare the maximum price at which any such goods may be sold. The Commissioner, by Prices Regulation Order No. 911, as amended, fixed and

declared the maximum price at which spirituous liquors might be sold by retail in the Melbourne metropolitan area to be those set out in the amended retail price list issued by the Victorian Associated Brewers as operating on and after 1st December 1942.

The magistrate held that Prices Regulation Orders numbered 911 and 937 respectively were not valid price-fixing orders under the *National Security (Prices) Regulations* and dismissed the information.

An order nisi to review that decision was granted by *Latham C.J.*

Upon the return of the order there was not any appearance by or on behalf of Hunt.

Teece K.C. (with him *Holmes*), for the appellant. Reg. 23 (1A) (h) of the *National Security (Prices) Regulations* contemplates, on its true construction, that the Commissioner is not bound to set forth in his order in detail the maximum price or prices of the declared goods referred to therein. The fixation and declaration of the maximum price by a reference in the order to some extraneous document or circumstance is a correct compliance with the terms of the regulation. Observations to the contrary in *McIver v. Allen* (1) are *obiter dicta* and incorrect. The Order under consideration is an order fixing and declaring prices and is a proper exercise of the power conferred upon the Commissioner. It is administrative or executive and not legislative in character. The Order was validly made; therefore, assuming that it is legislative in character, it is the only document which is required to be laid before each House of Parliament in compliance with s. 5 (4) of the *National Security Act* 1939-1940 and s. 48 (1) of the *Acts Interpretation Act* 1901-1937.

The following judgments were delivered :—

RICH J. This is an application to make absolute an order nisi granted by the Chief Justice calling upon the respondent Bridget Hunt to show cause before this Full Court why an order made on 8th July 1943 by a police magistrate in Victoria dismissing an information laid by the appellant against the respondent under reg. 29 of the *National Security (Prices) Regulations* and averring that the respondent contravened the said regulation in that she sold at a hotel at Collingwood within a radius of twenty miles from the General Post Office Melbourne one bottle of Corio Special Whisky being declared goods by reason of Declaration No. 96 made by the Minister of State for Trade and Customs on 13th April 1942 and published in the *Commonwealth Gazette* on 15th April 1942 at a price of two pounds, being greater than the price of 12s. 9d. per

(1) (1943) 43 S.R. (N.S.W.) 266, at pp. 270, 271; 60 W.N. 158, at pp. 161, 162.

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bottle which was the price set out for one bottle of Corio Special Whisky in the amended retail price list issued by the Victorian Associated Brewers as operating on and after 1st December 1942 which was by virtue of the terms and conditions of Prices Regulation Orders Nos. 911 and 937 made by the Commonwealth Prices Commissioner on 19th January and 5th February 1943 respectively and published in the *Commonwealth Government Gazettes* on 26th January and 9th February 1943 and numbered respectively 19 and 30, the maximum price fixed in relation to the said bottle of whisky under the Regulations aforesaid for the sale of the same should not be reviewed on the ground that the magistrate was wrong in holding that Prices Regulation Orders Nos. 911 and 937 were not valid price-fixing orders under the *National Security (Prices) Regulations*.

The evidence is clear that the respondent sold a bottle of Corio Special Whisky above the fixed price, so that the only question that arises is whether the magistrate was right in dismissing the information because the price was not fixed as required by reg. 23 (1) (a) of the *National Security (Prices) Regulations*. This regulation, so far as material, empowers the Commissioner with respect to any declared goods by order published in the *Gazette* to fix and declare the maximum price at which any such goods may be sold. With respect to the whisky, the subject matter of the present prosecution, the Commissioner by Prices Regulation Order No. 911 as amended fixed and declared the maximum price at which spirituous liquors might be sold by retail in the Melbourne metropolitan area to be those set out in the amended retail price list issued by the Victorian Associated Brewers as operating on and after 1st December 1942. This is not in my opinion compliance with the regulation. The regulation requires that the price shall be fixed and declared by an order which is published in the *Gazette*. The Order published in the *Gazette* in the present case does not fix or declare any price. The price is fixed and declared by the list issued by the Victorian Associated Brewers. I consider that the price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order.

Mr. Teece referred the Court to the decision of the Full Court of New South Wales in *McIver v. Allen* (1) and pointed out that if we were of opinion that the Order did comply with the regulation a question would arise whether the Order was of a legislative or executive character within the meaning of the *National Security Act* 1939-1940, s. 5 (4), which requires that orders of a legislative character must be laid before each House of Parliament. The Supreme

(1) (1943) 43 S.R. (N.S.W.) 266; 60 W.N. 158.

Court appears to have taken the view that orders fixing prices are of a legislative character. As the present Order does not comply with reg. 23, this further question does not arise for decision, but as at present advised I think that such orders are executive in character and so must not be taken to agree with the decision of the Supreme Court on this point.

For these reasons I think the application should be dismissed.

STARKE J. I agree that the Order is not in accordance with the provisions of reg. 23 of the *National Security (Prices) Regulations*.

McTIERNAN J. I agree that the order nisi should be discharged.

In my opinion the maximum price at which a bottle of Corio Special Whisky may be lawfully sold was not fixed and declared in accordance with the *National Security (Prices) Regulations*, in that the maximum prices at which spirituous liquors may be sold was not fixed and declared by the orders published in the *Gazette* in accordance with reg. 23.

Neither a description of the spirituous liquors to which either order applies, nor the prices fixed and declared by either order, can be ascertained from its terms. It is necessary to refer, in order to ascertain to what spirituous liquors it applies, and the prices which it fixes, to a trade list, the contents of which are not set out in the order nor published in the *Gazette* as part of it.

As at present advised I am not prepared to agree that these Prices Regulation Orders are of an executive rather than a legislative character.

WILLIAMS J. I agree that in cases under reg. 23 (1) (a) the price must form part of the order itself and cannot be fixed by reference to some extraneous document.

As at present advised, I agree with my brother *Rich* that orders fixing prices are of an executive character within the meaning of the *National Security Act*, s. 5 (4), but that it is not necessary on this application to express a final opinion on this point.

Appeal dismissed.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

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