

[HIGH COURT OF AUSTRALIA.]

VARDON

PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS

DEFENDANT.

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1943.

MELBOURNE,

Sept. 29, 30 ;

Oct. 25.

Latham C.J.,

Rich, Starke,

McTiernan and

Williams JJ.

National Security—Price control—Order declaring that maximum price at which goods might be sold by a specified person should be such as was fixed by notice—

Notice that price was “fixed at . . . cost . . . plus 20% ”—Validity

—National Security (Prices) Regulations (S.R. 1940 No. 176—1942 No. 513),

reg. 23 (1) (b), (2) (b).

Pursuant to a Prices Regulation Order declaring that the maximum price at which any goods might be sold by a person named in the Order should be such price as was fixed by notice by the Commonwealth Prices Commissioner in writing to that person, notice was given that the maximum price was “fixed at the cost of those goods . . . plus 20% thereof.”

Held that, as the meaning of the word “cost” was uncertain, the notice was not a notice fixing a price within the meaning of reg. 23 (1) (b) of the *National Security (Prices) Regulations* and was therefore invalid.

DEMURRER.

George Henry Kelsell Vardon brought an action in the High Court against the Commonwealth and others. His statement of claim was substantially as follows :—

1. The plaintiff is the sole proprietor of a tailoring business in Rundle Street Adelaide conducted under the name or style of “Myerson’s.”

2. The defendant Copland is the Prices Commissioner appointed pursuant to the *National Security (Prices) Regulations* ; the defendant McCarthy is the Assistant Prices Commissioner appointed pursuant to the said Regulations ; and the defendant Williamson is the secretary of the Commonwealth Prices Branch.

3. The business referred to in par. 1 is and at all material times has been conducted as follows :—(1) The plaintiff carries a range of materials and quotes the customer a price for making a suit or costume

inclusive of the material selected by the customer and the services referred to in sub-par 2 hereof. (2) If the customer orders a suit or costume, the plaintiff measures the customer, or in the case of a country customer sends self-measurement forms for the customer to fill in, and the plaintiff sends the selected material and the customer's measurements to a tailor for make-up, the tailor doing all the work of make-up, giving all necessary trial fittings and, as a general practice, supplying the linings, pocketings, and trimmings. In exceptional cases the plaintiff provides the linings, pocketings, and trimmings. (3) On completion of the suit or costume, the plaintiff receives it from the make-up tailor, and on payment of the total price quoted by him as mentioned in sub-par. 1 hereof (or if any deposit or part payment has been made by the customer, on payment of the balance of the price quoted then remaining due by the customer) delivers the suit or costume to the customer. (4) The plaintiff keeps proper books of account and records.

4. On 13th July 1943 the defendant McCarthy as Assistant Prices Commissioner made Prices Regulation Order No. 1110, which provided :—"Notwithstanding anything contained in any Order issued before or after the date of this Order, I fix and declare the maximum price at which any goods may be sold or services supplied by G. H. K. Vardon trading as 'Myerson's' in Rundle-street, Adelaide, in South Australia, or any other person or persons trading as 'Myerson's' in Rundle-street, aforesaid, to be such price as is fixed by notice by the Commonwealth Prices Commissioner in writing to the said G. H. K. Vardon or such person or persons as the case may be."

6. On 14th July 1943 the defendant Williamson as secretary of the said Prices Branch, and purporting to act under the powers delegated to him by the defendant Copland, as Commonwealth Prices Commissioner, wrote to the plaintiff as follows :—"I have to inform you that as you trading as Myerson's have failed to keep trading records as required under the *National Security (Prices) Regulations*, the Commonwealth Prices Commissioner has considered it necessary to issue a Prices Regulation Order and thereunder fix the maximum price at which any goods may be sold or services supplied by you to be such prices as are fixed by him by notice in writing. Pursuant to this Order the maximum price of any declared goods or services sold by you is fixed at the cost of those goods or services, plus 20% thereof. This notification is given in terms of . . . Prices Regulation Order No. 1110 and under the powers delegated to me by the Commonwealth Prices Commissioner pursuant to regulation 46 of the *National Security (Prices) Regulations*.

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Furthermore, in pursuance of regulation 20 of the regulations, I require you to furnish a return to the Deputy Prices Commissioner, Adelaide, within fourteen days of the receipt of this notice, setting out the following information:—(a) The quantities of any . . . goods in your possession or under your control at the date of the publication of this notice in the *Gazette*. . . . (b) The cost of each of these goods and the methods and principles in accordance with which you arrive at that cost. To enable the Commissioner to establish equitable selling prices, you will be required to keep the following records:—(a) Purchase Book; (b) Sales Book; (c) Materials Stock Book; (d) Costing records showing make-up of prices; (e) Books otherwise showing all income and expenditure by you. The foregoing determinations made in pursuance of the Order are subject to review and at any time subject to variation at the discretion of the Commissioner.”

7. The defendant McCarthy had no power to make or issue the said Prices Regulation Order No. 1110 and the defendant Copland had no power to authorize the defendant Williamson, nor had the defendant Williamson power, to issue the letter referred to in par. 6. The *National Security (Prices) Regulations* do not, on their proper construction, authorize or empower the defendants or any of them to do the acts matters and things referred to in pars. 4 and 6 hereof or any of them.

8. If the *National Security (Prices) Regulations* do on their proper interpretation authorize the doing of the acts matters and things referred to in pars. 4 and 6 hereof, such Regulations are to that extent *ultra vires* invalid and of no effect.

9. The plaintiff claims (a) a declaration that the said Prices Regulation Order No. 1110 and the notification in writing dated 14th July 1943 given to the plaintiff thereunder are and each of them is invalid on the ground that they are not authorized by the *National Security (Prices) Regulations* and a declaration that, if the said Regulations do authorize the making of the said Order and notification, the said Regulations are invalid; (b) an injunction restraining the defendants from enforcing the said Order or notification or otherwise interfering with the plaintiff in his conduct of the business of “Myerson’s”; (c) damages.

The defendants demurred to the statement of claim, stating as a ground in law for the demurrer “that *National Security Act* 1939-1940 and the *National Security (Prices) Regulations* . . . are valid laws of the Commonwealth and the acts which the defendants are alleged to have done were authorized by the said Act or regulations validly made thereunder.”

Fullagar K.C. (with him *P. D. Phillips*), for the defendants. The validity of the declaration of goods and services under reg. 22 of the *Prices Regulations* is established by *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1), per *Latham* C.J., and per *Rich* J. That is the first step. The next step is the Commissioner's order, which may be under par. *a* or par. *b* of reg. 23 (1) in the case of goods (or, in the case of services, par. *a* or par. *b* of reg. 23 (2)). The Assistant Prices Commissioner has power to act under reg. 7A (2) without any specific delegation. The Order in question here has done all that the Commissioner is required to do under reg. 23 (1) (*b*) so far as the making of an order is concerned. The next step contemplated by reg. 23 (1) (*b*) is the notice. The method adopted in the notice of fixing the price at cost plus twenty per cent is justified particularly by reg. 23 (1A) (*f*). Reg. 23 (1) (*b*) is a valid exercise of the defence power. It is well recognized that a system of price control is essential in time of war to prevent profiteering and inflation. Owing to the infinite variety of goods on the market and the widely varying circumstances under which traders operate, it is essential to a system of price control that there should be power to deal with the individual. A discretion has to be vested in someone, and there is no reason why it should not be vested in the Prices Commissioner. The suggestion that the action of the Commissioner was "punitive" is not supported by any allegation of fact. Apart from the notice itself the statement of claim contains no such allegation, and the notice does not justify the suggestion. In effect the Commissioner says to the plaintiff: "You have not kept proper books and records from which I can ascertain what is a proper price for you, so for the present I will fix your price at cost plus twenty per cent," not: "You have committed a breach of the Regulations and I am going to punish you." *Arnold v. Hunt* (2) was decided under reg. 23 (1) (*a*); it does not apply to this case. The meaning of "cost" does not present any difficulty here; there might be uncertainty in its application to some cases, but that is not so here. The cost to the plaintiff of a suit of clothes is what he pays for the material plus what he pays to have it made up into the suit; "overhead" charges must come out of the added twenty per cent, which is gross profit.

Ligertwood K.C. (with him *K. L. Ward*), for the plaintiff. (1) The Order and notice are bad because they contain no certain fixation of price. (*a*) The price must be ascertainable with certainty, not only by the trader, but also by the public. The effect of the Regulations is that the price must be known to everyone concerned: it is

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an offence for a member of the public to pay more than the fixed price. [He referred to regs. 28, 29, 32, 35, 45.] The power of the Commissioner is to fix *prices*. He must fix a money figure, or, at least, a standard whereby a money figure can be ascertained with certainty by both buyer and seller. In the latter case the standard must be such that it is only a mathematical matter to arrive at the price as a money figure. [He referred to *Arnold v. Hunt* (3), per *Rich J.*] The paragraphs of reg. 23 (1A) are merely indications of the principles on which the Commissioner may proceed in fixing a price, and the sub-regulation contains nothing inconsistent with the argument now submitted. (b) Even if the first argument is wrong, the Order and notice are still bad for uncertainty because of the vagueness of the word "cost." There is no definition of the items to be taken into account in ascertaining cost. It is well known that different people have different methods of arriving at cost. Unless the Commissioner, in the order or notice, defines cost, the vendor cannot know what is the command that he is to obey. (2) The intention of the Regulations is that the power of the Commissioner to make an order under reg. 23 (1) (b) shall be exercised only where the Minister has made a declaration under reg. 22 (1) and (3); that is to say, the Minister must make a declaration in respect of a particular person before the Commissioner can single out that person and make a special order in respect of him. Otherwise, there would be no point in the words of reg. 22 (3) referring to persons, which show that it was not to be left to the Commissioner to discriminate against a particular person as he has done in this case. (3) The Commissioner can only fix prices for an individual where the conditions of that person's trade are, in the judgment of the court, such as to require individual fixation. The power is applicable primarily to persons whose conditions of trade are in the nature of a monopoly. The collocation of phrases, "person," "body," "association of persons," is such as is commonly used in relation to trade monopolies and the like. (4) The Commissioner has not in this case truly exercised the power to *fix prices*. The notice shows that the Commissioner set out to punish the plaintiff for not keeping records in the manner approved by the Commissioner. That is arbitrary and is not the proper exercise of a discretion. There is no fixing of prices on the basis that the war economy and the interests of the public justify it. (5) If reg. 23 (1) (b) authorizes the Order and notice, it is beyond the defence power. The Order and notice have no relation to the war economy. It is not to the point here that the power to fix prices generally has, or may have,

a sufficient relation to defence. The power to deal with individual cases must be limited to cases in which it is necessary for purposes of defence to control the individual, and the Regulations must define, or be construed as limited by, the necessity. [He referred to *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1), per *Starke J.*.]

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Fullagar K.C., in reply. The argument that there must be a rigid correspondence between declarations of the Minister and orders of the Commissioner has already been rejected—impliedly, at all events—by the Court in the *Prices Regulations Case* (2). The argument that a money figure must be fixed in all cases is inconsistent with reg. 23 (1A), particularly par. *g*; also pars. *f* and *h*. The notice is not void for uncertainty merely because it is capable of more than one interpretation (*Gill v. City of Prahran* (3); *Barnes v. City of Coburg* (4); *Stephen v. Naylor* (5)).

Cur. adv. vult.

The following written judgments were delivered:—

Oct. 25

LATHAM C.J. This is a demurrer to a statement of claim which raises questions as to the validity of an order made and a notice given by the Prices Commissioner under the *National Security (Prices) Regulations*—Statutory Rules 1940 No. 176 as amended.

Reg. 22 provides that the Minister of State for Trade and Customs may, by notice in the *Gazette*, declare any goods to be declared goods, or any service to be a declared service for the purpose of the Regulations, subject to a proviso which is not important for the purpose of this case. The regulation also provides: "Any declaration by the Minister in pursuance of this regulation may be made generally or in respect of any part of Australia or any proclaimed area or in respect of any person or body or association of persons."

The Minister, by a notice in the *Gazette*, declared all goods and services, with certain exceptions, to be declared goods and services for the purpose of the Regulations. These declarations are set out in the report of *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (6). These declarations are relied upon by the defendants in the present case. In the *Prices Regulations Case* (2) it was decided that the declarations were valid.

(1) *Ante*, at p. 344.

(2) *Ante*, p. 335.

(3) (1926) V.L.R. 410.

(4) (1928) V.L.R. 334.

(5) (1937) 37 S.R. (N.S.W.) 127; 54 W.N. 50.

(6) *Ante*, p. 335, at pp. 338, 339.

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Reg. 23 (1) is as follows:—

“The Commissioner may, with respect to any declared goods, from time to time, in his absolute discretion, by order published in the *Gazette*—

(a) fix and declare the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area ; or

(b) declare that the maximum price at which any such goods may be sold by any person or body or association of persons shall be such price as is fixed by notice by the Commissioner in writing to that person or body or association of persons.”

In *Arnold v. Hunt* (1), it was held that an order of the Commissioner made under reg. 23 (1) (a) was not valid if the price of goods was fixed and declared by a document which was not part of the order. This part of the regulation requires that the price should not only be fixed but should also be declared by the order. In the present case the questions which arise depend upon the interpretation of reg. 23 (1) (b). This part of the regulation requires, first, a declaration by an order that the price is to be fixed by notice, and, secondly, a notice by which the price is fixed. The contents of the order are prescribed by the regulation. In the first case (a) the order must fix and also declare a price—as was held in *Arnold v. Hunt* (1). In the other case (b) the declaration required to be contained in the order is a quite different kind of declaration. No declaration of price is required by reg. 23 (1) (b). The declaration is to be a declaration that the price is to be fixed by a notice in writing. As there is no requirement, in this case, that a price must be declared, the decision in *Arnold v. Hunt* (1) does not, in my opinion, govern the present case.

The plaintiff, G. H. K. Vardon, carries on business in Adelaide under the name of “Myerson’s.” He is a tailor and carries a stock of suitings. Customers select their suitings and are measured, and the plaintiff sends the material to a tailor to be made up. That tailor does all the work of making up and of trying on and supplies linings, &c. When the suit (or costume) is made, the plaintiff receives it from the make-up tailor and, on payment of the price, delivers it to the customer. The price charged includes a price for the material and the services mentioned. The plaintiff keeps books and records which show the cost of materials and the amount paid by the plaintiff to the make-up tailor in respect of each suit or costume. The carrying on of the business necessarily involves the payment of other expenses referred to in the pleadings as overhead

expenses, such as the cost of providing premises, of clerical assistance, management, &c. It is not alleged that the plaintiff keeps any books or records purporting to allocate any proportion of such expenses to particular products.

On 13th July 1943 the defendant D. B. Copland, the Commonwealth Prices Commissioner, made an order which contained the following clause:—“(2) Notwithstanding anything contained in any Order issued before or after the date of this Order, I fix and declare the maximum price at which any goods may be sold or services supplied by G. H. K. Vardon trading as ‘Myerson’s’ in Rundle-street, Adelaide, in South Australia, or any other person or persons trading as ‘Myerson’s’ in Rundle-street, aforesaid, to be such price as is fixed by notice by the Commonwealth Prices Commissioner in writing to the said G. H. K. Vardon or such person or persons as the case may be.” This Order neither fixes nor declares any price. But it does declare that prices are to be fixed by notice and accordingly to this extent complies with reg. 23 (1) (b).

On 14th July 1943 the defendant Williamson, who is the Secretary of the Commonwealth Prices Branch, wrote a letter to the plaintiff by direction of the Prices Commissioner in which reference was made to the Order and it was further stated:—“Pursuant to this Order the maximum price of any declared goods or services sold by you is fixed at the cost of those goods or services, plus 20% thereof.”

The letter required the plaintiff to furnish in pursuance of reg. 20 a return containing certain information, and stated that the plaintiff would be required to keep certain specified records. (Reg. 49 requires certain persons to keep “proper” books and records, but there is no regulation which authorizes the Commissioner to prescribe what books shall be kept.) It is contended for the plaintiff upon various grounds that the Order is invalid and that the notice contained in the letter is invalid.

Upon the view which I take it will be sufficient for me to refer to a particular objection which is made to the notice. I find it unnecessary to consider other objections because, in my opinion, there is a good objection to the notice which prevents it being a notice given in compliance with reg. 23 (1) (b).

Under that regulation the Commissioner may declare that the maximum price of goods shall be “such price as is fixed by notice by the Commissioner in writing” to the person or body or association of persons concerned. The notice must be a notice which fixes a price. In the case of goods substantially identical in character and quality which are produced in quantity, it will often be simple and convenient to fix a price at a certain figure per article, per pound,

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or per other quantity. For example, the price of boots and shoes of certain standard descriptions and sizes might be fixed at particular prices. If, however, it is desired that the manufacture of surgical boots, individually fitted to meet the requirements of particular persons, shall continue, it is obvious that the fixation of fair general prices for all boots which might be adequate and proper for ordinary boots would not meet the case of surgical boots which were specially designed and manufactured for individual cases. Similarly a general price for surgical boots, even if divided into classes, would be inappropriate. It would be necessary in some cases to fix special prices for special boots—and, in many cases, this could not, before actual manufacture, be ascertained at a particular amount, though the method of ascertaining it could be prescribed in advance. Similarly, in the case of suits and dresses, if a general price were fixed for all suits or for all dresses, the practical result would be that no more suits or dresses would be made to order. In the case of suits or dresses specially made to meet the desires of individual persons, some other method of fixing the price must be applied if trade in such articles is to continue.

The general provision contained in reg. 23 (1) (b) would (in my opinion) enable the Commissioner to specify a means of ascertaining a price in the case of individual articles, and this would satisfy the requirements of that regulation. He might, for example, declare that the price should consist of the following elements in the case of, for example, a suit of clothes: cost of materials, plus cost of making up the material in each case, plus a specified percentage upon such costs. But, to remove any doubt upon the question, there are express provisions in reg. 23 (1A) that the Commissioner may fix a price within the meaning of the Regulations without specifying a money figure. Reg. 23 (1A) provides that, in particular, but without limiting the generality of the preceding sub-regulation, the Commissioner, in the exercise of his powers under that sub-regulation, may fix and declare maximum prices in the manner set out from (a) to (h). (Regs. 23 (2) and 23 (2A) correspond generally, in the case of services, to regs. 23 (1) and 23 (1A) in the case of goods. The notice of 14th July 1943 relates to goods and services.) For example, he may (par. c) fix maximum prices as on a sliding scale. If the Commissioner used this power, he could give notice (under reg. 23 (1) (b)) that retail prices of goods should move up or down with wholesale prices ascertained in a particular manner from time to time. If this principle were applied, the price at any particular time could not be ascertained from the terms of the notice taken by themselves, but nevertheless the price would be fixed by the notice.

Under par. *g* the Commissioner may fix maximum prices according to or upon any principle or condition specified by him. Under this provision the Commissioner might fix a price varying with the seasons of the year, with the rates of wages paid from time to time, or with reference to other principles or conditions. Par. *h* allows the Commissioner to fix maximum prices so that they shall vary with such costs as are determined by the Commissioner. These various provisions should not, in my opinion, be regarded as merely prescribing mental operations which the Commissioner is at liberty to perform. There would be no object in making such provisions. Under reg. 23 (1) the Commissioner is at liberty to follow any path which seems proper to him in arriving at a final determination of prices, and if reg. 23 (1A) were construed as relating only to the matters which might enter into the thought processes of the Commissioner when he was performing his duties, it would have no real effect. Reg. 23 (1A) has reference to the content or terms of an order or notice. In my opinion the object of reg. 23 (1A) is to make it clear that the Commissioner may fix prices within the meaning of the regulation by prescribing in an order, or in a notice, a method according to which prices of goods are to be determined without actually stating the amounts of any prices in the order or notice.

Par. *f* of reg. 23 (1A) provides that the Commissioner may fix "maximum prices on landed or other cost, together with a percentage thereon or a specified amount, or both." "Landed cost" is defined in reg. 33. In the present case the Commissioner has fixed prices at "the cost of the goods or services plus 20% thereof." It will be observed that the Commissioner has not specified landed cost of materials, nor has he specified any other cost. He has simply fixed the price at "the cost" plus 20%. In my opinion this provision is so vague that it is not possible to regard it as a notice fixing a price within the meaning of the regulation. It does not specify a price. But neither does it prescribe a clear method of fixing a price. It has been argued that the fixing of twenty per cent as the amount to be added to "cost" must necessarily lead to the conclusion that all charges other than charges for materials and making up are to be provided by the twenty per cent addition: that is, that the twenty per cent is intended to provide for overhead and other expenses, so that "cost" means cost of materials plus cost of making up. But this argument is really no more than a more or less probable conjecture. The attention of the Court has been directed to an order made relating to articles of clothing in which percentages of forty-five per cent and sixty per cent have been allowed on cost as

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ascertained under the terms of the order. (In those cases "cost" has been carefully defined.) The cost of a suit of clothes may be ascertained in different ways for different purposes—for example, it may mean factory cost only or may include also costs of distribution and merchandising. The production of a suit of clothes involves not only the cost of materials and making up, but also the cost of measuring, parcelling and transport, and overhead charges such as rent, and clerical, advertising, and management expenses. If it became necessary to ascertain in the most accurate manner the cost of a particular suit of clothes, these charges (some of which could be ascertained only over some conventional period) would necessarily be distributed according to some principle over the varying products of the business. It would have been possible, in my opinion, for the Commissioner to state and validly prescribe a principle according to which these charges should be ascertained and distributed over the products of the plaintiff, or to define cost on another basis, allowing such additional percentage in either case as he thought proper. But that course has not been followed, and the result is that, as the Commissioner has specified neither landed cost nor any other cost, and as the term "cost" is necessarily uncertain in meaning when applied to goods of the description to which the notice refers, the notice is not a notice fixing a price within the meaning of reg. 23 (1) (b). The notice does not fail to comply with the regulation because it fails to specify an actual money price in the case of all the products of the plaintiff. It fails to comply with the regulation because it is not a notice which fixes any price within the meaning of the Regulations, either by specifying a price, or by prescribing a method the application of which would result in the ascertainment of a price which would be "fixed" accordingly.

I am therefore of opinion that for this reason the demurrer should be disallowed.

RICH J. The present case illustrates the necessity for careful revision of the numerous regulations which are published from time to time. One can realize the difficulties which draftsmen meet by reason of the variety of subjects to be dealt with and the necessity for haste in coping with them. At the same time some system of checking the drafts would remove ambiguities, make the regulations more intelligible, and obviate the necessity for recourse to the court for interpretation. Otherwise the draftsmen accept the attitude adopted by *André Gide* in his preface to *Paludes*—"Avant d'expliquer aux autres mon livre, j'attends que d'autres me l'expliquent."

I find it unnecessary to pass upon some of the grounds relied upon in the argument of this demurrer, because I consider that the terms of regs. 23 (1) (b) and 23 (1A) (f), upon which the defendants rely, have not been complied with. Pursuant to s. 5 (1) (d) of the *National Security Act*, the *National Security (Prices) Regulations* authorize the fixing of maximum prices of goods or services for securing the public safety and defence of the Commonwealth. When the Regulations are scrutinized stress appears to be laid on fixing the maximum price whether for goods, reg. 23 (1) (a) and (b), or for services, in the parallel reg. 23 (2) (a) and (b). The price itself is to be fixed. Support to this view is to be found in the provisions of regulations creating offences, such as regs. 29, 30, 32, 34 and 35. In certain circumstances a trader must exhibit the maximum prices in his place of business, reg. 45. It thus appears that prices should be fixed so that they are clearly and precisely ascertainable both by traders and members of the public. Apart from statutory definition or figurative meaning, the price of an article is the money for which it is bought or sold. Now the letter or notice set out in par. 6 of the statement of claim was made pursuant to the Order contained in par. 4 of the statement of claim. It purports to fix the maximum price of any declared goods sold or services supplied by the plaintiff (or certain other persons) "at the cost of those goods or services plus 20% thereof." "Cost," not being defined, is an ambiguous and uncertain term. "The general idea of cost covers a number of different meanings" (p. 35, *Incidence of Overhead Costs*, Professor Maurice Clark). One finds in *Carter's Advanced Accounts* such expressions as flat cost, prime cost and total cost. And Professor Van Sickle, *Cost Accounting*, p. 4, says that "while cost accounting can be defined, it is quite another thing to endeavour to define cost." These books on accountancy illustrate the differing opinions of accountants as to the proper items of expense to include under the heading of cost and the proper method of allocating them to particular articles. In *Dawson's Accountant's Compendium* it is stated that "the cost of the materials and directly productive wages form the prime cost of the commodity or work, and the other expenditure, being indirect, is called the on-cost, the two together making the total cost of production." In the present case does "cost" mean merely the cost of the material used plus the amount paid to the make-up tailor? Or does it include an allowance for the time of the plaintiff or his employees in showing the customer the range of materials, measuring him and sending the materials and instructions to the make-up tailor? What overhead costs does it include? "Landed cost" (reg. 23 (1A) (f)), defined

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in reg. 33, is beside the question, as the notice sent to the plaintiff does not mention it. Indeed, reg. 23 (1A) (f), when it speaks of "landed or other cost," affords evidence of the uncertainty as to the meaning of "cost." In my opinion the notice in question by reason of its uncertainty and indefiniteness fails to comply with the terms of reg. 23 (1) (b).

During the argument reference was made to *Arnold v. Hunt* (1). That was a decision as to the validity of an order published in the *Gazette* under the provisions of reg. 23 (1) (a). There the price of the goods was not fixed and declared in the order but in a price list—which was not part and parcel of the order. This in my opinion did not comply with the provisions of this sub-regulation.

I agree that the demurrer should be overruled.

STARKE J. Demurrer to the statement of claim delivered in this action. This claim alleges that the plaintiff is the proprietor of a tailoring business conducted under the name of Myerson's and he claims (*inter alia*) a declaration that Prices Regulation Order No. 1110 and a notification in writing given to the plaintiff thereunder are invalid on the ground that they are not authorized by the *National Security (Prices) Regulations* and if the Regulations do authorize the making of the Order and notification the Regulations are invalid. The demurrer is to this claim.

The Prices Regulation Order No. 1110 is as follows:—

"In pursuance of the powers conferred upon me by the *National Security (Prices) Regulations*, I . . . Assistant Prices Commissioner, hereby make the following Order:—

1. This Order may be cited as Prices Regulation Order No. 1110.

2. Notwithstanding anything contained in any Order issued before or after the date of this Order, I fix and declare the maximum price at which any goods may be sold or services supplied by G. H. K. Vardon trading as 'Myerson's' in Rundle-street, Adelaide, in South Australia, or any other person or persons trading as 'Myerson's' in Rundle-street, aforesaid, to be such price as is fixed by notice by the Commonwealth Prices Commissioner in writing to the said G. H. K. Vardon or such person or persons as the case may be.

Dated this thirteenth day of July, 1943."

And the notification, so far as material, is as follows:—

"14th July, 1943.

Dear Sir,

I have to inform you that as you trading as Myerson's have failed to keep trading records as required under the *National*

Security (Prices) Regulations, the Commonwealth Prices Commissioner has considered it necessary to issue a Prices Regulation Order and thereunder fix the maximum price at which any goods may be sold or services supplied by you to be such prices as are fixed by him by notice in writing. Pursuant to this Order the maximum price of any declared goods or services sold by you is fixed at the cost of those goods or services, plus 20% thereof.

This notification is given in terms of paragraph 2 of Prices Regulation Order No. 1110 and under the powers delegated to me by the Commonwealth Prices Commissioner pursuant to Regulation 46 of the *National Security (Prices) Regulations*. Furthermore, in pursuance of Regulation 20 of the Regulations, I require you to furnish a return to the Deputy Prices Commissioner, Adelaide, within fourteen days of the receipt of this notice, setting out the following information :—

(a) The quantities of any of the following goods in your possession or under your control at the date of the publication of this notice in the *Gazette* :—

- (i) Stocks of material for use in manufacture ;
- (ii) Stocks of finished goods ;
- (iii) Any other stocks ;

(b) The cost of each of these goods and the methods and principles in accordance with which you arrive at that cost.

To enable the Commissioner to establish equitable selling prices, you will be required to keep the following records :—

- (a) Purchase Book ;
- (b) Sales Book ;
- (c) Materials Stock Book ;
- (d) Costing Records showing make-up of prices ;
- (e) Books otherwise showing all income and expenditure by you.

The foregoing determinations made in pursuance of the Order are subject to review and at any time subject to variation at the discretion of the Commissioner.

A copy of the relevant Prices Regulation Order No. 1110 is attached for your information.

I shall be glad if you will acknowledge receipt of this communication."

The *National Security (Prices) Regulations* authorize the Minister to declare any goods or services to be declared goods or services respectively : See *Prices Regulations Case* (1). And they further provide that the Commonwealth Prices Commissioner may with respect to any declared goods or services from time to time, in his

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absolute discretion, by order published in the *Gazette* declare that the maximum price at which any such goods may be sold by any person or body or association of persons shall be such price as is fixed by notice by the Commissioner in writing to that person or body or association and that the maximum rate at which any such service may be supplied or carried on by any person or body or association of persons shall be such rate as is fixed by notice by the Commissioner in writing to that person or body or association of persons. And without limiting the generality of these regulations the Commissioner in the exercise of his powers may fix and declare (*inter alia*) maximum prices and maximum rates according to or upon any principle or condition specified by the Commissioner.

The Prices Order No. 1110 and the notification already set out were made pursuant to these regulations. Arguments were addressed to the Court attacking the Order and notification on various grounds, but the only one which I think necessary to determine is whether the notification fixing the maximum price of declared goods or services sold by the plaintiff at the cost of those goods or services plus twenty per cent thereof is so uncertain and ambiguous that it affords no direction to those who are to obey it and consequently is invalid.

The Regulations (reg. 33) assign a meaning to such expressions as "landed cost," "retail," "wholesale," in the Regulations and in any order made under the Regulations fixing the maximum price for sale of any declared goods. But the notification uses none of these expressions. The maximum price of any declared goods or services is fixed at the cost of those goods or services plus twenty per cent thereof. Cost is an equivocal word and differs in meaning according to circumstances. Thus cost to an importer is one thing, to a manufacturer another, and to a purchaser still another. Cost to the plaintiff might, I suppose, cover the cost of materials, expenditure in the course of manufacture, duties, expenses and charges of all sorts including, I should think, those charges and expenses often referred to as "overhead charges," but the notification affords no principle, standard, rule or guide whereby those who have to obey it can estimate or fix their costs, and expenditures such as wages and other charges vary from time to time, especially in time of war. And this is so although the Regulations provide that a person shall not, unless the consent in writing of the Commissioner has been first obtained, sell or offer for sale any goods or supply or offer to supply any declared service at a price or rate greater than the maximum price or rate fixed for those goods or that service. And further that a person shall not pay or offer to pay for any declared goods or service at a greater price or rate than the maximum price

or rate fixed in relation thereto. And in any prosecution for a contravention or failure to comply with any provision of the Regulations or with any order made in pursuance thereof the averment of the prosecutor contained in the information or complaint shall be prima facie evidence of the matter or matters averred. But these provisions only show how necessary is the rule of law that by-laws or regulations of the character now before us should be certain, free from ambiguity, and afford complete direction to those who are to obey them.

The notification fixing the maximum price of any declared goods or services sold by the plaintiff at the cost of those goods or services plus twenty per cent is in my judgment bad and should be declared invalid.

MCTIERNAN J. The question to be decided is whether the action which has been taken in the purported exercise of powers conferred by the *National Security (Prices) Regulations* to limit the maximum prices to be charged by the plaintiff for goods sold or services supplied by him is invalid. It is claimed on behalf of the defendants that the action is authorized by reg. 23 of the foregoing Regulations. This regulation empowers the Commonwealth Prices Commissioner in his absolute discretion to make orders prescribing maximum prices for declared goods which are to be observed generally, and orders prescribing maximum prices for such goods which are to apply to any person or body or association. In the former case the Commissioner is empowered to "fix and declare" the maximum price and in the latter to "declare" that the maximum price shall be such price as is "fixed" by notice by the Commissioner in writing to that person or body or association. These powers are contained in pars. *a* and *b* respectively of sub-reg. 1 of reg. 23. Reg. 23 (1A) provides that, in particular, but without limiting the generality of the last preceding sub-regulation, the Commissioner, in the exercise of his powers under that sub-regulation, may fix and declare maximum prices as thereafter mentioned. Reg. 23 (2) and (2A) contains similar provisions with respect to "declared" services.

An order purporting to be an exercise of the powers conferred by these Regulations was made on 13th July 1943 which professes to fix and declare the maximum price at which any goods may be sold or services supplied by the plaintiff to be such price as is fixed by notice by the Commonwealth Prices Commissioner in writing to the plaintiff. A notice dated 14th July directed to the plaintiff states that "pursuant to this Order the maximum price of any declared goods or services sold by you is fixed at the cost of those

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goods or services, plus 20% thereof." The words "cost of those goods or services plus 20%" are used to indicate the price which is thereby fixed.

The word "cost" does not imply a definite list of items which are to be taken into account in calculating the basic figure which is to be increased by twenty per cent to give the price: and no criterion is provided by the Order or the notice for calculating cost. It is not necessary in order to fix a price under reg. 23 to stipulate a sum of money, but if a sum of money is not stipulated, it is necessary for the due exercise of the powers conferred by the regulation that a definite standard or criterion should be stated whereby the price can be ascertained. In my opinion a price is not fixed in the notice dated 14th July 1943 for the purposes of the Regulations and accordingly the notice is invalid. It is not necessary to deal with the other questions which were argued.

In my opinion the demurrer should be overruled on the ground that the notice dated 14th July 1943 was not authorized by the *National Security (Prices) Regulations*.

WILLIAMS J. This is a demurrer by the defendants to the statement of claim in an action in which the plaintiff, who carries on a tailoring business in Adelaide, is seeking to impeach the validity of reg. 23 of the *National Security (Prices) Regulations*, or alternatively of Prices Regulation Order No. 1110 dated 13th July 1943 made by the Prices Commissioner thereunder and duly published in the *Government Gazette*, or alternatively of a notice in writing dated 14th July 1943 directed to the plaintiff pursuant to that Order.

The statement of claim, par. 3, alleges that "(1) the plaintiff carries a range of materials and quotes the customer a price for making a suit or costume inclusive of the material selected by the customer and the services referred to in sub-par. 2 hereof. (2) If the customer orders a suit or costume, the plaintiff measures the customer, or in the case of a country customer sends self-measurement forms for the customer to fill in, and the plaintiff sends the selected material and the customer's measurements to a tailor for make-up, the tailor doing all the work of make-up, giving all necessary trial fittings and, as a general practice, supplying the linings, pocketings and trimmings. In exceptional cases the plaintiff provides the linings, pocketings and trimmings. (3) On completion of the suit or costume, the plaintiff receives it from the make-up tailor, and on payment of the total price quoted by him as mentioned in sub-par. 1 hereof (or if any deposit or part payment has been made by the customer, on payment of the balance of the price quoted

then remaining due by the customer) delivers the suit or costume to the customer." These allegations must be deemed to have been admitted by the defendants for the purposes of the demurrer.

The validity of reg. 23 is attacked on the ground that it is beyond the defence power of the Commonwealth to provide for the fixing of prices to be charged by an individual or a particular body or association of persons except individuals or bodies or associations occupying some special position such as individuals or bodies or associations who or which have a monopoly of certain goods or services.

In *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1) it was held by this Court that it was within the ambit of the defence power for the Commonwealth to legislate to control the price of any goods or the remuneration for any services during the war. In particular reg. 22 was held to be a valid exercise of power. Reg. 23 is consequential upon reg. 22. If it is competent for the Federal Executive Council to authorize the Minister, as it did in reg. 22, to declare what goods and services shall be subjected to such control, it must be equally competent for it to delegate to the Prices Commissioner the power to fix the prices of goods and the remuneration for services declared by the Minister under reg. 22. To be effective, the power must be wide enough to enable goods and services to be declared separately as well as collectively. Regs. 22 (3) and 23 (1) (b) are in my opinion valid sub-regulations.

It was contended that the Prices Commissioner must march in step with the Minister in the sense that if the Minister declares all goods or services, as he did (with certain exceptions) by Declarations 96 and 108, the terms of which appear in the *Prices Regulations Case* (1), then the Prices Commissioner can only fix the price of all such goods or the remuneration for all such services, so that, if it is desired to fix the price of particular goods or the remuneration for particular services, then the Minister must first declare these particular goods or services. In the case of the plaintiff, therefore, it was said that the Prices Commissioner could only fix the price of his particular goods or the remuneration for his particular services if the Minister first declared the plaintiff's business under reg. 22. I am unable to agree with this contention. It is clear, to my mind, that, once the Minister has declared any goods or services, the Prices Commissioner has all the powers contained in reg. 23 with respect to all or any of such goods or services. If, therefore, any of the goods or services declared by the Minister are sold or provided by

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an individual, the Prices Commissioner can then fix the price or remuneration for these particular goods or services to be charged by this individual.

It was also contended that, even if regs. 22 and 23 are in their entirety a valid exercise of the defence power, their application in any particular instance can still be challenged if the particular application is not capable of aiding in the defence of the Commonwealth. It was said that the control of prices to be charged by the plaintiff as an individual can have no conceivable connection with the prosecution of the war, so that the Order is beyond the ambit of the defence power. I am also unable to agree with this contention. The legislative act is the making of the regulation. If the regulation is within the ambit of the defence power, it is a valid law and the action of the Prices Commissioner in administering the regulation can only be challenged if his action is not authorized by the regulation or if it is not an honest exercise of his authority. It was urged that the statement in the notice of 14th July 1943 that the Prices Commissioner was fixing prices for the plaintiff's business because he had failed to keep proper records as required under the *Prices Regulations* showed that the action of the Prices Commissioner was intended to be punitive, and that this was not an honest exercise of power. But I am unable to construe the notice in this way. It is the function of the Prices Commissioner to prevent profiteering. If he is unable from the information which is available to determine whether an individual is profiteering or not, then he must be able to fix a price which he considers to be proper. The best source of information available to the Prices Commissioner would be the books of a business. If he cannot obtain the necessary information from such books, then there can be no objection to his stating that, in the absence of proper information, he has decided to fix a price. This is not a punishment for not keeping proper books. The Prices Commissioner need not state any ground and it might be wiser to refrain from doing so. If the honesty of the exercise is challenged, the court must examine into the charge on the evidence available to the plaintiff. There is no obligation on the defendant to provide any material for his own conviction. But the statement of claim does not allege that the Prices Commissioner exercised his discretion dishonestly. If it did, the statement in the letter would not be any evidence of dishonesty. On the contrary it would, in my opinion, provide an honest ground for the exercise of the power.

It was also contended that a definite maximum price must appear in the notice. Reliance was placed upon the recent decision of this

Court in *Arnold v. Hunt* (1). In that case the prices had been fixed generally for various spirituous liquors sold by retail in the Melbourne metropolitan area. These prices had been fixed by the Prices Commissioner in the purported exercise of his powers under reg. 23 (1) (a), but no prices appeared in the Order. The Order merely provided that the prices were to be those fixed by a retail price list issued by the Victorian Associated Brewers as operating on and after a certain date. It was held that the Order was bad on the ground that maximum prices fixed under reg. 23 (1) (a) must appear in the order itself. That means, to my mind, that what constitutes the fixing of a maximum price in accordance with reg. 23 (1) (a) must appear in the order and not in an extraneous document. In cases where the price is fixed in some other manner authorized by the regulation, as for instance by cost plus a certain percentage on cost, an order would be effective which defines the basis on which the cost is to be ascertained and states the percentage that is to be added, but it follows from the decision that in cases which fall within reg. 23 (1) (a) this definition and statement must appear in the order. The present Order was made by the Prices Commissioner under the powers contained in reg. 23 (1) (b). Order No. 1110 contains the information required by that sub-regulation to be inserted in the Order. Under that sub-regulation it is the notice in writing which has to fix the maximum price. Order No. 1110 is therefore, in my opinion, valid.

But the notice in writing of 14th July 1943 does not define the basis on which cost is to be ascertained. Mr. *Fullagar* contended that "cost" in the notice means all costs included in purchasing the material for the suit or costume and transporting it to the plaintiff's shop, plus the price which the plaintiff has to pay to the outside tailor for making up the suit or costume; or, in other words, that cost plus twenty per cent represents the gross profit, and that out of the twenty per cent the plaintiff has to pay those general overhead expenses ordinarily chargeable against gross profit such as rent, interest on borrowed money, wages, &c. If this is what was intended, it would have been easy for the Prices Commissioner to have so directed. Mr. *Fullagar* submitted that twenty per cent could not have been intended to represent net profit, because no Prices Commissioner would allow such a net profit in war-time. But if such a net profit was usual in peace-time, I am unable to see why such a profit should necessarily become excessive in war-time, especially where the turnover of a business would be likely to decrease, as would be the case with a

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tailoring business when clothes are rationed. As this is a demurrer there is no evidence to show what would be an ordinary profit on suits or costumes in peace-time, but it is not clear that twenty per cent would be an excessive net profit. It is also not clear that twenty per cent would be an ordinary gross profit.

No assistance, therefore, can be derived from the surrounding circumstances in order to ascertain the meaning of the word "cost" in the notice. It is quite uncertain what items are intended to be included, particularly as it is a composite word intended to cover items included in the supply of the material and the services rendered by the plaintiff and the manufacture of the suit or costume by an outside contractor. Reg. 23 (1) gives to the Prices Commissioner general powers to fix maximum prices, while reg. 23 (1A) enumerates specific methods by which, without limiting their generality, these powers can be exercised. In the present case it would appear that the Prices Commissioner relied in particular on reg. 23 (1A) (f), which provides that he may fix and declare maximum prices "on landed or other cost, together with a percentage thereon or a specified amount or both." Reg. 33 contains a definition of "landed cost," but this definition is not appropriate to the present case, and in any event the notice does not refer to landed cost. The Commissioner must therefore fix and declare some other cost, to which the twenty per cent can be added. Simply to state that it is to be added to cost without defining what is meant by cost is not to fix and declare what cost is intended, nor indeed to fix and declare any cost at all.

It follows that in my opinion the notice of 14th July 1943 is invalid, that the statement of claim discloses a good cause of action, and that the demurrer should be overruled.

Demurrer overruled.

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

Solicitors for the plaintiff, *Ward, Mollison, Litchfield & Ward*, Adelaide.

E. F. H.