[HIGH COURT OF AUSTRALIA.]

KING GEE CLOTHING COMPANY PROPRIETARY LIMITED AND OTHERS . } PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

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SYDNEY, *Aug.* 1.

MELBOURNE, *Oct.* 11.

Rich, Starke, Dixon and Williams JJ.

National Security—Price control—Men's, youths' and boys' outerwear—Manufacturer — Maximum price — Ascertainment — Certainty — Prescribed records — Cost —Labour—Direct—Indirect—Validity of order—National Security (Prices) Regulations (*S.R.* 1940 *No.* 176—1944 *No.* 113), *reg.* 23 (1), (1A), (2), (2A)—*Prices Regulation Order No.* 1816.

Paragraphs 6, 7 and 11 of Prices Regulation Order No. 1816 fixed the prices at which men's, youths' and boys' outerwear might be sold by manufacturers, semi-manufacturers and makers-up respectively. Each paragraph fixed a price first of all by the allowance of a percentage margin on cost, and included in "cost," where specified records were kept, an amount for "indirect labour" which was calculated as a percentage of the wages &c. for "direct labour" as shown by those records. Provisoes to each paragraph provided for reduction of the price thus fixed by a percentage which depended upon the ascertainment of, among other things, the value of the hours the employees of the manufacturer, semi-manufacturer or maker-up were engaged on indirect labour in respect of the goods, and the value of direct and indirect manufacturing labour paid for in three months, less the amount not applicable to men's, youths' and boys' outerwear.

Held that the provisoes involved some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment resulting in the attribution of an amount or figure as a matter of judgment; therefore the provisoes were not a proper exercise of the power conferred by reg. 23 of the *National Security* (*Prices*) *Regulations* and were invalid.

Held, also, by *Dixon* and *Williams* JJ., that under reg. 23 (1A) of the *National Security* (*Prices*) *Regulations* it is competent to make an order which distinguishes between those who do and those who do not keep prescribed records for the ascertainment of prices based upon costs of production.

The question whether "certainty" is a requirement in subordinate legislation discussed by *Dixon* J.

DEMURRER.

A suit by way of statement of claim was brought in the High Court by King Gee Clothing Pty. Ltd., F. Freeman Pty. Ltd., and Duncan & Sons Pty. Ltd., each of which companies carried on business as a manufacturer and/or a semi-manufacturer and/or a maker-up of men's, youths' and boys' outerwear, against the Commonwealth and Mortimer Eugene McCarthy, Acting Prices Commissioner appointed in accordance with the terms of the *National Security* (*Prices*) *Regulations*, for (i) a declaration that Prices Regulation Order No. 1816 and each paragraph thereof was beyond the powers conferred upon the Acting Prices Commissioner by those Regulations and was void and of no effect, and (ii) an injunction restraining the defendant McCarthy from enforcing any of the provisions of the said Order.

In the statement of claim it was alleged : (*a*) that purporting to act in pursuance of the powers conferred upon him by the *National Security* (*Prices*) *Regulations*, the defendant McCarthy, on 9th November 1944, made Prices Regulation Order No. 1816, which was published in the *Government Gazette* of 17th November 1944, (*b*) that the operation of the Order would adversely affect the plaintiffs and each of them in the carrying on of their businesses in that they would be able to make very little or no profit from the manufacture, semi-manufacture, or making-up of men's, youths' and boys' outerwear, and (*c*) that the plaintiffs feared that unless the Order or its provisions were declared invalid the defendant McCarthy would attempt to enforce the Order against the plaintiffs as he, by his servants and agents, threatened to do.

A copy of the Order was annexed to the statement of claim.

The plaintiffs submitted that the Order and each of its provisions was beyond the powers conferred upon the Acting Prices Commissioner by the *National Security* (*Prices*) *Regulations* for the reasons : (*a*) that the Regulations did not empower the Acting Prices Commissioner to fix in respect of the same goods one maximum price to be charged by traders who keep certain prescribed records and another maximum price to be charged by other traders, (*b*) that the Order in its terms discriminated between traders and goods in a manner not authorized by the Regulations, (*c*) that pars. 6, 7 and 11 of the Order were vague and uncertain in that it was not possible to give any accurate and certain meaning to the provisoes to those paragraphs, (*d*) that by reason of the provisions of par. 20 of the Order the prices purported to be fixed by pars. 6, 7, 8, 9, 11, 12, 13, 14 and 16 of the Order were not fixed upon any basis authorized by the Regulations,

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and (*e*) that the terms of the Order did not operate to fix prices with any practical certainty.

The defendants demurred to the whole of the statement of claim on the grounds :—(i) that it disclosed no cause of action, and (ii) that the Order and every part of it was a valid exercise of the power conferred on the Commissioner of Prices by the *National Security* (*Prices*) *Regulations*.

The relevant regulations and provisions of the Order are sufficiently set forth in the judgments hereunder.

A. R. Taylor K.C. (with him *Ashburner* and *Bowen-Thomas*), for the plaintiffs. Prices Regulation Order No. 1816 is complicated and confusing in its terms. It is not precise. The method indicated in the Order for ascertaining the fixed price is too uncertain in its application and results, for example, although in par. 6 of the Order is used the expression " the cost of the labour " as recorded in the detailed costs record, a person interested would be led to believe that the draftsman referred to direct labour because that is the cost which is to be recorded in Part III. of the Second Schedule and there is no other provision for the recording of any other form of labour. The Order purports to fix different prices for different traders. The basis of discrimination between them is not permitted by the provisions of reg. 23 of the *National Security* (*Prices*) *Regulations*. The Order is a " bookkeeping " order and is one which is intended or calculated to compel traders to keep costing accounts in a particular form. The distinction between the various traders is not based on any distinction or difference in the goods themselves, nor is it based on any distinction in the circumstances in which the traders operate, but it is directed wholly and solely to the question whether they do or do not keep records. Under reg. 49, all traders are bound to keep proper books and accounts and proper costing records. Notwithstanding the provisions of that regulation, the Order provides that books, accounts and records must be kept in the manner therein prescribed. Where in the same regulations a clause is found empowering the Commissioner to fix prices on conditions, the legislature did not have in mind that he should be able to fix one price for traders who observed the conditions of reg. 49 and another price for those who did not. There is nothing in reg. 23 (1A) which permits different maximum prices to be prescribed for traders in the circumstances set out in the Order. It was not intended by that regulation, including par. (*g*) thereof, to give the Commissioner authority to impose any condition whatsoever. If it had been so intended the provision would be void as being outside the defence power. The

principle or condition must be one of price fixing. The fixing of one price for those who keep prescribed records and another for those who do not does not involve any principle of price fixing. The basis of price fixing referred to by the Order is that of cost plus certain percentages to cover, in some cases, labour costs, overhead and profit. "Labour cost" is purely a fictional sum arrived at upon a basis not of certainty but of assumption. If the Commissioner purports to fix the price at cost he must fix it in regard to costs in some sense of the term. "Labour cost" in the Order is not a labour cost in any sense of the term; it is merely a notional or artificial sum. The expression "direct labour" as used in the Order, and particularly in the provisoes to pars. 6, 7 and 11, is too vague to enable any trader to determine his price with any reasonable or practical degree of accuracy or certainty. It is uncertain whether "direct labour costs" include, *inter alia*, the whole, or even some part, of the cost of supervision, foremen's wages, sorting and packing, workers' compensation. Similarly, the expression "indirect labour costs" is too vague to permit of any practical certain meaning. Even assuming that those expressions have a reasonably certain meaning, pars. 6, 7, 8, 9 and 11 do not provide an effective method of fixing the price for any garment. It is impossible to determine whether par. 6 purports to fix the price for a single garment or for an unspecified number of garments. If the quantity of production is unspecified no method of determining the price has been given. In regard to par. 4, in many cases the trader would not know and would not have the means of determining the value of the material used. An Order which purports to fix the price or define a method by which a price can be fixed by reference to data not in the possession of the trader, and which he has no legal right to acquire, is bad.

K. A. Ferguson K.C. (with him *Louat*), for the defendants. The powers conferred upon the Commissioner under reg. 23 are very wide. He may declare prices in his absolute discretion, and he may declare them upon any principle or condition he thinks fit: See particularly reg. 23 (1A) (*d*) and (*g*). Regulation 49 is in general terms only and has no bearing upon the question because it has no relation to the proper records on which the Commissioner has fixed the price. The methods shown in pars. 4 and 6 are methods which under reg. 23 the Commissioner is entitled to adopt. It is competent for the Commissioner to fix one maximum price to be charged by traders who keep proper records and another maximum price to be charged by other traders: See reg. 23 (1A) (*a*). The Commissioner does not impose any obligation with regard to the keeping of records.

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"Direct labour" is the labour actually employed in the physical operation of cutting and assembling the materials, linings and trimmings so as to produce an article of clothing. All other labour incidental to that production is indirect labour and includes, *inter alia*, supervision, costing and accounting, secretarial work, handling not being part of the manufacture, cleaning and maintenance of plant. By taking into account the aggregate direct labour costs and the other factors, a certain method is provided of ascertaining the exact cost of the garments. Any trader who wishes to have his prices fixed on the records basis must keep his records in such a way that the cost of the materials, labour, linings and trimmings in respect of such garments can be ascertained. All that par. 20 does is to prevent certain increases in wages being taken into consideration. That does not invalidate the Order, nor does a "fictitious" cost, if it be so, invalidate the Order. "Cost" was defined so as to enable traders to know exactly what they should insert in their records. "Labour" does not apply to costs where accounts are kept. It has nothing to do with the value of the material. So far as par. 4 is concerned, the labour is not taken into account as labour, but it is taken into account as portion of the price fixed under the First Schedule. The matter is entirely covered by reg. 23 (1A) (*g*).

Taylor K.C., in reply. If indirect labour charges include the many matters referred to on behalf of the defendants then the whole Order is quite unworkable. The prescribed records are not kept in respect of every article made by a trader but only in respect of men's, youths' and boys' outerwear. The prescribing of records goes to the heart of the matter. If the provision in respect of the records is bad then the whole Order is bad. There must be a system of averaging to enable the cost of a single garment to be ascertained. Without a basis therefor prescribed by the Order there is no certain method of ascertaining the cost of a single garment.

Cur. adv. vult.

Oct. 11. The following written judgments were delivered :—

RICH J. The question for our determination is whether Prices Regulation Order No. 1816 is a valid exercise of the power conferred on the Commissioner of Prices by the *National Security* (*Prices*) *Regulations*.

The Commissioner's Order is based upon reg. 23 (1) and (1A). In the first sub-paragraph of reg. 23 (1), he is empowered in his absolute discretion by order to fix and declare the maximum price

at which goods may be sold generally or in any part of Australia or in a proclaimed area. In sub-reg. (1A), the Commissioner is given a number of detailed authorities to be exercised by which he may carry out the power conferred by sub-reg. (1).

In *Vardon* v. *The Commonwealth* (1) there will be found a reference to some of the provisions of reg. 23 (1) and (1A). It is there pointed out that a scrutiny of the Regulations, including those creating offences, supported the view that the price itself is to be fixed and so fixed that in certain circumstances a trader will be able to exhibit the maximum prices in his place of business pursuant to reg. 45. It was also said :—" It thus appears that prices should be fixed so that they are clearly and precisely ascertainable both by traders and members of the public. Apart from statutory definition or figurative meaning, the price of an article is the money for which it is bought or sold " (2). So if the power given by sub-par. (*a*) of reg. 23 (1) is exercised, one would expect the maximum price to be stated in money either generally, or varying according to locality.

A consideration of sub-reg. (1A) will show that in pars. (*a*) to (*h*) there are a variety of methods or bases upon which the maximum price may be founded. In some of these clauses, " cost " is prescribed as an element. But the word " cost " is not defined, and, as the decisions of this Court show, " cost " is a flexible conception, and the word has no fixed denotation.

If a sum of money is not expressly specified as the price, then it is obviously necessary that the money sum forming the price should be ascertainable with certainty, and this means that the elements from which it is calculated must be definite. The powers given by reg. 23 (1A) cannot be duly exercised unless a definite criterion or standard is stated, or a process of calculation is prescribed proceeding from some certain basis and avoiding in its course all standards which are solely subjective. " It is not necessary in order to fix a price under reg. 23 to stipulate a sum of money, but if a sum of money is not stipulated, it is necessary for the due exercise of the powers conferred by the regulation that a definite standard or criterion should be stated whereby the price can be ascertained " (*Vardon's Case* (3)).

The Order No. 1816, to which we must apply these principles, is a complicated attempt to deal with the prices in a section of the clothing trade on what may be described as multiple bases. Its complication is no doubt due to the intricacies of any attempt to provide maximum prices according to a system of costing in that

(1) (1943) 67 C.L.R. 434, at p. 445.
(2) (1943) 67 C.L.R., at p. 445.
(3) (1943) 67 C.L.R., at p. 450.

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manufacturing trade, particularly when the costs are not to be actual, but are to be modified or reduced according to additional principles or policies embodied in provisoes. It will serve no useful purpose to discuss at length the paragraphs of the Order and the inter-relations of its various parts. I have found the actual expression of its intention, particularly in relation to the use of the schedules, elliptical, and therefore difficult. Though I do not feel sure of the manner in which a manufacturer is required to use the schedules in all circumstances I am not prepared to hold that the order as a whole is void for uncertainty. But I cannot find in the provisoes to pars. 6, 7 and 11 of the Order any adequate statement of the integers from which a calculation of the controlling price can be made. Their operation depends on uncertain matters of estimate and not of calculation. At many points the basis of the attempt to fix an overriding maximum price by reference to indirect costs, as well as direct costs, is too uncertain and does not amount to the statement of a "principle, standard, rule or guide" (*Vardon's Case* (1)), which is necessary to support the exercise in due form of these powers. I therefore hold the provisoes in question void. It follows that the Fourth Schedule also fails.

In my opinion, the demurrer should on this ground be overruled.

STARKE J. In the statement of claim in this action, the plaintiffs claim a declaration that Prices Regulation Order No. 1816 and each paragraph thereof is *ultra vires* the *National Security* (*Prices*) *Regulations*. The defendants have demurred to the statement of claim.

The Order relates to men's, youths' and boys' outerwear. The Regulations under which the Order was made confer very wide and extensive powers in relation to price fixing. But the Regulations require, I think, that the price should be actually fixed by the Prices Order or that the Order should state some principle, standard, rule or guide whereby the subject can certainly ascertain the price that is fixed. A minute examination of the Prices Order challenged in this case can serve no useful purpose, for the *National Security Act*, Regulations and Orders made thereunder are of a temporary character. But I shall take two cases to illustrate the matter.

First: Sales by manufacturers and semi-manufacturers—Where prescribed records are not kept—Ready-made garments.

"4. I fix and declare the maximum price at which any manufacturer or semi-manufacturer who does not keep the prescribed records may sell any ready-made men's, youths' or boys' outerwear to be—(*a*) in respect of sales, other than by retail, exclusive of sales tax,

(1) (1943) 67 C.L.R., at p. 448.

the sum of—(i) the value of the material used plus 17½ per centum thereof; and (ii) the amount specified in the third column of the First Schedule opposite the description of that outerwear specified in the first column of that Schedule; (*b*) in respect of sales by retail inclusive of sales tax—the sum of—(i) the value of the material used, plus 65 per centum thereof; and (ii) the amount specified in the third column of the First Schedule opposite the description of that outerwear specified in the first column of that Schedule, plus 40 per centum thereof."

"Manufacturer" and "semi-manufacturer" are defined.

But the definition of "value" is involved and depends on the country of origin of the material and various other matters. Thus, in respect of piece goods manufactured in British India—the basic landed cost of those goods as specified in the Schedule to Prices Regulation Order No. 1522, plus 12½ per cent thereof, or the cost thereof, whichever is the lesser.

"Cost" means in relation to any material, linings or trimmings—"(i) which have been imported by a manufacturer, semi-manufacturer or maker-up—the aggregate of the purchase price paid or payable by that manufacturer, semi-manufacturer or maker-up, for that material or those linings, and freight, insurance, exchange and duty paid thereon".

The basic landed cost specified in Prices Regulation Order No. 1522 is prescribed.

But, in *Arnold* v. *Hunt* (1), a majority of this Court said: "The price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order" (2). The order in that case fixed and declared "the maximum prices at which spirituous liquors . . . as specified in the Price List referred to hereunder, may be sold by retail in the Melbourne Metropolitan area . . . to be those set out in the amended retail Price List issued by the Victorian Associated Brewers . . . bearing the words and figures 'Approval No. 1434'": See Commonwealth *Gazette*, 26th January 1943 No. 19, p. 340.

Order 1522 is as much an "extraneous document" as was the price list referred to in *Arnold* v. *Hunt* (1). If, however, we disregard that decision and examine Orders 1816 and 1522 together it appears that the "basic landed cost" is per linear yard of various materials, of different widths and qualities, and of different manufacturers. So in respect of piece goods manufactured in British India the

(1) (1943) 67 C.L.R. 429

(2) (1943) 67 C.L.R., at p. 432.

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person who purchases that material and manufactures it into men's, youths' or boys' outerwear must know the name of the manufacturer in British India and then work out, as best he may, from the data supplied the maximum prices at which he may sell ready-made garments. Or else he must work out the actual cost of the material plus freight, insurance, exchange and duty. And the maximum price at which he may sell is then the lesser of the amounts arrived at by those intricate calculations. The Prices Order sets the subject a calculation which in the end will not bring out an exact but an approximate result. Averages in quantities and in expenditure must be used involving judgment and experience in the estimation of quantities and the allocation of those quantities and of expenditure in relation to various descriptions and sizes of garments upon which opinions may well differ.

In my opinion, that is not fixing or declaring any price within the authority conferred by the Regulations, for the subject cannot certainly ascertain the price that is fixed in respect of any garment manufactured or made by him for sale.

Second : Sales by manufacturers—Where prescribed records are kept—Ready-made garments.

" 6. I fix and declare the maximum price at which any manufacturer who keeps the prescribed records may sell ready-made men's, youths' or boys' outerwear to be—(*a*) in respect of sales other than by retail exclusive of sales tax—the sum of—(i) the cost of the labour, linings, trimmings and overhead recorded in the detailed costs records as specified in Parts II., III. and V. of the Second Schedule or approved by the Commissioner and kept by that manufacturer ; (ii) the value of the material used as recorded in the detailed costs records as specified in Part I. of the Second Schedule ; and (iii) $17\frac{1}{2}$ per centum of the sum of (i) and (ii). (*b*) in respect of sales by retail (inclusive of sales tax)—the sum of the value of the material used as recorded in the detailed costs records as specified in Part I. of the Second Schedule together with the cost of labour, linings, trimmings and overhead expenses as recorded in the detailed costs records specified in Parts II., III. and V. of the Second Schedule, or approved by the Commissioner and kept by that manufacturer, plus—(A) in respect of sales of working garments—60 per centum thereof ; (B) in respect of sales of garments other than working garments—$67\frac{1}{2}$ per centum thereof : Provided that where the value of direct labour recorded in the detailed costs records of any manufacturer to whom this paragraph applies, plus 10 per centum thereof, exceeds the value of the hours his employees were engaged on direct and indirect labour in respect of the goods to which those detailed costs relate by more than 5 per

cent in any three months, the maximum prices for the sale of men's, youths' or boys' outerwear by that manufacturer in the next succeeding three months shall be the maximum prices fixed by the foregoing provisions of this paragraph less in each case $2\frac{1}{2}$ per cent. of those prices for every 5 per cent. by which the value of direct labour, plus 10 per centum thereof, recorded in such detailed costs records, exceeds the value of the hours his employees were engaged on direct and indirect labour as aforesaid."

The detailed costs records required by this paragraph will not work out an exact but only an approximate figure for the various descriptions and sizes of garments manufactured or made for sale, for the estimation of quantities and the allocation of expenditure as I have said before involve judgment and experience upon which opinions may well differ. But the proviso adds an additional difficulty. It is an involved provision and there is no definition or description of what is meant by "the value of . . . direct and indirect labour." I take the value of direct labour to denote direct manufacturing expenses such as productive wages and the value of indirect labour to denote all expenses consequent upon or incidental to production and distribution. The ascertainment and allocation of these incidental expenses are necessarily matters of judgment and experience and afford the subject no certain or any rule for ascertaining or allocating them. Yet the Order directs that, if the value of direct labour recorded in the detailed costs records plus 10 per cent thereof, exceeds the value of the hours his employees were engaged on direct and indirect labour in respect of the goods to which the detailed costs relate by more than 5 per cent in any three months, then the maximum sale price in the next three months shall be the maximum prices fixed by the foregoing provisions of par. 6 less in each case $2\frac{1}{2}$ per cent of those prices for every 5 per cent by which the value of direct labour recorded plus 10 per cent thereof exceeds the value of the hours his employees were engaged on direct and indirect labour as aforesaid. The provisions of the paragraph require intricate calculations appropriate for a costs accountant but which in the end would not give him an exact but only an approximate result.

In my opinion, that is not fixing or declaring any price within the authority conferred by the Regulations, for the subject cannot certainly ascertain the price in respect of any garment manufactured or made by him. The other paragraphs of the Order purporting to fix maximum prices are all open to similar objections.

Consequently the demurrer should be overruled.

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DIXON J. The question raised by this demurrer is whether Prices Order No. 1816 relating to "Men's, Youths' and Boys' outerwear" is valid. It is made as under reg. 23 of the *National Security (Prices) Regulations*.

The order is attacked as *ultra vires* because it does not pursue the authority conferred upon the Prices Commissioner by the regulation and is void for uncertainty.

Under some parts of reg. 23 uncertainty doubtless goes to power. For, if some of the precise authorities which it gives are to be well exercised, it will be necessary to name or specify the matters and things intended, including amounts, and to use some exactness. But I am not prepared to subscribe to the doctrine that certainty is a separate requirement which all forms of subordinate legislation must fulfil, so that an instrument made under a statutory power of a legislative nature, though it is directed to the objects of the power, deals only with the subject of the power and observes its limitations, will yet be invalid unless it is certain. The doctrine appears to me to be an innovation and to have come from a generalization from, or transfer of, a rule or supposed rule for determining the validity of by-laws.

The common law, from the time the control of the King's Courts over franchise and local or special jurisdictions was established, has allowed to corporations, boroughs and vestries a power to make only reasonable by-laws for the government of the members or inhabitants or parishioners (*Holdsworth, History of English Law*, vol. II., pp. 391, 400; vol. IX., p. 60). "Every by-law must be reasonable in itself, and agreeable to the general laws of the realm, and be framed so as to advance the benefit of that place where it is made to operate" (*Bacon Abr.* I. 545). In England the rule was carried over and applied to the statutory powers of the modern municipal corporation, but, in Australia, as the result, I think, of early decisions of this Court, unreasonableness is not treated as an independent ground of invalidity (*Williams* v. *Melbourne Corporation* (1)). However, the rule has been applied to such statutory powers in other common law jurisdictions: Cf. for New Zealand, *McCarthy* v. *Madden* (2), and for America, *Yick Wo* v. *Hopkins* (3).

In more recent times, the necessity for reasonableness has given rise to a requirement that a by-law shall be certain. In his work on *Corporations*, published nearly a century ago, Mr. *Grant* wrote (at p. 86):—"It (the bye-law) ought to be expressed in such a manner

(1) (1933) 49 C.L.R. 142, at pp. 154, 155.
(2) (1914) 33 N.Z.L.R. 1251.
(3) (1885) 118 U.S. 356, at pp. 371-373 [30 Law. Ed. 220, at p. 227].

as that its meaning may be unambiguous, and in such language as may be readily understood by those on whom it is to operate. Except in the two Universities and the College of Physicians, a bye-law being in Latin would be bad for that reason." As to the exception to his illustration *cessat ratio*, but in the meantime, though stated by Mr. *Grant* without authority, the rule has gained currency. It is perhaps to the foregoing passage that we may trace so much of the well known statement in the dissenting judgment of *Mathew* J. in *Kruse* v. *Johnson* (1) as includes certainty among the conditions of validity of a by-law. It is interesting to notice that in America, too, certainty has come to be required of a municipal by-law or ordinance.

But I cannot see how this history warrants the courts in adopting as a general rule of law the proposition that subordinate or delegated legislation is invalid if uncertain. It appears to me impossible to qualify the power conferred on the Executive Government by ss. 5 and 13A of the *National Security Act* 1939 1943 by adding the unexpressed condition that regulations made thereunder must be certain. I should have thought that, in this matter, they stood on the same ground as an Act of Parliament and were governed by the same rules of construction. I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation conferred upon the Governor-General by the Parliament a limitation or condition making either reasonableness or certainty indispensable to its valid exercise. Our Constitution contains no due process clause and we cannot follow the jurisprudence of the United States by saying that uncertainty violates a constitutional safeguard : See *Connally* v. *General Construction Co.* (2) ; *Yu Cong Eng* v. *Trinidad* (3) ; *Cline* v. *Frink Dairy Co.* (4) ; *Champlin Refining Co.* v. *Corporation Commission* (5) ; *Lanzetta* v. *New Jersey* (6). In the unreported case, *Cody* v. *Claxton* (7), a decision was pronounced which proceeded upon the assumption that uncertainty invalidated a regulation but the question does not appear to have been argued.

The Prices Order, however, is made by the Commissioner under a regulation and not an Act of Parliament. Let it be assumed that it may be regarded as an administrative order, not as a piece of legislation. But, even so, I should think that uncertainty, as a test of

(1) (1898) 2 Q.B. 91, at p. 108.
(2) (1925) 269 U.S. 385 [70 Law. Ed. 322, and the note].
(3) (1925) 271 U.S. 500 [70 Law. Ed. 1059].
(4) (1926) 274 U.S. 445, at pp. 458, 459 [71 Law. Ed. 1146, at p. 1153].
(5) (1931) 286 U.S. 210, at p. 243 [76 Law. Ed. 1062, at p. 1082].
(6) (1938) 306 U.S. 451, at p. 453 [83 Law. Ed. 888, at p. 890, and note at p. 893].
(7) Noted (1944) 19 A.L.J. 206.

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validity, arose from the nature of the power. On this footing, in the end, the question comes back to *ultra vires*.

In the present case, the question whether the Order is *ultra vires* of the Prices Commissioner depends upon the meaning and operation of reg. 23 (1) and (1A) of the *Prices Regulations*, and, I think that, if the meaning of those provisions is ascertained, it will be found that there is no independent question of uncertainty or vagueness as a ground affecting the validity of the Order.

Sub-regulation 1 of reg. 23 gives the Prices Commissioner two powers. The second of them, which relates to notifying an individual, or an association of individuals, of prices particularly fixed for him or them, does not affect this case and nothing need be said about it. But the first contains what may be called the primary or principal expression of the power to fix prices. It relates, of course, only to "declared" goods, but with respect to them it gives the Prices Commissioner an absolute discretion, by order, to fix and declare the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area. Now, if that power stood by itself, and were to be interpreted without a context, it would, I think, be taken to mean that the Commissioner must name amounts as prices in respect of goods sufficiently described or indicated and that he could discriminate with reference to the same description of goods only geographically. It is, of course, clear that, if the power is to name an amount as a price, it could not be well exercised without providing the most certain information you could have as to a maximum price, namely a money figure. But sub-reg. 1 does not stand alone. Sub-regulation 1A goes on to enumerate a number of more specific powers. It provides that in particular . . . the Commissioner, in the exercise of his powers under sub-reg. 1, may fix and declare maximum prices. The prices may be of varying kinds and obtained, constructed or based from or upon many different considerations or grounds, which are defined in eight paragraphs. A perusal of the paragraphs makes it quite clear that, when prices are fixed under the particular powers they confer, or, at all events, under many of them, amounts need not be named as prices. To that extent at least greater room is allowed for uncertainty of expression. Prices may be fixed on sliding scales; on a condition or conditions; on landed or other cost with the addition of a percentage or specified amount or both; or upon or according to any principle or condition specified by the Commissioner. The powers thus reposed in the Commissioner are very wide indeed. But, having regard to certain expressions used and to the nature of the duty to be imposed by the orders upon the

subject, I think that there are limitations upon the kind of standards or criteria he may employ for building up the prices he fixes. They must, I think, be standards or criteria from which a price may be calculated. It is not enough if the price, or some element entering into its composition, can be obtained only by estimation or by the exercise of judgment or discretion, as, for instance, where apportionment or allocation is required.

The expressions to which I refer are " fix and declare," " maximum prices," words repeated in each power ; and the expression " specified," which is used in two connections.

By the nature of the duty imposed upon the subject I mean the obligation to keep the prices at which he sells below definite limits, limits which of necessity must be clearly ascertainable. The extremely heavy punishments to which, under the *Black Marketing Act*, a sale above those limits exposes the seller illustrates the reasons for authorizing only maximum prices that are clearly ascertainable.

It needs no imagination to see that in drafting an order for the fixing of prices for an important trade many difficulties must be encountered and it would be impossible to avoid ambiguities and uncertainties which are bound to arise both from forms of expression and from the intricacies of the subject. But it is not to matters of that sort that I refer. They depend upon the meaning of the instrument and they must be resolved by construction and interpretation as in the case of other documents. They do not go to power. But it is another matter when the basis of the price, however clearly described, involves some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment. When that is done no certain objective standard is prescribed ; it is not a calculation and the result is not a price fixed or a fixed price. That, I think, means that the power has not been pursued and is not well exercised.

With respect to the Order under consideration, I am of opinion that such a thing has happened in the provisoes to pars. 6, 7 and 11. These provisoes are all in the same form. Their purpose is to modify the effect, lest it prove too favourable to the seller, of a percentage charge to cover indirect labour costs allowed in the scheduled list of items, the totals of which constitute the maximum prices for manufacturers, semi-manufacturers and makers-up, if they keep the prescribed records. No advantage will be gained by setting out the somewhat intricate direction by which it is sought to effect this end, a direction partly contained in the proviso and partly in the schedules. It is enough to say that, to carry out the direction,

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it is necessary to ascertain, among other things—(1) the value of the hours the employees of the manufacturer, semi-manufacturer or maker-up were engaged on indirect labour in respect of the goods to which the detailed costs set down in the prescribed records relate; (2) the value of (direct and) indirect manufacturing labour paid for in three months, less the amount not applicable to men's, youths' and boys' outerwear under the Order.

I do not think that the proposition needs any elaboration that neither of these two elements can be found by a process of calculation. To discover what, in a large undertaking, are indirect labour costs and to distinguish them alike from direct labour costs and from manufacturing overhead charges, an item also covered by percentage, requires dissection, allocation, estimation, and perhaps apportionment, involving judgment, estimation and opinion, matters about which there can be no exactness, certainty or common agreement in result. In other words, it deserts clear objective standards capable of producing a result about which every man must agree if he knows the facts and figures and has made his calculations correctly. These observations apply with even greater force to the second of the two foregoing elements upon which depends fulfilment of the direction contained in the proviso. For, in an establishment manufacturing and disposing of a great variety of garments, I venture to think that, except by estimation and allocation depending upon judgment and opinion, you cannot determine what are the direct and indirect labour costs not applicable to male outerwear. The same result, therefore, is not necessarily produced by everybody who correctly follows the directions given for ascertaining the maximum price. That consideration appears to me to take the proviso outside the power given by reg. 23 (1A). Were it otherwise, no trader, however careful, could be sure what would be held to be the maximum prices within which, under the severest penalties, he must sell his goods.

But I am not prepared at present to agree in the other contentions upon which the plaintiff relies for the purpose of invalidating the Order.

On the whole, I think that under reg. 23 (1A) it is competent to make an order which distinguishes between those who do and those who do not keep prescribed records for the ascertainment of prices based on costs of production, whether full or qualified and whether consisting always of actual items of expenditure or sometimes including fixed allowances. As has been done in the present Order, prices may be fixed for the latter which do or may differ from those prescribed for the former as calculations from the records kept. This conclusion, no doubt, involves two disputed propositions,

namely that uniformity is not essential and that discrimination may rest on keeping prescribed records. I think that there is nothing, express or implied, in reg. 23 (1A) which indicates positively that prices or standards of price must apply uniformly to all sellers and there is much in reg. 23 to negative the notion, particularly in sub-reg. (1) (*b*) and in sub-reg. (1A) (*a*), (*b*), (*c*) and (*h*), which, I think, colour the other paragraphs. As to using the keeping of records as a ground of discrimination, I think that both par. (*d*) and par. (*g*) are wide enough to authorize it.

Again it does not appear to me to be a good objection to the validity of pars. 6 (*a*) (i), 7; 8 (*a*) (ii) and (*b*) (ii), 9 (*a*) and 11 (1) that the labour costs are not actual but represent that expenditure on labour which would have been incurred if the adjustments and increases since 12th April 1943 were excluded. Paragraph 20 and the fourth schedule require, in effect, that this artificial assumption should be made. The objection is based upon the view that in sub-reg. (1A) (*f*) of reg. 23 " cost " means " real cost " and that under no other sub-paragraph can a modified, qualified or adjusted cost be adopted as a basis of price computation. I doubt whether the words in par. (*f*) " landed or other cost " have this limited meaning, but, even if they do, the expression " prices on landed or other cost " seems to require no particular formula for the construction of the price " on " cost. But, in any case, par. (*g*) appears to me to be wide enough to cover the process of building up a price according to modifications or adjustments of costs.

I had some doubt whether, for the reasons already given in relation to indirect labour costs, the use of the value of direct labour as a factor is defensible. But there is a much greater degree of definiteness about labour directly employed in the production of goods than about the application of indirect labour and, without more knowledge of trade practice and understanding, I am not prepared to say that reliance by the Order upon the value of direct labour is necessarily fatal.

My first impression was that the absence of definite instructions or information about the use and application of the schedules left so much to the discretion and choice of the individual that the prescribed use of the schedules did not result in an objective standard of price. For example, the period selected and the size of the batch may make a difference. But further consideration has led me to think that the difficulties depend rather upon obscurities and deficiencies of expression which may be resolved by processes of interpretation, aided perhaps by information about the course of business and the practices of the trade.

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The definition of "value" in relation to material, no doubt, involves difficulties for some manufacturers &c., but I think that it is no objection to validity that facts or factors to be taken into account are not necessarily within the knowledge of the manufacturer. So far as validity goes, if the factor is certain, it is not an answer that the manufacturer is required to ascertain it at his peril.

But, as I have said, I think that the provisoes to pars. 6, 7 and 11 are bad and, although I think they are severable, that means that the demurrer, which is to the whole statement of claim, should be overruled. The fourth schedule is open to the same objections as are the provisoes.

It does not appear that the defendants have pleaded as well as demurred, but, if the defendants wish to plead, I should see no objection to allowing them to do so. But, at the same time, the plaintiffs should have leave, if they desire it, to amend as they may be advised.

Otherwise judgment should be given for the plaintiff for a declaration declaring the provisoes to pars. 6, 7 and 11 of the Order to be void.

WILLIAMS J. This is a demurrer by the defendants to a statement of claim which challenges the validity of Prices Regulation Order 1816 relating to men's, youths' and boys' outerwear. The Order, which was gazetted on 17th November 1944, was amended on 16th March 1945. It purports to fix and declare the maximum prices at which ready-made and tailored garments may be sold by manufacturers and semi-manufacturers, the maximum rates for the services of makers-up, and the maximum prices for sales by wholesalers and retailers. It contains the following definitions of manufacturers, semi-manufacturers and makers-up. "'Manufacturer' means a person who purchases material and manufactures that material into men's, youths', or boys' outerwear." "'Semi-manufacturer' means a person who purchases material and supplies it either cut or uncut to a maker-up who manufactures that material into men's, youths' or boys' outerwear." "'Maker-up' means a person who manufactures men's, youths' or boys' outerwear from material or material and linings, or material, linings and trimmings, supplied by a semi-manufacturer."

In the case of manufacturers and semi-manufacturers, the Order provides formulae for calculating the maximum prices for ready-made and tailored garments (including, in the case of ready-made outerwear, garments sold other than by retail or by retail) according to whether they keep or do not keep the prescribed records. In

the case of makers-up, it provides formulae for calculating the maximum rates for their services according to whether they keep or do not keep the prescribed records. Paragraphs 14 and 15 prescribe over-riding maximum prices for sales by manufacturers and semi-manufacturers of certain ready-made outerwear sold other than by retail or by retail, the maximum price being a specified sum of money or the sum arrived at by the formula adopted by the manufacturer or semi-manufacturer, whichever is the less. Paragraph 16 prescribes over-riding maximum rates for the services of makers-up in connection with the same garments, the maximum rate being a specified sum of money or the sum arrived at by the formula adopted by the maker-up, whichever is the less.

In the case of manufacturers and semi-manufacturers who do not keep the prescribed records, in respect of sales other than by retail and by retail of ready-made garments, the formulae provide that the maximum price shall be the value of the material used plus a certain percentage thereof and a certain fixed sum, while in the case of tailored garments the formula provides that the maximum price shall be the cost of the material used in the garment plus a certain fixed sum plus a percentage of the addition of these two sums.

In the case of sales by manufacturers where prescribed records are kept, in respect of ready-made garments sold other than by retail or by retail, the formulae provide that the maximum price shall be the cost of the labour, linings, trimmings and overhead expenses as recorded in the detailed costs records specified in the second schedule and the value of the material used as recorded in these records and a certain percentage of the addition of these sums. In the case of tailored garments, the formula provides that the maximum price shall be the aggregate of the cost of the material used, linings and trimmings and labour as recorded in the detailed costs records specified in the second schedule plus a certain percentage thereof.

In the case of semi-manufacturers, where prescribed records are kept, in respect of ready-made garments sold other than by retail or by retail, the formulae provide that the maximum price shall be the value of the material used, the cost of the labour, linings and trimmings, the charge made by the maker-up, and the overhead expenses as recorded in the detailed costs records in the schedule plus a certain percentage thereof. In respect of tailored garments, the formula provides that the maximum price shall be the cost of the material used, linings and trimmings supplied by the semi-manufacturer to the maker-up, together with the charge made by that maker-up for the service of making up and supplying any linings or trimmings incorporated in such tailored garments, and the cost

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of labour as recorded in the detailed costs records specified in the second schedule plus a certain percentage thereof.

The value of the material is defined to mean, in the case of any piece goods manufactured in British India and cotton piece goods manufactured in the United Kingdom, the basic landed cost as specified in the schedule to certain Prices Regulation Orders, in the case of piece goods manufactured in the United States of America, the price at which these goods were released by the Division of Import Procurement, in the case of any cotton piece goods manufactured in Australia, the maximum price fixed for sales by wholesale by the manufacturers of such piece goods, or the cost thereof whichever is the lesser, and, in respect of all other materials, the cost thereof.

In the case of makers-up, where the prescribed records are not kept, the maximum rates are fixed at certain stated sums. Where prescribed records are kept, the formula provides that the maximum rate shall be the cost of making up as recorded in the detailed costs records in the second schedule plus a certain percentage thereof.

Paragraph 20 provides that in estimating labour costs no amount is to be included in respect of any increase of labour cost consequent upon the variation of the Clothing Awards made by the Commonwealth Court of Conciliation and Arbitration on 20th December 1943, or in respect of any increase of labour cost consequent upon variations in the actual wage rates pursuant to adjustments for variations in the basic wage since 12th April 1943.

The second schedule contains a number of forms for keeping detailed costs records by manufacturers, semi-manufacturers and makers-up including the cost of the material in the case of tailored garments and the value of the material in the case of ready-made garments. Part III. provides a form for keeping an account of the value of direct labour employed in making a garment. The records provide for the allowance of 10 per cent of the cost of direct labour for indirect labour. The prescribed records for manufacturers and makers-up include two reconciliation statements, the forms for which appear in the third schedule, which provides for a weekly statement of the value of direct labour recorded in the costs records, and in the fourth schedule, which provides for a three-monthly reconciliation of the value of manufacturing labour recorded in the costs records with the value of manufacturing labour actually applicable to men's, youths' and boys' outerwear. The latter form has two columns, the total direct labour value recorded in the costs records plus 10 per cent for indirect manufacturing labour being entered and totalled in the left-hand column, and the value of direct

and indirect manufacturing labour paid for during the period, less the amount not applicable to men's, youths' and boys' outerwear under the Order, less amounts paid in excess of rates at 12th April 1943, and amount included for working proprietors in excess of 3s. 3d. per hour, less under absorbed or plus over absorbed, being entered and totalled in the right-hand column in order to give the total value of direct and indirect labour recorded in the costs records for three months.

These reconciliation statements, and particularly that provided for in the fourth schedule, are required for the purposes of the provisoes to the maximum prices declared for sales by manufacturers of ready-made and tailored goods where the prescribed records are kept, and the proviso to the maximum rates declared for the services of makers-up where such records are kept.

In the case of manufacturers, the provisoes are in the following terms : " Provided that where the value of direct labour recorded in the detailed costs records of any manufacturer to whom this paragraph applies, plus 10 per centum thereof, exceeds the value of the hours his employees were engaged on direct and indirect labour in respect of the goods to which those detailed costs relate by more than 5 per cent. in any three months, the maximum price for the sale of men's, youths' or boys' outerwear by that manufacturer in the next succeeding three months shall be the maximum prices fixed by the foregoing provisions of this paragraph less in each case $2\frac{1}{2}$ per cent. of those prices for every 5 per cent. by which the value of direct labour, plus 10 per centum thereof, recorded in such detailed costs records, exceeds the value of the hours his employees were engaged on direct and indirect labour as aforesaid."

In the case of makers-up, the proviso is *mutatis mutandis* to the same effect. As the charge made by a maker-up affects the maximum prices for sales by semi-manufacturers of ready-made and tailored garments where prescribed records are kept, the operation of this proviso affects these prices as well as the maximum rates which can be charged by makers-up. In the case of makers-up where prescribed records are not kept, the maximum rates for their services are specified sums of money.

It will be seen from these extracts that, in the case of manufacturers and semi-manufacturers, the maximum prices, except where they result from the operation of pars. 14 and 15, are not stated in sums of money but must be calculated, alternative formulae being provided according to whether they elect to keep the prescribed records or not. But it would appear that there is a strong inducement to keep the prescribed records, because, for instance, where

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they are not kept, manufacturers and semi-manufacturers are only allowed, in the case of ready-made garments, the value of the material, and, in the case of tailored garments, the cost of the material, whereas, where they are kept, the cost of the linings and trimmings is also allowed.

The first ground of objection to the validity of the Order is that the *Prices Regulations* do not empower the Commissioner to fix in respect of the same goods one maximum price to be charged by traders who keep certain prescribed records and another maximum price to be charged by those who do not keep such records. The legal foundation of the Order is reg. 23 (1), (1A), (2) and (2A) of these Regulations. Sub-regulation (1A) (*d*) authorizes the Commissioner to fix and declare maximum prices on a condition or conditions. Paragraph (*f*) authorizes the Commissioner to fix and declare maximum prices on landed or other cost, together with a percentage thereon or a specified amount, or both. Paragraph (*g*) authorizes the Commissioner to fix maximum prices according to or upon any principle or condition specified by the Commissioner. Sub-regulation (2A) (*d*) and (*f*) contain similar provisions with respect to fixing and declaring maximum rates for services to those contained in sub-reg. (1A) (*d*) and (*g*). The effect of reg. 23 (1) and (1A), (2) and (2A), speaking generally, is to empower the Commissioner to fix maximum prices for goods or maximum rates for services by specifying a sum of money or providing a formula for ascertaining a sum of money (*Vardon* v. *The Commonwealth* (1)). The simplest and most certain method of fixing a maximum price or rate is to specify a sum of money. This method has been used in the Order in some instances, of which pars. 14, 15 and 16 are perhaps the most important. But in these paragraphs the specified sums only provide a maximum price or rate where they are less than the prices or rates ascertained by the use of the selected formulae. They do not fix an independent maximum price or rate but only operate conditionally. The whole substratum of the Order is therefore the prescribed formulae. The defendants seek to support these formulae as valid exercises by the Commissioner of the powers conferred upon him, in the case of manufacturers and semi-manufacturers, by reg. 23 (1A) (*d*) and (*g*), and, in the case of makers-up, by reg. 23 (2A) (*d*) and (*f*). The Order makes the use of the more favourable of the alternative formulae conditional upon the manufacturer, semi-manufacturer or maker-up keeping the prescribed records. It was contended for the plaintiffs that the condition authorized by the regulation is a condition having some relation to the goods or the sale or supply of the goods, and that a provision that a trader

(1) (1943) 67 C.L.R., at p. 443.

who keeps prescribed records may charge a different price for the same class of goods to another trader who does not keep such records is not a condition authorized by pars. (*d*) or (*g*), and does not involve any principle of price fixing. It seems to me that the Commissioner is authorized by par. (*g*) to give traders the choice of alternative methods of calculating a price, the one upon a somewhat rough and ready, and the other upon a more precise principle, and to make it a condition of their adopting the latter that they shall keep such records as are required to enable them to use it properly and the Commissioner to supervise its use. In this respect I venture to refer to the remarks that appear in *Vardon* v. *The Commonwealth* (1). This objection therefore fails.

The second ground of objection to the validity of the Order is that, in the formulae in pars. 6, 7, 8, 9 and 11 (and this ground is said also to involve pars. 12, 13, 14 and 16), the principle adopted is to take the cost of a number of major items and a certain percentage to cover other items. But the cost of labour, one of the major items, because of the provisions of par. 20, is not an actual but a notional cost, and only actual costs are authorized by the Regulations. Prima facie the words of a statute, regulation or order should be given their ordinary popular meaning at the date it came into force. The ordinary popular meaning of cost is something which must be given in order to acquire or produce something. This is the meaning which I think the word bears in reg. 23 (1A) (*f*). There is nothing in the context of reg. 23 or of the *Prices Regulations* as a whole to displace this meaning. If, therefore, the Commissioner has to depend on reg. 23 (1A) (*f*), the provision that the cost of labour should not be the actual amount that the employer is legally liable to pay, but the amount that he would have been legally liable to pay if wages had remained at the same rates as those prevailing at 12th April 1943, would be objectionable. And it would follow that the paragraphs for bringing in the material at its defined value or cost, whichever is the lesser, would be equally objectionable.

But the powers conferred upon the Commissioner by reg. 23 (1A) are cumulative. Under par. (*g*) he is given a very wide power of fixing and declaring maximum prices according to any principle, and this power is sufficient, in my opinion, to authorize him to prescribe a formula in which an ingredient is brought in not at its actual cost but at a cost or value estimated in a defined manner. This objection therefore also fails.

The third objection to the validity of the Order is that it is void for uncertainty. It was submitted that the Order does not define

(1) (1943) 67 C.L.R., at p. 452.

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what items are included in the cost of direct and indirect labour, so that the formulae for fixing a maximum price or rate where prescribed records are kept is uncertain in a material ingredient. It was also submitted that this uncertainty vitiates the provisoes. It was also submitted that no means are provided in the Order whereby a manufacturer or semi-manufacturer can determine the price at which piece goods manufactured in the United States of America were released by the Division of Import Procurement, or the maximum price fixed for sales by wholesale by the manufacturer of cotton piece goods manufactured in Australia, so that the meaning of value, where material is brought in as an ingredient in a formula at its value, is uncertain.

In the absence of express definition, the meaning of labour and indirect labour must be determined in the context of the Order as a whole including the schedules. The second schedule, Part III., provides a form to keep a separate record of the value of direct labour, the particulars including the name of the employee engaged in "direct labour process as under," the time in minutes spent on the work, and the rate of pay computed at the rates legally payable in respect of each process at 12th April 1943, proprietors engaged in manufacturing to be included at rates not exceeding 3s. 3d. per hour actual time of working. Indirect labour is included in the detailed costs records at the round figure of 10 per cent of direct labour. Direct and indirect labour costs do not include any manufacturing overhead expenses, because, where these expenses are allowed, they are brought in at 15 per cent of the allowance for indirect labour. See the second schedule, Part V., under the headings "Manufacturers of ready-made garments" and "Makers-up." This is sufficient to indicate that direct labour is intended to refer to the labour engaged in the physical operations of cutting and assembling the materials, linings and trimmings (including in the case of tailored garments the labour of measuring and fitting the customer), so as to produce an article of clothing. If machines are used for any of the processes of manufacturing, it would include the labour operating the machines. In other words, the expression includes the whole of the cost of productive labour, and raises a question of fact, which, as *Jordan* C.J. said in a passage cited in *Fraser Henleins Pty. Ltd.* v. *Cody* (1), "may be difficult of determination in a particular case, but the problem is clearly enough set."

But, in the absence of a definition, it is not at all clear what is meant by indirect labour. In *Vardon's Case* (2), *Rich* J. refers to the statement in *Dawson's Accountant's Compendium* that "the cost of the materials and directly productive wages form the prime cost of the

(1) (1945) 70 C.L.R. 100, at p. 138. (2) (1943) 67 C.L.R. 434.

commodity or work, and the other expenditure, being indirect, is called the on-cost, the two together making the total cost of production" (1). In *Advanced Accounts* (*Australasian Edition*) by *R. N. Carter*, F.C.A., 6th ed. (1939), at p. 703, it is stated that on-cost is a term used to denote all the expenses consequent on or incidental to production and distribution, and that factory on-cost includes all expenses directly or indirectly connected with production. At first sight, indirect labour would appear to include the wages of the foreman and timekeeper, of the mechanics who keep the manufacturing machinery in running order, of the cleaners and watchmen, and the wages of all other employees whose labour contributes however remotely to the production of the outerwear. But the prescribed records also contain provisions for the allowance of the expenses of manufacturing overhead. While these expenses probably refer to payments other than salaries and wages, such as for rent, motive power, heating and lighting, it is by no means certain that they are not intended to include some salaries and wages. Except in the case of the provisoes, this indefiniteness in the meaning of indirect labour would not make the Order uncertain, because once the cost of direct labour is ascertained, a definite percentage of that cost is allowed for whatever is intended to be included in indirect labour, and a further definite percentage for what is intended to be allowed in manufacturing overheads. But, in order to keep the three-monthly reconciliation statement in the fourth schedule, the manufacturer and maker-up must assess the value of the hours his employees were engaged on indirect labour in respect of the goods to which the detailed costs relate, and for that purpose determine what is indirect labour, and whether any of that labour should be excluded because it should be included in the expenses of manufacturing overheads. The separation of these items would be difficult enough in a factory exclusively engaged in the manufacture of men's, youths' and boys' outerwear. Where a factory was also engaged in the manufacture of other goods the difficulties would increase, because it would not only be necessary to determine what was indirect labour in relation to the outerwear, but also what proportion of the costs of indirect labour should be attributed thereto. As my brother *Dixon* has said in his judgment, compliance with the proviso involves a degree of "judgment, estimation and opinion, matters about which there can be no exactness, certainty or common agreement in result." In *Fraser Henleins Pty. Ltd.* v. *Cody* (2), referring, I assume, to *Vardon* v. *The Commonwealth* (3) and *Bendixen* v. *Coleman* (4) he said: "It may be conceded, and,

(1) (1943) 67 C.L.R., at p. 445.
(2) (1945) 70 C.L.R. 100.
(3) (1943) 67 C.L.R. 434.
(4) (1943) 68 C.L.R. 401.

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indeed, it appears to have been decided, that a bare power to 'fix' a price cannot be validly exercised without naming a money sum, or prescribing a certain standard by the application of which it can be calculated or ascertained definitely" (1). In the present case, the application of the specified standards, or as I have called them formulae, by which the maximum prices and rates are ascertained where prescribed records are kept, appear to me, subject to the ground of uncertainty still remaining for consideration, to fix with sufficient definiteness the initial maximum prices or rates. The purpose of the provisoes is to reduce these prices or rates for the following three months in the circumstances there stated. The question is whether their invalidity vitiates the whole of the provisions for fixing maximum prices and rates where prescribed records are kept, and if it has this effect, whether it destroys the whole Order. The defendants are entitled to rely on the provisions of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 and s. 5 (5) of the *National Security Act* 1939-1943. These sections were recently discussed in *Fraser Henleins Pty. Ltd.* v. *Cody* (2). The decisions of this Court upon the proper meaning of s. 46 (*b*) and the analogous section of the *Acts Interpretation Act*, s. 15A, are collected by *Dixon* J. (3). My own view of their effect is contained in *Pidoto* v. *Victoria* (4). The answer to the question whether the provisoes are severable from the other ingredients of the formulae within the principles of these decisions is not easy. The prescribed records which are a condition of these formulae being used include the keeping of the reconciliation statement in the fourth schedule. The function of the provisoes is, in the circumstances mentioned, to adjust the maximum prices and rates every three months. But the fourth schedule is severable from the other prescribed records, and the provisoes are also severable from the other ingredients in the formulae. Provided the cost of direct labour is accurately kept in the detailed costs records, the effect of the provisoes on the maximum prices and rates would be small, because it would only be where the cost of indirect labour was less than 5 per cent of the cost of direct labour that they would have any operation. They would then only reduce the prices and rates by $2\frac{1}{2}$ per cent. Their purpose appears to be, as Mr. *Ferguson* said, to act as a check in order to ascertain whether direct labour plus 10 per cent is a reasonable figure to adopt to cover all labour direct and indirect employed in the manufacture of the outerwear. On the whole, it seems to me that the requirement that those manufacturers and makers-up who elect to use the

(1) (1945) 70 C.L.R., at p. 128.
(2) (1945) 70 C.L.R. 100.
(3) (1945) 70 C.L.R., at p. 127.
(4) (1943) 68 C.L.R. 87, at pp. 130, 131.

formulae where prescribed records are kept should keep the reconciliation statement in the fourth schedule, and the provisoes are severable, and that the Order can be read down by a process of construction so as to have an operation which is not in excess of power.

There remains for consideration the third ground on which the order is attacked for uncertainty. Before reg. 23 contained sub-reg. 1B it was held by this Court in *Arnold* v. *Hunt* (1) that, where the Commissioner by an order published in the *Gazette* purported to declare and fix maximum prices for goods in sums of money, it was necessary that the price should appear in the body of the order or in a schedule to the order. The effect of the decision is that, apart from a special provision, what constitutes the fixing of a maximum price in accordance with reg. 23 (1) (*a*) must appear in the order itself and not in an extraneous document: (*Vardon's Case* (2)). If, therefore, the price is a specified sum of money, that sum must be stated in the order. But if the price is specified by a formula, the application of which to the facts of any particular case will determine a price, it is the specification of the formula which must appear in the order or in a schedule to the order. Provided the factors to be taken into the calculation are clearly defined, the difficulty, if any, in ascertaining those factors could not render the formula uncertain.

For these reasons, I am of opinion that the Order is valid except with respect to the fourth schedule and the provisoes to pars. 6, 7 and 11. But the defendants have demurred to the whole of the statement of claim on the ground that it discloses no cause of action and that the Order and every part thereof is a valid exercise of the powers conferred on the Commissioner by the *Prices Regulations*, so that the demurrer should be overruled. I agree with *Dixon* J. that if the defendants wish to plead they should be allowed to do so, and that the plaintiffs should have leave, if they desire it, to amend as they may be advised. Otherwise it seems to me that the plaintiffs are entitled to a declaration that the provisoes in question and the requirement that they should keep the record prescribed by the fourth schedule are void.

Demurrer overruled.

Solicitors for the plaintiffs, *R. N. Henderson & Taylor.*

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

J. B.

(1) (1943) 67 C.L.R. 429.

(2) (1943) 67 C.L.R., at p. 453.