

[HIGH COURT OF AUSTRALIA.]

FERGUSON PLAINTIFF ;

AND

THE COMMONWEALTH OF AUSTRALIA . DEFENDANT.

H. C. OF A. *Constitutional Law—Defence—National security—Prohibition of advertisements—*
1943. *Validity of regulations—The Constitution (63 & 64 Vict. c. 12), sec. 51 (vi.)—*
MELBOURNE, *National Security Act 1939-1940 (No. 15 of 1939—No. 44 of 1940), sec. 5 (1)—*
National Security (Supplementary) Regulations (S.R. 1940 No. 126—1942 No.
May 31. 500), reg. 83.

Latham C.J.,
Rich and
Starke JJ.
Reg. 83 of the *National Security (Supplementary) Regulations*, which pro-
hibits the publication of “any advertisement relating to, or intended to pro-
mote the sale of, any goods, which contains any matter . . . relating to
—(a) the seasons or days of Christmas, New Year or Easter . . . or
(b) Christmas, New Year or Easter gifts, or the practice of giving Christmas,
New Year or Easter gifts,” is authorized by sec. 5 (1) of the *National Security*
Act 1939-1940, and is within the defence power of the Commonwealth.

DEMURRER.

Carlyle Ferguson, the proprietor and publisher of the *Guardian* newspaper, a weekly newspaper published in Perth and circulating in the State of Western Australia, brought an action in the High Court of Australia against the Commonwealth claiming a declaration that reg. 83 of the *National Security (Supplementary) Regulations* (inserted by Statutory Rules 1942 No. 500) was invalid because (a) it was not authorized by any of the provisions of the *National Security Act 1939-1940* ; (b) it was not a regulation for securing the public safety or the defence of the Commonwealth or the Territories of the Commonwealth nor were the matters therein prescribed necessary or convenient to be prescribed for the more effectual prosecution of the present war, and/or (c) it was beyond the legis-
lative powers conferred upon the Commonwealth Parliament by the Constitution of the Commonwealth. The defendant demurred to the statement of claim.

Fullagar K.C. (with him *Dean*), for the defendant. Reg. 83 is valid under the defence power. In time of war there is an economic front, with which (as is well established by the authorities) the Commonwealth may concern itself under the defence power. The object of the regulation is to discourage expenditure on non-essential goods at Christmas and the other seasons mentioned, and it can be justified on this ground. Advertisements tend to stimulate such expenditure by referring to the particular season, and such advertisements are properly prohibited.

L. D. Seaton, for the plaintiff. The regulation cannot be supported on the ground suggested by the defendant. It is not a reasonable means of effecting the object suggested. In one view, it is too narrow and ineffectual, and, therefore, has no real relation to the defence power. In another view, it is too wide and goes beyond anything that can be justified by the defence power. As to the first view.—It cannot be said that the seasonal buying of goods, as e.g., for the purpose of making gifts, is the result of advertising; therefore, the prohibition of advertisements relating to the particular season is not in any real sense a means of checking such expenditure. As to the second view.—The regulation is at least open to the construction that it prohibits advertisements relating to goods (i.e., as distinct from advertisements relating to *the sale of* goods), if there is a reference to Christmas or other specified season. It is well known that many manufacturers have suspended their ordinary business in order to do work connected with the war, and that they publish “goodwill” advertisements at Christmas and other seasons although they have nothing to offer for sale to the public at present. Such advertisements would be hit by the regulation, at all events on the wide construction to which it is susceptible. A trader could not publish an advertisement referring to the Christmas season and stating that he would have goods of a specified kind to sell after the war: this clearly goes beyond anything authorized by the defence power.

Fullagar K.C., in reply.

The following judgments were delivered :—

LATHAM C.J. This proceeding is a demurrer which raises the question of the validity of Statutory Rules 1942 No. 500, by which reg. 83 was inserted in the *National Security (Supplementary) Regulations*. Par. 1 prohibits the publication of certain advertisements. Par. 2 relates to publication within the meaning of the

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regulation. Par. 3 provides for the administration of the regulation, and par. 4 provides an inclusive definition of "advertisement" for the purpose of the regulation.

The regulation (par. 1) prohibits the publication of certain advertisements. Those advertisements are advertisements relating to, or intended to promote the sale of, any goods, and containing any matter directly or indirectly relating to the seasons of Christmas, New Year or Easter, or Christmas, New Year or Easter gifts or the practice of giving such gifts. The validity of the regulation is attacked because (it is submitted) it is made under the defence power (sec. 51 (vi.) of the Constitution) and it has no relation to war or the defence of the country. The Court, it need hardly be repeated, is not concerned with the wisdom or expediency of the regulation, but only with the power to make it.

The waging of war to-day involves a large measure of control of economic matters. It involves a large measure of control of the expenditure of moneys by members of the public. The degree to which this control should be exercised is a matter for the legislature and not for the judicial authorities. The legislature may prevent wasteful or extravagant expenditure of moneys and, within limits of reason, it must be left to the legislature to determine what expenditures are in all the circumstances of the relevant time to be regarded as wasteful or extravagant. It is a matter of common knowledge that, at particular seasons of the year, particularly at Christmas and to a lesser extent at Easter and New Year, there is a practice of making gifts and there is a rise in the expenditure of the public. The effect of the regulation is to depress the particular stimulus which otherwise would be given to the retail trade at such a time by large expenditure in the purchase of retail goods. The result is also to apply a check to the manufacture of such goods. Accordingly, the regulation has a relation to the manufacture of goods which may reasonably be regarded as non-essential, and therefore limits the use of labour for such a purpose. Thus the regulation is a means of making more labour and more finance available for the war effort.

It is objected, however, that the regulation also imposes a prohibition upon "goodwill" advertisements, that is, advertisements not seeking to bring about the immediate sale of goods, but intended to preserve the goodwill of a business in which goods normally are sold. It may be pointed out that advertisement is prohibited only if it contains matter directly or indirectly relating to the seasons mentioned or the practice of making gifts at those seasons, and accordingly the regulation does not prohibit ordinary Christmas greetings unrelated to the sale of goods or unrelated to any goods. The

point has been taken that the regulation prohibits the publication of advertisements relating to goods as well as the publication of advertisements intended to promote the sale of goods if they contain any of the matter mentioned in par. 1. It is argued that this goes beyond the defence power. I find myself unable to accept that argument, because, whatever may be the construction of the regulation, in my opinion it is within the power of the Commonwealth Parliament in time of war to limit all advertising in relation to all matters. The decision as to whether particular advertisements should be prohibited or not, as I have said, is in my opinion a matter for the decision of the legislative rather than of the judicial authority.

In my opinion, therefore, the demurrer should be allowed.

RICH J. I agree. I think that the regulation in question should be read as relating to the sale of goods, and the promotion of the sale of goods. It has for its object the prevention of wasteful and extravagant expenditure and spending, and it tends to conserve labour and to prevent waste of material. The regulation may not fully achieve its object. But that kind of criticism is irrelevant and does not affect its nexus with defence.

I agree that the demurrer should be allowed.

STARKE J. I agree that the demurrer should be allowed.

Demurrer allowed with costs, and action dismissed with costs.

Solicitors for the plaintiff, *Leonard D. Seaton & Co.*, Perth, by *Whiting & Byrne*.

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

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