[HIGH COURT OF AUSTRALIA.]

DE MESTRE . . . . . APPLICANT;

AND

CHISHOLM AND ANOTHER . . . . RESPONDENTS.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 28; *April* 20.

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

National Security—Defence—Intoxicating liquor—Sale—Control and regulation—Licensed premises—Bars—Requirement to open and keep open during specified hours—Regulation—Order of State Premier—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*)—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *s.* 5—*National Security* (*Supplementary*) *Regulations* (*S.R.* 1942 *Nos.* 132, 438—1943 *No.* 63), *reg.* 45 (1), (1A)—*Liquor* (*Opening of Bars*) *Order* (*N.S.W.*), 1943, *No.* 36.

The provisions of reg. 45 (1) and (1A) of the *National Security* (*Supplementary*) *Regulations*, empowering the Premier of a State to make an order requiring a licensee of licensed premises to open and keep open to the public during specified hours every bar on the premises, are authorized by s. 5 (1) of the *National Security Act* 1939-1940, and are within the defence power of the Commonwealth.

So *held* by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting).

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

Reg. 45 of the *National Security* (*Supplementary*) *Regulations* provides, so far as is material to this report, as follows:—"(1) Notwithstanding anything contained in the law of any State, where the Premier of the State is of opinion that it is in the interests of the defence of the Commonwealth or the effectual prosecution of the war that limitations or restrictions on the sale, supply, disposal, possession or use of intoxicating liquor in the State, additional to, or different from, the limitations and restrictions prescribed by the laws of the State, should be imposed, he may, by order published in

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the *Government Gazette* of the State, prohibit, restrict, control or regulate the sale, supply, disposal, possession or use of intoxicating liquor in the State. (1A) The power conferred by sub-regulation (1) of this Regulation shall extend to authorize the Premier of the State, in and by any such order, to require the holder of a licence for the sale of intoxicating liquor under the law of the State to open and keep open to the public during such hours as are specified in the order (being hours during which the premises may lawfully be open to the public for the sale of intoxicating liquor) every bar on the premises in respect of which that licence is held."

Order No. 36 of the State of New South Wales, made by the Premier of New South Wales, in purported exercise of the powers conferred by reg. 45, on 22nd March 1943 and published in the New South Wales *Government Gazette* on 23rd March 1943, provided, *inter alia*, as follows:—"1. (1) This Order may be cited as the 'Liquor (Opening of Bars) Order, 1943.' (2) Expressions used in this Order shall, unless the context or subject matter otherwise indicates or requires, have the meanings ascribed to them in the (New South Wales) *Liquor Acts*, 1912, as amended by subsequent Acts. 2. The holder of a publican's licence shall open and keep open to the public every bar on his licensed premises during the period commencing at the hour of two o'clock in the afternoon and ending at the hour of six o'clock in the afternoon on every day upon which the licensed premises may lawfully be kept open for the sale of liquor."

Maurice John Victor de Mestre was charged at the Court of Petty Sessions, Parramatta, that at Parramatta on Saturday, 3rd April 1943, he, being the holder of a publican's licence under the *Liquor Act* 1912 (N.S.W.) in respect of licensed premises known as the Railway Hotel situate at Church Street, Parramatta, New South Wales, did during the period commencing at the hour of two o'clock in the afternoon and ending at the hour of six o'clock in the afternoon, to wit at ten minutes past three o'clock in the afternoon on the day mentioned above, a day on which licensed premises may lawfully be kept open for the sale of liquor, not open and keep open to the public every bar on the said licensed premises contrary to the Regulations and Order in such case made and provided.

At the time and on the day mentioned in the charge all the doors giving access from the public street to the public bar of the licensed premises were closed and locked, but a door giving access from the street to the saloon bar was open. Two doors giving access from the saloon bar to the public bar were closed but not locked. They could be opened. The defendant informed a sergeant of police

that he was serving all his customers in the saloon bar. His beer quota had been sold and he had no staff to open up the " big public bar." The defendant said in evidence that access to the public bar was at all times available to any person wishing to enter it and although there was not any beer for sale, whisky could have been supplied to any such person. Also, following his usual practice, he would not have charged any such person, who having regard to the circumstances was served in the saloon bar, a price higher than that usually charged in the public bar for the particular commodity.

The defendant was convicted.

He obtained from the Supreme Court an order nisi calling upon the sergeant of police and the magistrate to show cause why a common law writ of prohibition should not issue to each of them restraining them and each of them from proceeding further upon or in respect of the conviction.

Upon the return of the order nisi the Full Court of the Supreme Court was of opinion that there arose in the cause a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales and refrained from deciding the cause: *Ex parte de Mestre*; *Re Chisholm* (1).

The cause came before the High Court pursuant to s. 40A of the *Judiciary Act* 1903-1940. In order to avoid argument as to whether an *inter se* question arose, the High Court made an order under s. 40 of the Act removing the cause into that Court.

Barwick K.C. (with him *Holmes* and *Coates*), for the applicant. The *Liquor* (*Opening of Bars*) *Order* made by the Premier of New South Wales is beyond the powers conferred by reg. 45 (1) and (1A) of the *National Security* (*Supplementary*) *Regulations*. Although some aspects of the liquor trade can be regulated within the defence power, there are some aspects of that trade which cannot be so regulated (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (2)). The Order stands by itself. It is not part of any scheme which in totality may be within the power. An Order purporting to regulate disorderly houses was held to be invalid in *Ex parte Day*; *Re Courtney* (3). The Order is based not only on the assumption that the control of the sale of liquor is within the defence power, but also on the assumption that the control of licensed premises and the obligation to keep them open, as distinct from the selling of liquor, are also within the power. Reg. 45 (1) and (1A) is beyond the powers

(1) (1943) 44 S.R. (N.S.W.) 55; 61 W.N. 43.

(2) (1919) 251 U.S. 146, at p. 155 [64 Law. Ed. 194, at p. 198].

(3) (1942) 42 S.R. (N.S.W.) 212; 59 W.N. 182.

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conferred by the *National Security Act* 1939-1940. Sub-reg. 1 is not within the power of the Governor-General under that Act. On its true construction reg. 45 (1) purports to give to the Premier power to impose such limitations as the Premier thinks are in the interests of defence, that is, it purports to delegate to the Premier a power greater than that possessed by the Governor-General. The Governor-General himself has no power to promulgate a regulation merely because in his opinion it is in the interests of defence. Reg. 45 delegates to the Premier power to issue orders in respect of some aspects related to intoxicating liquor that do not come within the defence power. Even though intoxicating liquor in some respects may have something to do with defence, not every limitation and not every restriction and not every control that may be exercised in relation to intoxicating liquor has some connection with defence; therefore sub-regs. 1 and 1A of reg. 45 are too widely expressed. The opinion of the Premier is completely irrelevant for all purposes even though he bona fide thinks control is necessary. Sub-reg. 1A is bad whether or not it depends upon sub-reg. 1. Upon its true construction sub-reg. 1A is a power to delegate to the Premier aspects which have nothing to do with defence. The limit of the defence power, so far as intoxicating liquor is concerned, is to restrict or control its sale so far as that relates to defence. Reg. 45 is beyond the powers conferred by the Constitution.

Dwyer K.C. (with him *Roland Green*), for the respondents. The Premier's Order is authorized by reg. 45 of the *Supplementary Regulations* and by s. 5 of the *National Security Act* 1939-1940. Reg. 45 is part of a scheme for the control of intoxicating liquor. It is analogous to the control which has been exercised in regard to food, clothing and goods generally. The Order is designed, *inter alia*, to combat improper practices and to make available to the general public during reasonable hours a reasonable supply of the commodity thereby removing cause for discontent and maintaining morale. These results are essential for purposes of defence. It is too late to contend that under the defence power the Federal Parliament has not got power to make laws, or the Governor-General under those laws to make regulations, controlling many, if not all, commodities. A power to restrict connotes a power subsequently to mitigate that restriction. The qualification in reg. 45 (1) in regard to the opinion of the Premier is a provision in limitation of the power rather than an authorization to exceed the bounds of the Constitution. The Premier has power to make such Orders and restrictions only when there is a certain relevancy between the

exercise of that power and the defence of the Commonwealth. Under sub-reg. 1A the power is enlarged, that is, it is a power to order something to be done and not merely to restrict. The regulation is its own dictionary. It shows that control is a limitation or restriction within the meaning of the regulation. Keeping the bars open is one method of regulating the disposal of intoxicating liquor. The fact that the regulation may not fully achieve its object is irrelevant and does not necessarily affect its nexus with defence (*Ferguson* v. *The Commonwealth* (1)). A submission that incorporation in a regulation of reference to the opinion of the Premier would tend to give a power to the Premier which was not given to the Governor-General under the Act was dealt with in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (2).

Barwick K.C., in reply. Reg. 45 (1A) is totally unrelated to the *Prices Regulations*. It is not a power to require the bars to be open in cases where the price of the commodity is fixed. On its face reg. 45 (1A) is a power unconnected with defence and it does not become connected with defence by reason of the fact that there is a power in some other person to fix the price. Reg. 45 (1A) must stand or fall on its own merits, whether or not some other regulation may contain other provisions with which it may co-operate.

Cur. adv. vult.

April 20.

The following written judgments were delivered :—

LATHAM C.J. The applicant, M. J. V. de Mestre, was prosecuted upon the following charge :—" That at Parramatta on 3rd April 1943 he, being the holder of a publican's licence under the *Liquor Act* 1912 in respect of certain licensed premises, did, during the period commencing at the hour of two o'clock in the afternoon, and ending at the hour of six o'clock in the afternoon . . . not open and keep open to the public every bar on his said licensed premises contrary to the regulations and order in such case made and provided." The applicant was convicted of the charge. He obtained an order nisi for a common law prohibition. Upon the return of the order nisi before the Full Court of the Supreme Court of New South Wales the Court was of opinion that there arose in the cause a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales, and accordingly refrained from deciding the cause (*Judiciary Act* 1903-1940, s. 40A), and the cause came before this Court. In order to

(1) (1943) 66 C.L.R. 432, at p. 435. (2) (1943) 67 C.L.R. 116, at p. 135.

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avoid argument as to whether a question of the limits *inter se* of constitutional powers arose, an order was made under s. 40 of the *Judiciary Act* removing the cause into this Court.

The *National Security Act* 1939-1940, s. 5, authorizes the making of regulations for securing the public safety and defence of the Commonwealth. The *National Security* (*Supplementary*) *Regulations*, reg. 45, authorize the Premier of a State to make certain orders with respect to intoxicating liquor. Acting under the powers conferred by the regulation, the Premier of New South Wales made an Order which required all bars on licensed premises to be kept open during certain hours. The applicant did not keep his public bar open during the hours fixed in the Premier's Order. His conviction for this offence is challenged upon three grounds—first, that the Premier's Order is not authorized by the *National Security* (*Supplementary*) *Regulations* ; secondly, that the relevant National Security regulation is not authorized by the *National Security Act* because it is quite unconnected with defence ; and, thirdly, it is said, if the *National Security Act* does authorize such a regulation, and the regulation does authorize such an Order, then the *National Security Act* is itself invalid because it is beyond the only relevant constitutional power of the Commonwealth Parliament, namely, the power to make laws with respect to naval and military defence.

It has already been held in *Wishart* v. *Fraser* (1) and other cases that the *National Security Act* is valid under the defence power contained in the Constitution, s. 51 (vi.). There is no ground for again considering the question of the validity of the Act.

If the second ground of objection to the conviction is established, the third ground cannot arise. If, on the other hand, the second objection cannot be supported, the third ground necessarily fails. The Act plainly does not give any authority to make regulations upon matters which have no relation to defence. Thus, upon any view, it appears to me to be unnecessary, in the circumstances of this case, to go beyond a consideration of the relation of the Premier's Order to the regulations, and of the regulations to the *National Security Act*.

The first question which I propose to consider is whether the Premier's Order was authorized by the National Security Regulations. The Premier's Order (Order No. 36 of the State of New South Wales) is, so far as relevant, in the following terms :—

" The holder of a publican's license shall open and keep open to the public every bar on his licensed premises during the period commencing at the hour of two o'clock in the afternoon and ending

(1) (1941) 64 C.L.R. 470.

at the hour of six o'clock in the afternoon on every day upon which the licensed premises may lawfully be kept open for the sale of liquor."

The regulations which are relied upon to justify this Order are regs. 45 (1) and 45 (1A) of the *National Security (Supplementary) Regulations*, which were made by Statutory Rules 1942 No. 132 and Statutory Rules 1943 No. 63 respectively. They are in the following terms :—

" 45.—(1) Notwithstanding anything contained in the law of any State, where the Premier of the State is of opinion that it is in the interests of the defence of the Commonwealth or the effectual prosecution of the war that limitations or restrictions on the sale, supply, disposal, possession or use of intoxicating liquor in the State, additional to, or different from, the limitations and restrictions prescribed by the laws of the State, should be imposed, he may, by order published in the *Government Gazette* of the State, prohibit, restrict, control or regulate the sale, supply, disposal, possession or use of intoxicating liquor in the State.

(1A) The power conferred by sub-regulation (1) of this regulation shall extend to authorize the Premier of the State, in and by any such order, to require the holder of a licence for the sale of intoxicating liquor under the law of the State to open and keep open to the public during such hours as are specified in the order (being hours during which the premises may lawfully be open to the public for the sale of intoxicating liquor) every bar on the premises in respect of which that licence is held."

The principal attack upon the Order was based upon the contention that the power conferred upon the Premier depended upon his opinion that limitations or restrictions on the sale, supply, disposal, possession or use of intoxicating liquor should be imposed in the interests of the defence of the Commonwealth. It was argued that a requirement that liquor bars should be kept open could not possibly be regarded as a limitation or restriction on the sale, &c., of liquor. I agree that a provision that liquor bars shall be kept open during certain hours does not impose a limitation or restriction on the sale, &c., of liquor. But, although the condition upon which the Premier can make an order *under reg.* 45 (1) is that he should have an opinion that limitations or restrictions are necessary, the actual *power* conferred by that regulation is a power to " prohibit, restrict, control or regulate the sale, supply, disposal, possession or use of intoxicating liquor in the State." It is this power, including a power to control or regulate (as well as to prohibit or restrict) the sale, &c., of liquor, which is extended by reg. 45 (1A). The " extension "

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effected by reg. 45 (1A) is defined so as expressly to include a power to require the holders of licences for the sale of intoxicating liquor to keep bars open. The words " limitation and restriction " do not appear in reg. 45 (1A), and, in my opinion, they should not be read into it. It is, in my opinion, plain upon the construction of reg. 45 (1A) that it was intended thereby to confer power upon a Premier to make an Order to keep bars open during specified hours. Otherwise the regulation means nothing. In my opinion, the argument that the Order is beyond the power conferred by the regulations fails.

The next question is whether the regulations mentioned are invalid because not authorized by the *National Security Act*.

The argument against the validity of the regulations is that the power of making regulations conferred by the *National Security Act*, being limited to matters of defence, cannot authorize the making of any regulation requiring liquor bars to be kept open during specified hours, because such a regulation can have nothing whatever to do with defence. It was submitted that the Commonwealth Parliament can, in time of war, restrict the consumption of liquor, but it was contended that Parliament would be acting beyond the defence power if it made any provision for facilitating the consumption of liquor. Thus it has been strongly urged that, while the prohibition of the sale of liquor (See *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (1)) may be within the defence power, and while restriction of the sale of liquor and of the hours of sale may be within the defence power, yet a provision that liquor bars are to be kept open within such hours is beyond the defence power. This view, expressed in this most general form, appears to me to rest upon an assumption that all restrictions of consumption of intoxicating liquor may help the war effort, but that no regulation of facilities for obtaining liquor not involving restriction can possibly help the war effort. This is a controversial question upon which there are acute differences of opinion in the community. I do not think that it should be assumed as a matter of course that the court is bound to take a particular side in such a controversy as this.

In my opinion the consumption of intoxicating liquor is a matter which has a most direct relation to discipline in the armed forces and to the efficiency of work and industry upon which the successful prosecution of the war must depend. A mere negative power of preventing consumption of liquor may well be regarded as an inadequate means of dealing with the problem. The hours of opening of liquor bars might be left to the unregulated and haphazard will of individual licensees, with the probable result that hours of

(1) (1919) 251 U.S. 146 [64 Law. Ed. 194].

opening and closing would vary indefinitely. The positive provision of facilities for the consumption of liquor at known and regular hours may, in my opinion, reasonably, though not necessarily (it is a matter of opinion), be regarded as a means of control which has a direct effect upon and therefore a relation to the consumption of intoxicating liquor, and therefore a real relation to discipline in the forces and to industrial efficiency.

It was objected that the regulation did not require liquor to be sold during the hours specified in a Premier's Order, and that therefore the regulation did not affect either the sale or the consumption of liquor, which were subjects which might be within the defence power. It is true that reg. 45 (1A) does not compel liquor to be sold while the bars are open ; but if a particular matter falls within a legislative power it is not necessary that the power should be exercised to its full extent whenever it is exercised. Both the quantity of liquor consumed and the rate of consumption are affected by the hours during which bars may be open. The spread of hours might also be expected to have some effect upon the allocation or distribution of a limited supply of liquor among those desiring it or competing for it.

It was not contended that the control of the manufacture of intoxicating liquor was beyond the defence power. But it could equally be said that control of the manufacture of liquor had no relation to the control of the sale or consumption of liquor, which were the really important things from the point of view of defence. But it is obvious that, allowing for the operation of ordinary human instincts, the amount of liquor manufactured has a direct bearing upon the amount of liquor likely to be consumed. In exactly the same way, though the fact that a liquor bar is open does not in itself bring about any sale of liquor or any particular distribution of the sale of liquor during the hours of opening, yet it is an element which may affect both the quantity sold and the identity of the persons who consume it. It may have been thought that if bars were required to be kept open for a certain number of hours in the afternoon there would be a tendency for licensees to try to make the liquor go further so as to have something on hand for their customers during the whole of the time during which the bars were required to be kept open. It may be that this particular expectation, if it were entertained, will be disappointed ; but, even if it were disappointed, that would not, in my opinion, show that the attempt to affect the consumption of liquor by dealing with one element affecting that consumption, namely, the length of time during which bars may be open, should be regarded as being beyond

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the defence power. It is not necessary that legislation should be completely successful in order to be valid.

In my opinion, therefore, regs. 45 (1) and 45 (1A) of the *National Security (Supplementary) Regulations* are within the powers conferred by the *National Security Act*, s. 5, of making regulations for securing the public safety and the defence of the Commonwealth, and, as I have said, the validity of the *National Security Act* has already been upheld by this Court.

Therefore, in my opinion, all the objections of the applicant fail. He was rightly convicted and the order nisi should be discharged with costs here and in the Supreme Court.

RICH J. The preliminary matters to be dealt with are concerned with regs. 45 (1) and (1A) of the *National Security (Supplementary) Regulations*. In my opinion reg. 45 (1) is within the scope of the defence power and reg. 45 (1A) is an extension of the preceding regulation so as to include in it the power to require the holder of a licence to open and keep open, &c., every bar on the premises in respect of which his licence is held. This extension is also within the defence power. For this construction I adopt the reasons of *Jordan* C.J. (1). But the substantial question which arises for our determination in the present case is whether it is within the scope of the defence power to regulate hours for the sale of liquor. Since the commodity is one over-indulgence in which is capable of interfering with the war effort, by producing incapacity in members of the fighting forces and also in civilians engaged in the production of munitions and other necessary supplies, it is one the regulation of the production and disposal of which is, in my opinion, within the defence power in time of war. Indeed, it has been held in the United States of America that control may be pressed so far as to prohibit traffic in liquor altogether as a means of increasing general war efficiency (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (2)). Since the commodity is one greatly in demand, but harmful if abused, I am unable to see that it is beyond the scope of the defence power to restrict the hours of sale, or, incidentally to a general restriction upon the production of the commodity or upon the hours of selling, to prescribe certain hours during which those who are authorized to sell it are to supply to customers asking for it, so much of it as they have for the time being available.

Restrictions on the sale of a popular or necessary commodity always tend to cause friction and dissatisfaction amongst those who

(1) (1943) 44 S.R. (N.S.W.), at p. 57; 61 W.N., at pp. 44, 45.

(2) (1919) 251 U.S., at pp. 158, 159 [64 Law. Ed., at pp. 200, 201].

are hampered in their efforts to obtain it. I do not regard as outside the scope of a power to impose restrictions, a power to add such incidental regulatory provisions as may not unreasonably be thought necessary or desirable for the smooth working of the restriction scheme.

The order nisi should be discharged with costs here and in the Supreme Court.

STARKE J. The Premier of New South Wales in pursuance of powers conferred upon him by reg. 45 of the *National Security (Supplementary) Regulations* under the *National Security Act* 1939-1940 of the Commonwealth made the following Order No. 36 :—

" The holder of a publican's license shall open and keep open to the public every bar on his licensed premises during the period commencing at the hour of two o'clock in the afternoon and ending at the hour of six o'clock in the afternoon of every day upon which the licensed premises may lawfully be kept open for the sale of liquor."

This order is within the very words of the *National Security (Supplementary) Regulations*, reg. 45 (1A), authorizing the Premier of the State to require the holder of a licence for the sale of intoxicating liquor under the law of the State to open and keep open to the public during hours specified in the Order every bar on the premises in respect of which that licence is held. It was contended that this regulation was but an appendage to reg. 45 (1), which authorized orders by the Premier only if he was of opinion that it was in the interests of the defence of the Commonwealth or the effectual prosecution of the war that limitations or restrictions on the sale, supply, disposal, possession or use of intoxicating liquor in the State, additional to, or different from, the limitations or restrictions prescribed by the laws of the State, should be imposed. But reg. 45 (1A) imposes no such condition, and if it did I should think that the regulation itself regards an order made pursuant to it as a limitation or restriction for the purposes of reg. 45 (1).

The suggestion in the latter case that the Premier's Order should disclose on its face the necessary opinion is untenable. If the Premier makes an order pursuant to a regulation that requires such an opinion, then it should be presumed that he had formed the necessary opinion. The critical question in this case is whether the regulation 45 (1A), under which the Premier's Order was promulgated, is validly made under the powers contained in the *National Security Act* 1939-1940 to make regulations for securing the public safety and defence of the Commonwealth, which in its turn depends upon the legislative

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power of the Commonwealth to make laws with respect to the naval and military defence of the Commonwealth. It is the duty of the Court to decide this question.

The decisions of the Court in connection with the defence power of the Commonwealth are such that I have abandoned the hope of deciding any case upon grounds that are intelligible, satisfactory or convincing. The power no doubt is extensive and enables the Parliament to exercise considerable control over the production and disposal of liquor and also over licensed houses in the interests of war efficiency. But the Constitution does not give to the Parliament any general power to make laws with respect to the liquor trade or licensed houses, and the power to make such laws is a constitutional power belonging to the States. " A wide latitude " must, however, be given to the Parliament and the regulation-making authority under the defence power, but the Court ought not to shelter itself under the discretion of the law-making authority. It must determine for itself whether a given law or regulation is a law with respect to the naval and military defence of the Commonwealth, to use the language of the Constitution, or for securing the public safety and the defence of the Commonwealth, to use the language of the *National Security Act*.

The *Liquor Act* 1912 of New South Wales provides in s. 15 that all publicans' licences shall authorize the licensee therein named to sell and dispose of liquor but (subject to certain provisions contained in s. 57 of the Act which are immaterial here) only on the premises specified between six o'clock in the morning and six o'clock at night. The Premier by an Order No. 24 purporting to have been made pursuant to the *National Security* (*Supplementary*) *Regulations* has directed in respect of premises situated within the Sydney Metropolitan District that the *Liquor Act* shall be read and construed as if the words six o'clock were omitted from s. 15 of the Act and the words eleven o'clock inserted in lieu thereof, and ten o'clock outside the Metropolitan District.

The validity of this regulation may be questioned. The Commonwealth may make laws within its constitutional powers and State laws inconsistent therewith are invalid to the extent of the inconsistency (Constitution, s. 109). But the Commonwealth has no authority to repeal or amend the laws of the States.

Now the Premier's Order (No. 36) has nothing to do with the production of liquor. And it neither commands, restricts, nor regulates the sale or disposal of liquor. It does not spread the sale of liquor over particular hours nor apportion the quantity sold to any particular time. The Order does not prevent the licensee from selling

and disposing of liquor in lawful hours in such quantities and in such manner as suits his business purposes. All the Order does is to command that bar doors in licensed premises in the cities, towns and outback settlements of New South Wales be kept open from two to six without any apparent reason, for the licensee may keep his bar doors open during those hours and if his business so required he would no doubt do so : he may sell and dispose of liquor during those hours or he may have disposed of all his liquor and have none to sell between those hours. So what is the connection, to adopt the words of the Chief Justice in *South Australia* v. *The Commonwealth* (1), between the Order and the defence of the Commonwealth ? Counsel suggested that the purpose of the Order was to make what is called " black marketing " unprofitable or else to provide a resting place or lounge for weary citizens or soldiers, but this is mere assumption, and, again to quote the words of the Chief Justice, " the Court cannot base any decision upon an assumption so obviously disputable " (2). And in this case, I would add, so obviously absurd. But members of the Court came to the aid of counsel and suggested that the economic effect of the Order might convenience the public and might also, having regard to the business instincts of licensees, have some effect upon the sale and distribution of liquor. At best this is a very tenuous connection with defence and, in my opinion, mere conjecture and guesswork, and is not, I think, in line with the decisions of this Court in the *Industrial Lighting Regulations Case* (3), or the *Universities Commission Case* (4). As well might it be suggested that the effect of the Order is to hinder or retard war efficiency because it necessitates the useless employment of labour in order that bars on licensed premises may be kept open.

The Order, as it seems to me, is one of those irritating orders and restrictions upon freedom of action which is arbitrary and capricious, serves no useful purpose, and has no connection whatever with defence. In so far as the *National Security* (*Supplementary*) *Regulations* authorize such an Order they are beyond the powers conferred upon the Commonwealth by the Constitution and upon the Governor-General in Council by the *National Security Act*.

The motion for a writ of prohibition should succeed.

McTiernan J. This application came on for hearing as a cause which had been removed from the Supreme Court of New South Wales to this Court by virtue of s. 40A of the *Judiciary Act* 1903-1940. By it the applicant sought a writ of common law prohibition

(1) (1942) 65 C.L.R. 373, at p. 432.
(2) (1942) 65 C.L.R., at p. 433.
(3) (1943) 67 C.L.R. 413.
(4) (1943) 67 C.L.R. 95.

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in respect of a conviction by a Court of Petty Sessions for a breach by him of Order No. 36 which the Premier of New South Wales made on 22nd March 1943 in pursuance of powers conferred upon the Premier by reg. 45 of the *National Security (Supplementary) Regulations*. This Order requires the holders of licences for the sale of intoxicating liquor to keep open every bar on their licensed premises between two and six o'clock in the afternoon on every day upon which they are permitted by law to sell liquor.

One of the questions which was argued in the Supreme Court was whether reg. 45 and the Premier's Order are within the constitutional powers of the Commonwealth. Their Honours thought that an *inter se* question within the meaning of s. 40A of the *Judiciary Act* 1903-1940 was raised by the argument on this question, and accordingly treated the application to the Supreme Court as removed into the High Court.

This Court by consent made an order under s. 40 of the above-mentioned Act, and it became unnecessary to argue the question whether such an *inter se* question was raised.

The application for the writ of prohibition is based on the contention that the Premier's Order and reg. 45 are invalid. If the regulation is invalid, the Order falls with it: but if the regulation is wholly valid, the Order is valid as it literally pursues the terms of reg. 45 (1A).

Reg. 45 (1) authorizes the Premier of any State, by Order published in the *Government Gazette* of the State, to prohibit, restrict, control or regulate the sale, supply, disposal, possession or use of intoxicating liquor in the State: the condition of the exercise of this power is that the Premier is of the opinion that it is in the interests of the defence of the Commonwealth or the effectual prosecution of the war that limitations or restrictions different from or additional to those prescribed by the State laws, should be imposed on the sale, supply, disposal, possession or use of intoxicating liquor in the State: the expressed intention of the sub-regulation is that the Order should override the State laws. Reg. 45 (1A) provides that the "power conferred by sub-regulation (1) of this regulation shall extend to authorize the Premier of the State, in and by any such order, to require the holder of a licence for the sale of intoxicating liquor under the law of the State to open and keep open to the public during such hours as are specified in the order (being hours during which the premises may lawfully be open to the public for the sale of intoxicating liquor) every bar on the premises in respect of which that licence is held."

The Premier's Order now in question does not in terms fall within the powers conferred by sub-reg. 45 (1); it falls within the powers

conferred by sub-reg. 45 (1A). As this sub-regulation professes to extend the power conferred by the first sub-regulation, it is necessary to inquire whether both sub-regulations are valid.

The primary proposition is, I think, that it is a matter of common knowledge that the discipline and efficiency of the members of the forces, their auxiliary services and persons engaged in essential work and services in war-time may be affected detrimentally or beneficially by the conditions under which such members and persons who desire intoxicating liquor as a beverage may obtain it. Hence it is within the defence power of the Commonwealth for it to provide in war-time limitations and restrictions on the sale, supply, disposal, possession or use of intoxicating liquor.

Reg. 45 (1) contains a plan for serving the war effort by imposing such limitations and restrictions, and it is within the powers of the Commonwealth to use means which are appropriate or incidental to the execution of the plan. These means may include the restriction, control or regulation of the sale, supply, disposal, possession or use of intoxicating liquor.

Sub-reg. 45 (1), as has been shown, confers power on a Premier to do any of these things in his own State. Having at his elbow the police services of the State, a State Premier is clearly an appropriate authority to determine whether it would be in the interests of the war effort to vary the restrictions or limitations which the State laws impose on the sale, supply, disposal, possession or use of intoxicating liquor in the State, and for the purpose of serving those interests to impose on such transactions, possession or use other limitations or restrictions by way of prohibition, restriction, control or regulation.

Reg. 45 (1) is, in my opinion, within the powers which s. 5 (3) of the *National Security Act* confers upon the Governor-General (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)). Section 5 is a valid exercise of legislative power. It follows that reg. 45 (1) is within the constitutional powers of the Commonwealth and the powers conferred upon the Governor-General by s. 5 of the *National Security Act* and is valid.

Reg. 45 (1A), as has been observed, professes to extend the power conferred by reg. 45 (1), which is to prohibit, restrict, control or regulate the sale, supply, disposal, possession or use of intoxicating liquor, to requiring bars on licensed premises to be kept open for a specified time during the hours when liquor may be lawfully sold. This sub-regulation therefore purports to put a further means at the disposal of a State Premier to effectuate the plan of limitation

(1) (1943) 67 C.L.R., at pp. 135, 136.

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or restriction in reg. 45 (1). It is therefore a condition of the use of this means that a State Premier should be of opinion that it would be in the interests of the defence of the Commonwealth or the effectual prosecution of the war that other limitations or restrictions than those imposed by the laws of the State should be introduced. But is a requirement that bars should be kept open a measure which is capable of effectuating a plan for limitation or restriction? It may be said that it is a measure which runs in the opposite direction. This difficulty is completely met by a solution which *Jordan* C.J. gave in the Supreme Court. His Honour said that the words creating the extended power should be regarded "as referable to cases in which a Premier is of opinion that limitations or restrictions should be imposed on the sale, &c., of liquor, by treating them as providing for cases in which a Premier thinks it desirable to introduce a scheme of restrictions which, whilst requiring or permitting closing during certain hours, requires opening during others" (1). Regarded in this way, the extension, which sub-reg. 45 (1A) makes of the power conferred upon a State Premier by reg. 45 (1), places at his disposal a power which is ancillary to the execution of the scheme of limitation or restriction at which reg. 45 (1) aims.

Reg. 45 (1A) is, I think, for these reasons within the constitutional powers of the Commonwealth and the powers which s. 5 of the *National Security Act* 1939-1940 confers upon the Governor-General.

The Premier's Order for the breach of which the appellant was convicted is within reg. 45 as it is clearly an exercise of the power conferred by reg. 45 (1A).

In my opinion the application should be dismissed.

WILLIAMS J. The nature of the application is explained in the judgment of the Chief Justice, so that I shall proceed to deal shortly with the three grounds upon which Mr. *Barwick* contends that the *Liquor (Opening of Bars) Order* 1943 is void.

As to the first ground—Before the Premier can make an Order under reg. 45 (1) of the *National Security (Supplementary) Regulations* he must be of opinion that it is in the interests of the defence of the Commonwealth or the effectual prosecution of the war that limitations or restrictions on the sale, supply, disposal, possession or use of intoxicating liquor in the State, additional to, or different from, the limitations and restrictions prescribed by the laws of the State, should be imposed. He may then by Order prohibit, restrict, control or regulate the sale, supply, disposal, possession or use of intoxicating liquor in the State. But control or regulation must be

(1) (1943) 44 S.R. (N.S.W.), at p. 57.

by way of limitation or restriction. It would not be a limitation or restriction in the ordinary and natural meaning of the words to direct that all bars should remain open between certain hours, but reg. 45 (1A) expressly provides that the power conferred by sub-reg. 1 shall extend to authorize the Premier so to order. If, therefore, the Premier is of opinion that it would be in the interests of defence or the effectual prosecution of the war to make such an Order he can do so, because sub-reg. 1A supplies a context and directs that a limitation or restriction is to be construed in this respect in an affirmative sense. The first ground therefore fails.

The second and third grounds can, I think, be disposed of together, because, as I have said in several recent judgments, the purpose of the *National Security Act* is to delegate to the Governor-General, that is to say to the Federal Executive Council, during the war and for six months thereafter, the power to make laws for the peace, order and good government of the Commonwealth for the naval and military defence of the Commonwealth conferred upon the Parliament by the Constitution, s. 51 (vi.). The *National Security Act*, s. 5 (3), authorizes the Executive to delegate this legislative power to such persons or classes of persons as are prescribed and thereto authorized by the regulations. In order, therefore, to determine whether reg. 45 (1) and (1A) is a valid exercise of power, it is necessary to determine whether, if it had been enacted by the Parliament, it would have been a valid exercise of the defence power. In the *Women's Employment Regulations Case* (1) I stated what I consider to be the relevant considerations in determining this question. Legislative powers for the regulation and control of the persons by whom, the places where, and the conditions under which intoxicating liquor may be sold under normal conditions are saved for the States by ss. 106 and 107 of the Constitution and the States have freely exercised the powers, the relevant statute in New South Wales being the *Liquor Act* 1912. But in time of war special problems arise relating to the supply and sale of liquor. It becomes in short supply, so that the amount available for sale can be quickly disposed of, and, subject to price control, can command high prices. Soldiers, munition workers and other civilians whose work is related to the prosecution of the war live unusual lives and work unusual hours. Publicans are not required to keep their bars open by the law of New South Wales. It is probable, therefore, that they could dispose of the available supply of liquor by opening their bars for a very short period when the demand is at its greatest which would be, presumably, immediately before the legal closing time at 6 p.m.

(1) (1943) 67 C.L.R. 347, at pp. 399-403.

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Further, if the bars of some hotels were open at one time and some at another chaos would result. The purpose of the Order would appear to be to require all bars to be kept open for a reasonable period at the most appropriate time of the day so as to give the public, including the classes already mentioned, a reasonable opportunity of obtaining a drink at their leisure, and to prevent too many members of the public suffering from the effect of too many drinks consumed in too short a period.

The regulation and even prohibition of the supply of liquor as a means of increasing war efficiency has been held by the Supreme Court of the United States of America to be within the ambit of the war power (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (1)). It was in that case that the Supreme Court stated that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded. That case was cited with approval by the Privy Council in *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (2). In the present case it is not a question whether the consumption of intoxicating liquor is beneficial or otherwise in war-time, but whether its regulation and control is capable at least incidentally of aiding in the prosecution of the war. It is true that the Order does not require the publican to supply liquor, if he has any ; it merely directs him to keep his bars open. But if a publican had his bars open but refused to sell, the goodwill of his business (and probably his furniture and fittings) would soon suffer, so that the purpose of the Order would probably be effective, but, even if it were not, I agree with my brother *Rich* that, although the regulation may not fully achieve its object, that does not affect its nexus with defence (*Ferguson* v. *The Commonwealth* (3)).

For these reasons I am of opinion that the application should be refused.

Order nisi discharged with costs in High Court and Supreme Court.

Solicitor for the applicant, *Mervyn Finlay.*

Solicitor for the respondents, *A. H. O'Connor*, Crown Solicitor for New South Wales.

J. B.

(1) (1919) 251 U.S. 146 [64 Law. Ed. 194].

(2) (1923) A.C. 695, at p. 706.

(3) (1943) 66 C.L.R., at p. 435.