

[HIGH COURT OF AUSTRALIA.]

WERTHEIM PLAINTIFF ;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

National Security—Power to Minister, in interests of defence, to control production of “essential articles”—Operative provisions of order exceeding its stated objects—National Security (General) Regulations (S.R. 1939 No. 87—1944 No. 131) reg. 59—Fly and Insect Sprays Order.

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MELBOURNE,
March 7, 8.
SYDNEY,
April 9.
Latham C.J.,
Rich, Starke,
Dixon,
McTiernan and
Williams J.J.

The *Fly and Insect Sprays Order*, which purported to be made under reg. 59 of the *National Security (General) Regulations*, declared that the objects of the Order were “by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays”; it provided that “a person shall not manufacture or put up any fly spray except under the authority of and in accordance with a licence granted” pursuant to the Order, and it prohibited the disposal or acquisition of “any fly spray manufactured or put up in contravention of this Order.”

Held that the Order was not authorized by reg. 59 of the *National Security (General) Regulations* and was invalid.

DEMURRER.

Purporting to act in pursuance of reg. 59 of the *National Security (General) Regulations*, the Minister for War Organization of Industry on 6th September 1944 made the *Fly and Insect Sprays Order*, which provided :—“3. The objects of this Order are, by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays. 4. In this Order, unless the contrary intention appears . . . ‘fly spray’ includes an insect spray, other than an insect spray manufactured for use in horticultural or animal husbandry; ‘manufacture’ means manufacture for the purpose of sale . . .

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5. A person shall not manufacture or put up any fly spray except under the authority of and in accordance with a licence granted by the Minister or an authorized officer . . . 7. (1) A licence issued under this Order shall be in such form, and may be subject to such conditions, as the Minister or an authorized officer thinks fit. . . . 9. A person shall not, without the consent of the Minister or an authorized officer, sell or otherwise dispose of, or purchase or otherwise acquire, any fly spray manufactured or put up in contravention of this Order which he knows or has reasonable cause to suspect to have been so manufactured or put up."

The plaintiff, who for many years had been engaged in the business of manufacturing fly and insect sprays, was refused a licence under the above Order. He brought an action in the High Court against the Commonwealth and the Minister, seeking a declaration that the Order was *ultra vires* and void as being beyond the powers conferred upon the Minister by reg. 59.

The defendants demurred to the statement of claim.

Ashkanasy K.C. (with him *Spicer*), for the plaintiff. The Order goes beyond the authority conferred by reg. 59 of the *National Security (General) Regulations* and even beyond the object declared in the Order itself. The declared object of the Order is to prevent the waste of essential materials. The Order does not even say that the Minister wants to control all fly sprays. It would have been simple to say that no essential materials (or none of specified essential materials) should be used in the manufacture of fly sprays without a licence. The present Order purports to prohibit the manufacture of any fly spray, whether it does or does not contain kerosene or thanite or any other material considered to be "essential." The Order is directed, not to the control of the use of any essential material, but to the prevention of waste of "essential materials" (not specified, apart from kerosene and thanite) in ineffective fly sprays. It does not appear that fly sprays are the essential materials to be controlled; there is really no sufficient definition of "essential materials" for the purposes of the Order. [He referred to *Country Roads Board v. Neale Ads Pty. Ltd.* (1).]

Dean K.C. (with him *Gowans*), for the defendants. The Order acts upon fly sprays as the essential materials. The only obstacle, if any, to this view is the objects clause; but it should not be allowed to control provisions which clearly go beyond it, if those provisions are *intra vires*. The Order cannot be dealt with on the assumption

that par. (a) of reg. 59 (1) is the only relevant source of power. Paragraph (c) is also relevant ; under it articles other than essential articles may be controlled, and therefore the question whether this Order goes beyond essential articles ceases to be a critical one.

Spicer, in reply.

The following written judgments were delivered :—

LATHAM C.J. This demurrer raises the question of the validity of the *Fly and Insect Sprays Order* made by a Minister “in pursuance of regulation 59 of the National Security (General) Regulations.”

Regulation 59, so far as material, provides :—“(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, purchase . . . of essential articles . . . (c) for regulating, restricting or prohibiting the production . . . distribution or sale of articles other than 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) In this regulation—(a) the expressions ‘essential articles’ and ‘essential work’ mean respectively articles and work 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 (clause 5) prohibits the manufacture or putting up of any fly spray except under the authority of and in accordance with a licence granted by the Minister or an authorized officer. Clause 7 provides that a licence issued under the Order shall be in such form and may be subject to such conditions as the Minister or an authorized officer determines. Clause 9 provides that a person shall not, without the consent of the Minister or an authorized officer, sell or otherwise dispose of, or purchase or otherwise acquire, any fly spray manufactured or put up in contravention of the Order which he knows or has reasonable cause to suspect to have been so manufactured or put up.

Clause 3 of the Order is as follows :—“The objects of this Order are, by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays.”

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The Order nowhere uses the term "essential articles." In the clause which has just been quoted there is a reference to "essential materials," but if it had been intended to exercise the powers conferred by reg. 59 (1) (a) with respect to "essential articles," the Order would (it should be presumed) have been so expressed. There must have been some reason why the use of the term "essential articles" was avoided in the Order, but, whatever the reason may be, it is, in my opinion, impossible to regard the words "essential materials" as equivalent to the words "essential articles," when the latter words are given a specifically defined meaning for the purpose of the Regulations. In my opinion, the Order cannot be justified under reg. 59 (1) (a), because there is nothing to show that either of the two materials (kerosene and thanite) referred to in the Order are "essential articles" within the meaning of the Regulations. It may be added that no other "materials" are specified in the Order as being essential.

Regulation 59 (1) (c), however, authorizes an order to be made "for regulating, restricting or prohibiting the production . . . distribution or sale of articles other than essential articles." As it does not appear that fly and insect sprays are essential articles within the meaning of the Regulations, they must fall within the category of "articles other than essential articles." The next question, therefore, is whether the Order can be supported under reg. 59 (1) (c).

The powers conferred upon a Minister by reg. 59 (1) can be exercised only up to a certain limit, which is described by the words "so far as appears to him" (the Minister) "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."

Clause 3, setting forth the objects of the Order, shows how far it appeared to the Minister to be necessary to regulate the manufacture and putting up of fly and insect sprays for the purposes mentioned. Such regulation was, in the opinion of the Minister, required only for a stated purpose, namely, "to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays." When Australia is engaged in a war carried on in tropical territory, the production of effective fly and insect sprays and the prevention of waste of materials and labour in the production of ineffective sprays has a close relation to defence requirements. But an examination of the other provisions of the Order shows that they are not limited by the objects stated. The principal provision (clause 5) prohibits

the manufacture of any fly spray except under licence, and clause 7 purports to permit the Minister or an authorized officer to impose any conditions upon the licence which he thinks fit. These provisions are quite general in form. They are not confined to the prevention of the manufacture of ineffective sprays, and are not conditioned by any requirements relative to the production of effective sprays. Accordingly, in my opinion, they have gone further than the objects of the Order as declared in the Order itself, and, therefore, have gone further than appears to the Minister to be necessary in the interests of the defence of the Commonwealth, &c. Thus, in my opinion, the Order is not justified by reg. 59.

One of the arguments submitted for the plaintiff was that, though under reg. 59 the Minister might control the use or sale of ingredients of fly or insect sprays, the Regulations did not confer power to control the use or sale of such sprays themselves. I wish to guard myself against it being thought that I accept such an argument. It appears to me that a similar argument would lead to the conclusion that the Minister could control the production (and I may add the price) of flour but not of bread, and of leather but not of boots, because it could be argued that control of ingredients would give sufficient and effective control of the product. Such an argument appears to me to involve the proposition that it is a proper function of a court to prescribe the means whereby a legitimate object of Commonwealth legislation may be attained. This is a proposition which I am not prepared to accept. What *Marshall* C.J. said in the case of *M'Culloch v. The State of Maryland* (1) has long been accepted as a general rule of constitutional interpretation: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In my opinion, for the reasons which I have stated, the demurrer should be overruled in so far as it depends upon the contention that the Order is within the powers conferred upon the Minister by reg. 59.

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(1) (1819) 17 U.S. 579 [4 Law. Ed. 316].

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RICH J. The question for our determination is whether the Order in question falls within the power to make regulations for ensuring the safety and defence of the community. In another branch of the law, in considering the validity of a company's power, one looks to the objects stated in the memorandum of association of the particular company, which limits and restricts the company's authority to the objects stated therein and to things incidental and conducive thereto. Similarly, in order to ensure the validity of legislation of this kind, whether by statute or regulation, the purpose of the legislation must be limited to defence or war. Legislative competence is not measured by question of policy or intention, nor does the court usurp the function of the executive by substituting its opinion for that of the executive. In the final analysis, the court decides whether the particular legislation conforms to constitutional requirements and does not travel beyond them in an attempt to carry out an object beyond the power invoked: Cf. *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.* (1), per Evatt J.

In other words, in this case our task is to decide whether the *Fly and Insect Sprays Order* is a genuine exercise of the defence power. The Order leaves no room for speculation about its objects. They are stated to be:—"The objects of this Order are, by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays." The only limitation to their generality is the exception of "an insect spray manufactured for use in horticultural or animal husbandry." Apart from this limitation, "a person shall not manufacture or put up *any* fly spray without a licence." It appears on the face of the Order that its object is to prevent waste in the use of essential materials, in particular kerosene and thanite. I am well aware that flies may be a menace to the health of the community as well as to the armed forces and war workers, but this does not justify the prohibition of the manufacture and sale of all sprays. The individual should not be dragooned into the purchase of a particular spray, prevented from using the spray of his choice and thrown back on the humble swat. The object of the regulation can be reached by regulating "the manufacture and putting up" of sprays made up with what are considered to be essential materials.

In my opinion the prohibition is expressed in such wide terms as to take the Order out of the scope and limit of reg. 59 of the *National*

Security (General) Regulations. The Order is invalid, and the demurrer should be overruled.

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STARKE J. Demurrer in an action to a statement of claim which claimed that the *Fly and Insect Sprays Order*, made pursuant to reg. 59 of the *National Security (General) Regulations*, was beyond the power conferred upon the Minister of State for War Organization of Industry and that the regulation itself was beyond the power conferred upon the Governor-General by the *National Security Act* or by the Constitution.

The Order, in clause 3, sets forth that its objects are, by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays. And the Order provides that a person shall not manufacture or put up any fly spray except under the authority of and in accordance with a licence granted by the Minister or an authorized officer. A fly spray includes an insect spray, other than an insect spray manufactured for use in horticultural or animal husbandry, and manufacture means manufacture for the purpose of sale.

It is, no doubt, a legitimate exercise of power in time of war to prevent the waste of materials essential for the purposes of defence, securing the public safety, the efficient prosecution of the war or the life of the community. The Order itself particularly specifies kerosene and thanite, but gives no indication of any other material essential for the purposes of defence. And it prohibits the manufacture for sale without a licence of all fly sprays other than for the purposes mentioned in the Order, whether the ingredients thereof are or are not essential for the purposes of defence, the public safety, the efficient prosecution of the war or the life of the community. The Order is plainly in excess of power, but it is but another illustration of the extravagant powers claimed by the Commonwealth in time of war.

The demurrer should be overruled.

DIXON J. The demurrer depends upon the validity of an Order made as under reg. 59 of the *National Security (General) Regulations* last September for the purpose of prohibiting the manufacture without a licence of fly and insect sprays.

The operative provisions of the Order say little more than that no one shall manufacture for sale, or put up for sale, fly and insect spray, unless he has obtained a licence from the Minister or an

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authorized officer; that the licensing authority may impose such conditions as he thinks fit; and that no one shall sell or buy fly or insect spray made and put up in contravention of the Order.

The grounds upon which the Minister and his authorized officers are to proceed in granting or withholding licences and in formulating conditions are not stated, and their discretion is neither defined nor expressly limited. But the Order contains a clause declaring the objects its provisions have in view. If that clause is read with the definition of "fly spray" and "manufacture," the intended scope of the control set up by the system of licensing can be gathered, as well as the reasons for making the Order.

The purpose is not that of promoting the production of effective fly and insect sprays, nor of directing the supply of the sprays produced to the consumers or localities having the greatest need of them. The purpose of regulating manufacture is to prevent the waste of materials, considered essential, through their unrestrained use in making fly and insect sprays that are ineffective. It is manufacture for sale that is regulated, that is, the manufacture for ordinary commercial distribution. The manufacture of insect sprays for use in horticultural and animal husbandry is excepted, and this, as it appears to me, must be on the ground that there should be no hindrance to the free and full supply of the needs of fruit-growers and stock raisers.

It is not difficult to see that the power over defence may extend to suppressing the waste of essential materials, that is, materials required for the conduct of the war, or indispensable to the civilian community. Regulation 59 (1) (a) is framed upon that assumption. But, naturally, the question whether particular articles or materials are so essential as to justify or require the intervention of the Federal authority is a matter the decision of which administratively is a responsible duty. This fact is recognized by the regulation, which places upon the Minister the responsibility of forming the opinion that the articles that may be in question are essential for the defence of the Commonwealth or the efficient prosecution of the war, or are essential to the life of the community: See sub-reg. (5) (a) of reg. 59.

Unfortunately, except for the two ingredients thanite and kerosene, named as particular instances, the purpose clause of the Order fails to specify or indicate what are the essential materials the waste of which the Order undertakes to restrain by means of the system of licensing. Instead of the Minister forming and expressing an opinion about the essentiality of definite substances or liquids, or of this or that class or description of things, it is stated as a general

proposition, with two examples, that, in order to ensure that essential materials are not wasted, the manufacture of sprays must be regulated.

Under reg. 59 (1) (a), it is for the Minister to judge whether an "article" is essential. Then the use of the "article," or "articles," he has considered essential may be regulated by Order. But, even if this were done, the Order could not affect those who used other "articles," and, for all that appears, there may be many other things, besides thanite and kerosene, to which the manufacturers of fly spray may resort.

The result is that, as I see it, the Order, in its scope and intended operation, goes beyond what reg. 59 (1) (a) authorizes.

The Order, on its own statement of objects, cannot be justified under par. (c) of reg. 59 (1).

Independently, therefore, of any question whether the width of the Order and its attempt, by sub-delegation so to speak, to leave the real regulation of the subject matter to the undefined discretion of the licensing authority do not put it beyond power, I think that it fails to conform to the requirements of reg. 59 itself and on that ground is *ultra vires* and void.

In my opinion the demurrer should be overruled.

McTIERNAN J. The *Fly and Insect Sprays Order*, which is the subject of this action, is expressed to have been made in pursuance of reg. 59 of the *National Security (General) Regulations*. The presumption is that it appeared to the Minister necessary to make the provisions contained in the Order 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. The statement which is in the Order of its objects defines the limits of the action which it appeared to the Minister necessary to take for any of the above-mentioned purposes. The validity of the prohibition which is contained in the Order turns upon the question whether it is within those limits. The statement of the objects shows that it appeared to the Minister to be necessary "by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays." The prohibition is in these terms: "a person shall not manufacture or put up any fly spray except under the authority of and in accordance with a licence granted by the Minister or an authorized officer." The words "fly spray" include any insect spray other than a spray manufactured

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for use in certain branches of primary industry, and “put up” means to put up for sale. The legal basis of the Order, however, is not that the regulating of the manufacture and putting up for sale of fly and insect sprays appeared to the Minister to be necessary for the war effort: the Order has a different legal basis: it is that it appeared to the Minister necessary to ensure, by regulating the manufacture and putting up for sale of such sprays, that two materials kerosene and thanite, and other materials indicated by the words “essential materials,” but not otherwise specified or described, should not be wasted in making ineffective fly and insect sprays. It is not shown, by the Order or otherwise, that kerosene or thanite or any particular material is necessary for or might be used in the production of all, or even most, fly and insect sprays within the terms of the prohibition.

From what appears on the face of the Order, the prohibition exceeds the object which it appeared to the Minister necessary to effectuate in the interests of defence, or the prosecution of the war or for maintaining essential supplies and services. In my opinion the demurrer should be overruled.

WILLIAMS J. The only ground upon which counsel for the plaintiff has challenged the validity of the *Fly and Insect Sprays Order* is that it is not authorized by reg. 59 of the *National Security (General) Regulations*. I have already set out the material parts of that regulation in *Stenhouse v. Coleman* (1) and will not repeat them. The effect of the Order is to prohibit, except under licence, the manufacture or putting up for purposes of sale of any fly spray, including any insect spray, other than an insect spray manufactured for use in horticultural and animal husbandry. The objects of the Order are stated to be, by regulating the manufacture and putting up of sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays. In *Stenhouse v. Coleman* (2) this Court considered the operation of reg. 59, and in particular the extent to which legislative orders made by Ministers thereunder are examinable by the Court. It is clear from that decision, and the earlier decisions there referred to, that the Court is not bound by the opinion of the Minister, and that a duty is imposed upon the Court, in the exercise of the judicial power, to examine the scope and operation of the order to see whether it is a valid exercise of the legislative power conferred upon him.

(1) (1944) 69 C.L.R. 457, at p. 473.

(2) (1944) 69 C.L.R. 457.

The substance and purpose of the instant Order is to take complete control of the manufacture and sale of fly and insect sprays throughout the Commonwealth, other than sprays for use in horticulture and upon animals. That is not a purpose which, on its face, appears to me to have any connection with the defence of the Commonwealth or the effectual prosecution of the war or the maintenance of supplies and services essential to the life of the community. It is said that there is such a connection, because flies and other insects are a menace to the health of members of the armed forces and persons engaged in the manufacture of munitions and other articles relating to the prosecution of the war. But there can be no difficulty in the Commonwealth procuring the manufacture of those sprays which it considers to be most effective for use by the armed forces and such persons. If certain ingredients are, in the opinion of its advisers, particularly suitable for this purpose, the Commonwealth can regulate their production, distribution, sale or consumption. It can regulate the manufacture and sale of sprays in which these ingredients are used. But I am unable to conceive how it can aid any of the purposes mentioned in the regulation to prohibit the manufacture and sale of sprays which do not contain any of these ingredients. That appears to me to be an interference with the rights of persons under State laws to carry on their business, which is not justified by any reasonable connection with the prosecution of the war. In *Stenhouse v. Coleman* (1), a connection between the control of the manufacture and distribution of bread and the prosecution of the war sufficiently appeared from the nature of the commodity itself, but no such connection appears from the nature of the article in the present case. A sound appraisal of the effectiveness or non-effectiveness of fly and insect sprays for ordinary domestic use can be safely left to the purchasing public. Such sprays are required to the same extent in times of peace as in times of war. The necessity, if any, in the interests of public health, to legislate to safeguard the public against the manufacture and sale of useless sprays is no greater in time of war than in time of peace. Legislation upon a social subject which does not present any features in time of war not present in normal times is legislation that lies within the legislative province of the States and cannot be enacted by the Commonwealth under the defence power or any delegation of that power.

As the mere regulation of the manufacture and sale of sprays does not of itself provide a subject matter which has a sufficient link with the purposes stated in reg. 59, the Court is thrown back on the statements of the objects contained in the Order. But these

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objects could be fully achieved by prohibiting the manufacture and sale, except under licence, of sprays which contained kerosene or thanite or other named essential materials. The Order is, therefore, wider than is 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. It is in the same category as the *Industrial Lighting Regulations*, which were held to be invalid in *Victorian Chamber of Manufactures v. The Commonwealth* (1).

Further, applying the principles most recently re-stated in *Pidoto v. Victoria* (2) the Order cannot be read down by construction so as to be saved by the *Acts Interpretation Act* 1901-1941, s. 46 (b).

I am therefore of opinion that the Order is invalid and that the demurrer should be overruled.

Demurrer overruled. Liberty to apply.

Solicitor for the plaintiff, *Sylvia Rothstadt*.

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

E. F. H.

(1) (1943) 67 C.L.R. 413.

(2) (1943) 68 C.L.R. 87.