[HIGH COURT OF AUSTRALIA.]

STENHOUSE . . . . . APPLICANT;

AND

COLEMAN AND ANOTHER . . . . RESPONDENTS.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 16; *Dec.* 6.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

National Security—Defence—Bread—Manufacture and distribution—Licence—Regulation—Validity—Order—Necessity—Discretion of Minister—National Security Act 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 5—*National Security (General) Regulations* 1939-1943 (*S.R.* 1939 *No.* 87—1943 *No.* 278), *reg.* 59—*Bread Industry (New South Wales) Order.*

The provisions of reg. 59 of the *National Security (General) Regulations*, empowering a Minister, so far as it 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, to make an order regulating, restricting or prohibiting the production, . . . movement, . . . distribution, sale, purchase . . . of articles appearing to the 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, are authorized by s. 5 of the *National Security Act* 1939-1943, and are within the defence power of the Commonwealth.

An order by the Minister prohibiting any person from carrying on the business of a master baker or bread distributor or distributing or causing to be distributed any bread in any area to which the Order applies unless he is the holder of a licence issued under the Order authorizing him so to do, is a valid exercise of the power conferred by reg. 59.

CAUSE removed to the High Court under s. 40 of the *Judiciary Act* 1903-1940.

Section 5 of the *National Security Act* 1939-1943 provides:—"The Governor-General may make regulations for securing the

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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."

Reg. 59 of the *National Security (General) Regulations*, made under the above-mentioned section, provides, so far as material, as follows: —"(1) 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" is defined in sub-reg. 5 as meaning articles "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."

The Bread Industry (New South Wales) Order, made on 22nd June 1942, in pursuance of reg. 59 of the *National Security (General) Regulations* by the Minister of State for War Organization of Industry, provides, *inter alia*, by clause 4, that "'master baker' means any person who manufactures or carries on any process of manufacture of bread for sale"; by clause 6 (7), that "no person shall carry on the business of a master baker or bread distributor . . . except under the authority of a licence"; by clause 9, that "a person shall not distribute, or cause to be distributed any bread in any area to which this Order applies unless he is the holder of a current licence authorizing him to distribute bread . . . or is employed by the holder of such a licence to distribute bread"; and by clause 14, that "a person shall not carry on the business of a master baker or bread distributor in contravention of this Order . . ."

Upon an information laid by John Joseph Coleman, an officer of the Department of War Organization of Industry, Myrtle Grove Stenhouse was charged at a Court of Petty Sessions, Sydney, that on or about 20th July 1944, at Chatswood, New South Wales, she did contravene the provisions of the Bread Industry (New South Wales) Order referred to above, in that she did carry on the business of a master baker without the authority of a licence issued under that Order.

The defendant was convicted.

She obtained from the Supreme Court a rule nisi calling upon the informant and the magistrate to show cause why a writ of prohibition should not issue to each of them restraining them and each of them from further proceeding upon or in respect of the

conviction on the ground " that the said conviction was contrary to law in that the Bread Industry (New South Wales) Order made under the *National Security* (*General*) *Regulations* is ultra vires the *National Security Act* 1939-1943 ".

Upon the return of the rule nisi the Full Court of the Supreme Court was of opinion that the matter involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State and, therefore, that by virtue of s. 40A of the *Judiciary Act* 1903-1940, the matter was automatically removed to the High Court.

In order to avoid argument as to whether an *inter se* question did arise in the matter, the High Court, upon the cause coming before it, by consent, made an order under s. 40 (1) of the *Judiciary Act* removing the cause into that Court.

There was not any appearance by or on behalf of the magistrate.

Redshaw, for the applicant. Although the power purported to have been given by the words " or for maintaining supplies and services essential to the life of the community " in reg. 59 of the *National Security* (*General*) *Regulations* may be appropriate to a country with sovereign powers, it is not appropriate where there is a division of the sovereign powers as here between the Commonwealth and the States. The provisions of the Bread Industry (New South Wales) Order purport to prohibit the baking of bread for sale and are without any nexus or relationship to the defence power. The Order has no " real connection with defence " (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (2); *Reid* v. *Sinderberry* (3)). The baking of bread and the selling of bread in a suburb of Sydney, or throughout New South Wales, has no bearing at all on the war and does not affect it (*R.* v. *University of Sydney*; *Ex parte Drummond* (4)). Legislative power in respect of these matters was not exclusively or at all vested in the Commonwealth under the defence power, but, under s. 107 of the Constitution, continued with the States. As stated in the *Industrial Lighting Regulations Case* (5), " the existence of war does not result in handing over to the Commonwealth general control of these " matters. The Order does not and cannot " conduce to the more effectual prosecution of the war " (*Farey* v. *Burvett* (6)). It may serve to bring about greater industrial

(1) (1943) 67 C.L.R. 347, at p. 358.
(2) (1943) 67 C.L.R. 413, at pp. 417, 418, 421, 423, 428.
(3) (1944) 68 C.L.R. 504, at p. 515.
(4) (1943) 67 C.L.R. 95, at pp. 105, 109, 114.
(5) (1943) 67 C.L.R., at p. 417.
(6) (1916) 21 C.L.R. 433, at p. 442.

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efficiency, but that is a matter within the power of the State and has no connection with the defence power. A mere state of war does not connect the matter with the defence power. It is the concern of the State to provide for the supplying of bread for the non-combatant section of the community. In *Ex parte Day*; *Re Courtney* (1) the court declared invalid an Order relating to disorderly houses purporting to have been made under reg. 35A of the *National Security (General) Regulations*, whereupon legislation dealing with that subject matter was enacted by the State legislature. Reg. 59 is wider than is necessary.

Sugerman K.C. (with him *Holmes*), for the respondent Coleman. The regulation is not stated too widely. The control of an essential foodstuff in time of war is within the defence power (*Reid* v. *Sinderberry* (2)). The proper test is to ascertain the purpose of the Order and what has been done and is being done under it. The Order is designed to bring about greater efficiency in the production of a commodity which is essential to the life of the community. The Order provides for the achieving of this purpose by the setting up of a system of licensing of master bakers; the standardization of the types of bread which master bakers may manufacture in order to avoid waste of labour and materials; the use of the licensing system as a means of supervision and control and as a means of preventing wastage of man power. The Order is a measure of rationalization of the bread industry designed and operating to conserve man power, and also materials in the form of, *inter alia*, vehicles, petrol and tyres. It is also designed to regulate the quality of bread and to deal with the war-created problems of an industry supplying essential needs. The regulation is not invalid because it authorizes the making of orders on the basis of the Minister's opinion; the connection of an order with defence is not thereby made unexaminable. Whatever the extent of the Minister's authority may be in this case there is nothing in the Order which is not amply justified both by the *National Security Act* and s. 51 (vi.) of the Constitution (*Reid* v. *Sinderberry* (3)). *R.* v. *University of Sydney*; *Ex parte Drummond* (4) is distinguishable from this case for reasons similar to those stated in *Gonzwa* v. *The Commonwealth* (5).

Cur. adv. vult.

(1) (1942) 42 S.R. (N.S.W.) 212.
(2) (1944) 68 C.L.R., at pp. 512, 513.
(3) (1944) 68 C.L.R. 504.
(4) (1943) 67 C.L.R. 95.
(5) (1944) 68 C.L.R. 469, at p. 484.

The following written judgments were delivered :—

LATHAM C.J. In this proceeding by way of statutory prohibition the applicant challenges the validity of an Order made under a regulation which was made under the *National Security Act* 1939-1943. The Supreme Court of New South Wales was of opinion that the proceeding raised a question of the limits *inter se* of the constitutional powers of the Commonwealth and a State, so that the cause was automatically removed to the High Court under the *Judiciary Act* 1903-1940, s. 40A. In order to avoid any argument as to whether a question of limits *inter se* arose an order under s. 40 (1) was made by consent for the removal of the matter to this Court.

Proceedings were instituted against Myrtle Grove Stenhouse before a police magistrate for a breach of the Bread Industry (New South Wales) Order made on 22nd June 1942 under reg. 59 of the *National Security (General) Regulations*, which Regulations were made under the *National Security Act* 1939-1943. The Order provides, *inter alia*, (clause 9) that a person shall not distribute, or cause to be distributed any bread in any area to which the Order applies unless he is the holder of a current licence authorizing him to distribute bread in that area, or is employed by the holder of a licence to distribute bread. Clause 14 provides that " a person shall not carry on the business of a master baker or bread distributor in contravention of this Order." Mrs. Stenhouse was charged with the offence of carrying on the business of a master baker without the authority of a licence as required by the Order. It was proved that she did so carry on that business and she was convicted. She obtained a statutory prohibition in the Supreme Court of New South Wales upon the ground " that the said conviction was contrary to law in that the Bread Industry (New South Wales) Order made under the *National Security (General) Regulations* is *ultra vires* the *National Security Act* 1939-1943." It was not contended that the Order was not authorized in terms by reg. 59 of the *National Security (General) Regulations*, but it was contended that that regulation was not authorized by the *National Security Act*.

The *National Security Act*, s. 5, provides that : " 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."

Reg. 59 of the *National Security (General) Regulations*, made under the section quoted, provides, so far as material, as follows :—" A

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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 " is defined in sub-reg. 5 as meaning articles " 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."

The Order under which Mrs. Stenhouse was prosecuted is plainly an order providing for regulating and restricting and, in some cases, prohibiting the production, movement, distribution, sale and purchase of bread. The Order recites that it is made in pursuance of reg. 59, and it may, I think, properly be assumed that the Minister therefore regarded bread as an essential article, though there is no express statement to that effect: See per *Starke* J. in *de Mestre* v. *Chisholm* (1).

The question to be decided is whether the regulation is authorized by the *National Security Act*. As I understood the argument the regulation was attacked on three grounds. In the first place it was argued that the production of goods, at least for civilian use, was not a matter which fell within the defence power of the Commonwealth Parliament. In my opinion this general proposition cannot be supported. It was held during the last war in *Farey* v. *Burvett* (2), that the Commonwealth Parliament might validly provide means for fixing the price of bread intended for civilian consumption. The same reasoning leads to the conclusion that the Commonwealth Parliament can provide means for controlling the production of bread, which is the most obvious necessity of life, both for the armed forces and for the civilian population. Similar considerations apply to many other articles and, accordingly, the general statement that the subject of production is beyond the defence power of the Commonwealth must be rejected: See *Reid* v. *Sinderberry* (3).

In the second place it was contended that the regulation was too wide in that it authorized the making of orders for the purpose of " maintaining supplies and services essential to the life of the community." It was urged that this provision went beyond the subject of " securing the public safety and the defence of the Commonwealth and matters necessary or convenient to be prescribed for the more effectual prosecution of the war "—the words of the *National*

(1) (1944) 69 C.L.R. 51, at p. 61. (2) (1916) 21 C.L.R. 433.
(3) (1944) 68 C.L.R., at p. 512.

Security Act. In my opinion this argument also fails. The maintenance of supplies and services essential to the life of the community is, I think, plainly and necessarily a matter having the most direct connection with the war. If the life of the community cannot be maintained the armed forces cannot be maintained.

In the third place it was argued that reg. 59 is too wide in that its application depends, as shown by its initial words and by the definition of "essential articles", upon the opinion of a Minister. The regulation is not limited to a power of making orders which are necessary in the interests of the defence of the Commonwealth, &c., but allows the making of orders which "appear to a Minister" to be necessary in the interests of the defence of the Commonwealth, &c. Therefore, it is said, the regulation purports to authorize the making of orders merely upon the basis of the opinion of the Minister as to their necessity for the purposes specified, quite irrespective of whether or not in fact that necessity in fact exists.

An identical argument was considered by this Court in *Reid* v. *Sinderberry* (1). The Court there considered s. 13A of the *National Security Act*, which provides 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 appear 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 is or may be engaged." 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 dealt with this matter at pp. 511, 512, where it was 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:—"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

(1) (1944) 68 C.L.R. 504.

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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. Accordingly the question which the Court has to determine is that which has so frequently arisen in this Court during the present war—' Is the regulation really a law with respect to securing the public safety, the defence of the Commonwealth, or the efficient prosecution of the war ? ' " (1)—See also per *Starke* J. (2) and per *Williams* J. (3).

Identical reasoning applies, in my opinion, to reg. 59. Reg. 59 does not authorize the making of any orders whatever which, in the opinion of the Minister, may be necessary for the purposes mentioned in the regulation. If the orders related to matters which could have no connection whatever with the specified purposes, they would be invalid, notwithstanding the declared opinion of the Minister. The regulation should be construed in the same manner as s. 13A of the *National Security Act* was construed in *Reid* v. *Sinderberry* (4), that is, as authorizing only the making of orders which have a real connection with the subject of defence.

In my opinion all the objections to the conviction fail and the order nisi for prohibition should therefore be discharged.

RICH J. The Order challenged in this case was made under reg. 59 of the *National Security* (*General*) *Regulations*. The provisions of the Order have been sufficiently stated in the judgment of the Chief Justice and need no restatement on my part. The substantial ground upon which the Order is challenged is that it is not within the *National Security Act* 1939-1943 and the defence power of the Constitution. The Order may cover too wide an area, but its main provisions, with which we are concerned, are directed to the control of essential foodstuff—bread—and the restriction on the manufacture and distribution of varieties and classes of bread. It has the effect, I think, of rationalizing the production and consumption of bread and of conserving man power and necessary materials—part of the resources of the Commonwealth. Thus it follows that there is some nexus with the defence power.

The order nisi should be discharged with costs.

(1) (1944) 68 C.L.R., at p. 512.
(2) (1944) 68 C.L.R., at p. 516.
(3) (1944) 68 C.L.R., at p. 521.
(4) (1944) 68 C.L.R. 504.

STARKE J. Rule nisi for statutory prohibition issued by the Supreme Court of New South Wales and removed into this Court pursuant to the provisions of the *Judiciary Act*. The purpose of the rule is to restrain further proceedings against the appellant upon a conviction against her for a contravention of a provision of the Bread Industry (New South Wales) Order made under the *National Security (General) Regulations*. The ground stated in the rule is that the conviction was contrary to law in that the Bread Industry (New South Wales) Order made under the *National Security (General) Regulations* is ultra vires the *National Security Act* 1939-1943, which means that the Order is beyond the power to make regulations for securing the public safety and the defence of the Commonwealth. The Order purports to have been made pursuant to reg. 59 of the *National Security (General) Regulations*. No objection is taken in the rule to the regulation, and it is not a ground of the rule that the Order exceeds the authority conferred by the regulation.

The only question is whether the Order is within the authority to make regulations for securing the public safety and the defence of the Commonwealth or, in other words, whether it is within the constitutional power to make laws for the peace, order and good government of the Commonwealth with respect to defence.

The Order requires that no person shall carry on the business of a master baker or bread distributor without a licence, and an application for a licence must be accompanied by a fee. The grant of a licence is within the discretion of the licensing authority set up under the regulation and subject to such terms and conditions as that authority specifies in the licence. The licensing authority may at any time suspend or revoke the licence or vary its terms or the area specified therein or impose new terms and conditions. A person manufacturing bread cannot manufacture, distribute or sell bread of any variety or class other than certain specified varieties or classes, though the Minister administering the Act may add to or vary the varieties or classes or remove any varieties or classes of bread from the prohibition. Authorized persons may enter and inspect premises, require the production of books and accounts, search vehicles used in connection with the distribution and delivery of bread and seize and take possession of any bread which the authorized person has reason to believe was manufactured, distributed or sold in contravention of the Order. The Order, it was stated at the Bar, has not been applied to the whole of New South Wales, but only to areas in which large numbers of people reside.

The maintenance and regulation of food supplies, particularly bread and meat for the armed forces and the civil population, is

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essential in time of war. Both experience and history teach us that such regulations are necessary war measures and the passing of such a measure is, in the words of the Judicial Committee, essentially an act of statesmanship which should be related to the purpose of the constitutional power, and not to any political or other ulterior purpose. Every legislative Act, regulation or order must find some warrant in the Constitution, though the presumption is in favour of validity. But it is for the courts of law to determine whether the particular Act, regulation or order has any such warrant or, in other words, whether the particular Act, regulation or order affords some reasonable and substantial basis for the conclusion that it is an Act, regulation or order with respect to defence.

Drastic as are the terms of the Order, yet in operation and in effect the Order affords a real and substantial basis for the conclusion that the Order is one for the defence and safety of the Commonwealth. It regulates the manufacture and distribution of a foodstuff essential for the life of the armed forces and the civil population at a time when war is raging and supplies and man power are short. In principle the case is governed by *Farey* v. *Burvett* (1). But there are one or two matters in connection with the regulation and Order that are worthy of attention.

The regulation gives the Minister authority to make orders for maintaining supplies and services essential to the life of the community, whereas the *National Security Act* authorizes the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth. But maintaining supplies and services essential to the life of the community in time of war is plainly within the authority given by the *National Security Act* and the ambit of the defence power.

The regulation also authorizes the Minister to make orders so far as appears to him to be necessary in the interests of the defence of the Commonwealth, and the Order made by the Minister sets up a licensing authority with wide discretionary powers. A regulation, however, is not bad because it confers discretionary power (See *Reid* v. *Sinderberry* (2)) ; that must depend upon the nature of the authority conferred upon the Minister and the subject matter of the regulation. The maintenance and regulation of food supplies and services for the purposes of defence and the life of the community is of such a nature that some discretionary power must necessarily be vested in some authority for the purpose of determining the supplies and services that require regulation and how and in what manner they should be regulated.

(1) (1916) 21 C.L.R. 433.

(2) (1944) 68 C.L.R., at pp. 512, 516.

And an order which confers upon a licensing authority discretionary powers does not give it arbitrary and uncontrolled power. The powers must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself (*Sharp* v. *Wakefield* (1)). Thus, if the licensing authority were to exercise its powers arbitrarily or to decline to consider matters that it ought to consider or to take into consideration extraneous and irrelevant matters that it ought not to consider, then it would not have exercised the discretion entrusted to it and its assumption would not be lawful : See *R.* v. *Cotham* (2) ; *R.* v. *Bowman* (3) ; *R.* v. *Port of London Authority* ; *Ex parte Kynoch Ltd.* (4).

Further, the setting up of a licensing authority, apart altogether from the implication arising from the *National Security Act*, s. 5 (1) (*j*), is valid because it is a means appropriate and adapted to the regulation of the manufacture and supply of bread for securing the public safety and the defence of the Commonwealth (*Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (5)).

The provision in the Minister's Order that each application for a licence shall be accompanied by a fee requires some legislative sanction. Ministers cannot impose burdens on the subject without such sanction : See *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (6). In the *National Security Act*, s. 5 (1) (*j*), however, there is a provision authorizing regulations providing for licence fees, and in the *National Security* (*General*) *Regulations* there is a provision (reg. 77) that there may be charged in respect of the grant, renewal or issue of any licence . . . for the purposes of the Regulations or any order made under them such fee, not exceeding five pounds, as the Minister by order determines.

The ground upon which the rule was granted fails and it should be discharged.

Dixon J. The question for our decision is the validity of so much of the Bread Industry (New South Wales) Order as would make it an offence to carry on the business of a master baker without the authority of a licence, that is, in an area to which the Order has been applied.

The Order, which is made under the *National Security* (*General*) *Regulations*, is said to exceed the power which could be derived from the *National Security Act* 1939-1943. It is expressed to be made in pursuance of reg. 59 of the *General Regulations*.

(1) (1891) A.C. 173, at p. 179.
(2) (1898) 1 Q.B. 802.
(3) (1898) 1 Q.B. 663.
(4) (1919) 1 K.B. 176, at pp. 183, 187.
(5) (1908) 6 C.L.R. 309, at pp. 322, 343, 357.
(6) (1922) 31 C.L.R. 421, at pp. 462, 473.

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The Order, in effect, enables the Minister to specify parts of New South Wales in which the business of manufacturing bread for sale and the business of selling to consumers bread purchased from a master baker can no longer be carried on except under licence granted by an authority appointed by the Minister.

The licensing authority is invested with a discretion to grant a licence or not and may impose terms and conditions which are to be specified in the licence. The conditions may restrict the business to named premises and to a particular area. They may require that at the premises the sale must be either by retail or, if by wholesale, to another licensee. The conditions may contain limitations as to quantities in accordance with which bread must be sold. A licence when granted may be revoked or suspended by the licensing authority, and that authority may vary the terms or conditions of the licence or the area or the premises specified and it may impose new terms and conditions.

One ground of revocation or suspension mentioned in the Order is that a complaint concerning the quality of the bread has been made by a consumer and substantiated.

The Order contains some prohibitions which are absolute and are not simply expressed in the conditions upon which the authority thinks fit to grant the licence. One of these provisions limits the varieties or classes of bread which may be manufactured or sold. Another forbids the slicing, wrapping or banding of bread distributed by a master baker or distributor, but excepts a shopkeeper who wraps in a single paper bread delivered at his shop to a customer.

There are some ancillary provisions concerned either with the policing of the Order or with the use by the Minister of Advisory Committees of the bread industry, to whose consideration he may submit any matter.

It is not necessary to enter upon an examination of reg. 59, under which the Order was made. It is enough to say that among its clauses are to be found provisions which, unless their operation is restrained or denied for want of power, would authorize the material parts of the Order. I say the material parts of the Order, because we are not concerned with every subsidiary clause, but only with the provisions carrying out its main purpose or plan upon which that creating the offence is dependent.

The claim that the Order is invalid rests, not upon the frame of reg. 59, but upon the contention that no regulation under the *National Security Act* could have an operation authorizing such an Order because the Order is outside that Act and the defence power.

In matters of this description it is, I think, desirable that, as far as possible, we should rest our decision upon the material characteristics of the particular provision the validity of which is in issue. We are dealing with an Order made in the course of war and supported on the ground that it is incidental to the prosecution of the war. It is not a thing done by way of preparation against a future war, nor in the course of disposing of matters arising from a war just concluded.

When the question is whether a measure is incidental or conducive to the prosecution of a war that is being fought, the solution of the question is bound to depend much less upon the abstract formulation of the general test or criterion to be applied than upon a correct ascertainment of the true nature and operation of the provisions impugned and of their bearing upon the prosecution of the war.

The bearing of any particular legislative or executive act upon the prosecution of this or any other war is necessarily the product of factors or conditions the operation of which is likely to be intricate.

If the actual and possible factors could be openly and exhaustively examined and laid bare before it, a court would probably find little difficulty in deciding whether a given measure was, or was not, incidental or conducive to the prosecution of the war. But in many cases this cannot be done. Apart from other reasons, information and considerations which may have guided the authors of a statutory instrument under attack may be of such a nature that they cannot be publicly canvassed without prejudicing the conduct of the war or imperilling the national interest. In any case, there are limitations upon the material which a court can receive or take into account for the purpose of considering the validity of a general law. If the form of the power makes the existence of some special or particular state of fact a condition of its exercise, then, no doubt, the existence of that state of fact may be proved or disproved by evidence like any other matter of fact. But 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. It may be that in this respect the field open to the court is wider than has been commonly supposed : See *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation (N.S.W.)* (1) ; *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). But, however that may be, common experience shows that much of the difficulty and of the uncertainty that attends the discussion of the validity of a purported exercise of legislative power,

(1) (1940) A.C. 838, at p. 849 ; 63 C.L.R. 338, at p. 341 ; (1939) 61 C.L.R. 735, at pp. 793 et seq.

(2) (1939) A.C. 117, at p. 130 ; (1938) 2 D.L.R. 81.

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defined like the defence power by reference to the end to which it is directed, arises from the inferential, not to say speculative, character of the grounds connecting the provision with the prosecution of the war. It is for that reason no doubt that those supporting the validity of a measure so often place reliance upon the presumption in favour of validity. The question is one of law and not of fact, and in such a case a presumption seldom provides a solution; at best it supplies a step in legal reasoning. But where the validity of a legislative instrument is affected by what is planned or is going forward in relation to the prosecution of the war, 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. But great as must be the weight given to these considerations, it is finally the court which must form and act upon a judgment upon the question whether the legislation, be it direct or be it subordinate, is a true exercise of the legislative power with respect to defence.

Some confusion seems to exist between the duty of the court in deciding whether in truth legislation is with respect to defence under the Constitution and the quite different and lighter responsibility placed upon the court when the question is whether a regulation satisfies a purely statutory requirement such as that expressed in s. 13A of the *National Security Act* by the words "as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth . . . or the efficient prosecution of . . ." the "war." These words leave it to the Governor-General in Council to form an opinion upon the necessity and expediency of the regulations to secure the purpose of the power and they do not make the soundness, reasonableness or factual basis of that opinion a condition of the power it purports to give: Cf. *R.* v. *Comptroller General of Patents*; *Ex parte Bayer Products Ltd.* (1), *Progressive Supply Co. Ltd.* v. *Dalton* (2), and cf. *Carbines* v. *Powell* (3). 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.

(1) (1941) 2 K.B. 306, at pp. 311, 312, 314.
(2) (1943) 1 Ch. 54, at p. 57.
(3) (1925) 36 C.L.R. 88.

Some of the difficulties which have been felt in the application of that power seem to me to be due to the circumstance that, unlike most other powers conferred by s. 51 of the Constitution, it involves the notion of purpose or object. In most of the paragraphs of s. 51 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). In such cases it is usual, when the validity of legislation is in question, to consider whether the legislation operates upon or affects the subject matter, or in the last case answers the description, and to disregard purpose or object. An example will be found in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (1). But " a law with respect to the defence of the Commonwealth " is an expression which seems rather to treat defence or war as the purpose to which the legislation must be addressed. This peculiarity in the power has caused no departure from the practice that excludes from investigation the actual extrinsic motives and intentions of legislative authorities. But, however it may be expressed, whether by the words—" scope ", " object ", " pith ", " substance ", " effect " or " operation ", the connection of the regulation with defence can scarcely be other than purposive, if it is within the power. 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 " (*Blott's Case* (2)). 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. It is evident that among these circumstances the character of the war, its notorious incidents, and its far-reaching consequences must take first place. In some cases they must form controlling considerations, because from them will appear the cause and the justification for the challenged measure. They are considerations arising from matters about which, in case of doubt, courts can inform themselves by looking at materials that are the subject of judicial notice.

The course of the war has taught us that, in grave emergencies, it may be necessary, in exercise of the defence power, to assume control of the greater part of the human and material resources of the nation. The character of a war and the state of emergency at a

(1) (1931) 46 C.L.R. 73, at p. 103. (2) (1921) 2 A.C. 171, at p. 218.

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given time may justify measures which at another time would be unwarranted. One difficulty to which this elastic application of the defence power gives rise is that regulations, the necessity or justification for which would be conceded during the emergency which called them forth, may continue unrevoked when the emergency may have passed and conditions may have assumed a normal appearance.

But in the present case I do not think that any difficulty of this nature arises. In my opinion the material provisions of the Order are valid. They were valid when made and they continue to be effective. They appear to me to embody an administrative system of control of the production and distribution of bread, designed to save the unnecessary use of labour, flour, materials and transport without endangering the supply to individuals of a necessary food. That, I think, is clearly incidental to the conduct of the war. An objection may be made to the wide discretion which the Order gives to a licensing authority, on the ground that by inserting conditions foreign to the purpose of the regulation or the Act, or by refusing, revoking, or suspending licences as a means of pursuing some policy irrelevant to the war such an authority may in fact exercise a control not authorized by the Act or the Constitution. The danger may be conceded. But the licensee, or applicant for a licence, would not be without remedy. The attempt to impose the condition would be void and the refusal of a licence free from the condition might be dealt with by mandamus, or perhaps by action for a declaration of right: Cf. *Rossi's Case* (1). Even if the licence were accepted the conditions might be considered void: Cf. *Ellis* v. *Dubowski* (2), though the doubts of *Avory* J. (3) should be noticed.

In my opinion the attack upon the Bread Industry (New South Wales) Order fails.

The matter came before us as under s. 40A of the *Judiciary Act* and, merely in order to avoid any discussion of the application of that section to the case, we also made an order of removal under s. 40. The order we should make is to discharge the order nisi with costs.

WILLIAMS J. The manner in which this rule nisi for prohibition comes before this Court is explained in the reasons for judgment of the Chief Justice. Mrs. Stenhouse was prosecuted and convicted on a charge that on or about 20th July 1944 she did at Chatswood in the State of New South Wales carry on the business of a master

(1) (1905) A.C. 21, at p. 23. (2) (1921) 3 K.B. 621.
(3) (1921) 3 K.B., at p. 626.

baker in contravention of the Bread Industry (New South Wales) Order. This Order, which came into force in June 1942, provides that the Minister shall in respect of each area to which the Order is applied fix a date on and after which no person shall carry on the business of a master baker or bread distributor in that area except under the authority of a licence. It is not disputed that prior to the time of the alleged offence a date on and after which no person should carry on the business of a master baker or bread distributor without a licence had been fixed for the County of Cumberland, and that the appellant was carrying on the business of a master baker without a licence at Chatswood, which is situated in this County, so that the sole question is whether it was lawful for the Minister to prohibit the carrying on of this business without a licence.

The Order was made under the authority conferred upon the Minister by reg. 59 of the *National Security (General) Regulations*. This regulation provides, so far as material, as follows:—(1) 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, . . . distribution, sale . . . use or consumption of essential articles. . . . (2) An order under this regulation may prohibit the doing of anything regulated by the order except under the authority of a licence granted by the authority or person specified in the order. . . . (5) (*a*) The expression " essential articles " means articles 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.

In several previous judgments I have expressed the opinion that the effect of the *National Security Act* is to delegate to the Executive authority to exercise the defence power conferred upon the Commonwealth Parliament by s. 51 (vi.) of the Constitution. Section 5 (3) of the *National Security Act* authorizes the Executive to sub-delegate to such persons as are prescribed power to make orders for any of the purposes for which regulations are authorized by the Act to be made. Reg. 59 of the *National Security (General) Regulations* is an example of the Executive sub-delegating to a Minister the power to legislate by orders for the purposes there specified. It authorizes a Minister to legislate in this way so far as it appears to him to be necessary for the purposes mentioned and to legislate with respect to articles which appear to him to be essential for these purposes. The regulation on its face, therefore, like the English legislation

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referred to in *Reid* v. *Sinderberry* (1), leaves it to the unfettered discretion of a Minister to decide what are essential articles for these purposes, and what orders should be made regulating the production and distribution of such articles, and the English cases there referred to show that in the case of legislation by a parliament with untrammelled powers the regulation would have to be construed to mean that if a Minister made an order it would not be for the court to consider whether there was evidence of any necessity to make it. But the position is different in a federal system of government, and I agree with Mr. *Sugerman* that it follows *mutatis mutandis* from the decision of this Court in *Reid* v. *Sinderberry* (2) that when a Minister, in exercise of the power conferred upon him by reg. 59, makes an order it is examinable by the Court to ascertain whether there is a sufficient connection between its provisions and the defence of the Commonwealth, and that it would only be valid if and to the extent to which a statute to the same effect would be a valid exercise by the Commonwealth Parliament of its power under the Constitution, s. 51 (vi.) (*de Mestre* v. *Chisholm* (3)).

The objection to the validity of reg. 59 on the ground that it is not justified by the *National Security Act* because it makes an order dependent upon the opinion of a Minister that it is required for these purposes must therefore fail. Indeed, to uphold it, it would be necessary to overrule the opinions to the contrary already expressed in the cases collected by the Chief Justice in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (4), *de Mestre* v. *Chisholm* (5), and *Reid* v. *Sinderberry* (6).

The question is, therefore, whether the Bread Industry (New South Wales) Order would be a valid exercise of power if it had been embodied in a statute passed by the Commonwealth Parliament. The Order is only to operate in such parts of the State as are from time to time specified by the Minister by notice in the *Gazette* and from such dates as are respectively specified in such notice. It prohibits the carrying on of the business of a master baker or bread distributor in these areas without a licence. Paragraph 10 restricts the varieties and classes of bread that may be manufactured, distributed and sold from time to time. Paragraphs 12 and 13 provide for the lodging of complaints by consumers and for any person authorized by the licensing authority to enter and inspect the premises used for the manufacture of bread, and to require any person carrying on the business of a master baker or bread distributor to produce his books relating to the manufacture, distribution and

(1) (1944) 68 C.L.R., at pp. 517-521.
(2) (1944) 68 C.L.R. 504.
(3) (1944) 69 C.L.R., at p. 67.
(4) (1943) 67 C.L.R. 116, at p. 135.
(5) (1944) 69 C.L.R. 51.
(6) (1944) 68 C.L.R. 504.

sale of bread. Paragraph 14 provides that a person shall not carry on the business of a master baker or bread distributor in contravention of the Order, or fail to comply with any requirement made in pursuance of the Order by a licensing authority or a person authorized in that behalf by a licensing authority.

The substance and purpose of the Order is, therefore, to control the manufacture and distribution of bread within such parts of New South Wales as the Minister may consider necessary from time to time, and its validity must depend upon whether there is a sufficient connection between this purpose and the defence of the Commonwealth. The Order is in substance a sumptuary law, and as such is justified as a valid sub-delegated exercise of the defence power for the reasons stated in *Farey* v. *Burvett* (1). Recently in *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (2) it was held by this Court that the *National Security* (*Landlord and Tenant*) *Regulations*, apart from regs. 15 and 16 which were held to infringe the judicial power, were valid because there was a sufficient connection between the provision of shelter for the civilian population in time of war and the defence of the Commonwealth. In the case of an exportable commodity like wheat, which is required to feed the armed forces and civilian population of the Allies as well as the armed forces and civilian population of Australia, there is a far closer connection with the defence of the Commonwealth than in the case of the provision of shelter for the civilian population of the Commonwealth itself.

The Order has the effect of regulating the amount and quality of the bread that is manufactured for and distributed to the civilian population during the war. That is a purpose which is sufficiently connected with the prosecution of the war. It is also reasonably corollary and incidental to such a purpose to provide that only persons licensed under the Order should be allowed to manufacture and distribute bread (*Gonzwa* v. *The Commonwealth* (3)).

For these reasons I am of opinion that the order nisi should be discharged.

Order nisi discharged with costs, including costs of proceedings in the Supreme Court.

Solicitors for the applicant, *K. D. Manion & Co.*

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

J. B.

(1) (1916) 21 C.L.R., particularly at pp. 441, 448, 455, 459, 460.

(2) (1943) 67 C.L.R. 1.

(3) (1944) 68 C.L.R., at p. 484.