[HIGH COURT OF AUSTRALIA.]

WILLMORE AND ANOTHER . . . PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . . DEFENDANTS.

H. C. OF A. 1945.

MELBOURNE, *Oct.* 24, 25.

SYDNEY, *Nov.* 22.

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

National Security—Prices Regulations—"Declared service"—Power to Commissioner by order published in Gazette to "declare that the maximum rate at which any such service may be supplied . . . by any person shall be such rate as is fixed . . . by notice in writing to that person"—Necessity for identification, in order published in Gazette, of person to be affected—National Security (Prices) Regulations (S.R. 1940 *No.* 176—1945 *No.* 113), *reg.* 23 (2) (*b*) (i)—*Prices Regulation Order No.* 1015, *par.* 8.

Regulation 23 (2) of the *National Security* (*Prices*) *Regulations* provides, *inter alia*, that the Prices Commissioner may, with respect to any declared service, from time to time, in his absolute discretion, by order published in the *Gazette* "(*b*) declare that the maximum rate at which any" (declared) "service may be supplied or carried on—(i) by any person shall be such rate as is fixed by the Commissioner by notice in writing to that person." Purporting to act in pursuance of this regulation, the Commissioner made and published in the *Gazette* Prices Regulation Order No. 1015, par. 8 of which was as follows:—"Notwithstanding anything contained in this order, I fix and declare the maximum price or rate at which any goods or services specified in a notice given in pursuance of this paragraph may be sold or supplied by any person to be such price or rate as is fixed by me by notice in writing to that person."

Held that an order under reg. 23 (2) (*b*) (i) must identify the person to whom notice is to be given, and, therefore, that par. 8 of the Order in question was not authorized by the regulation and was void.

DEMURRER.

George Malcolm Willmore and Reginald Nockolds Randell carried on a real estate agency business in partnership at Melbourne. They brought an action in the High Court against The Commonwealth, the Prices Commissioner and the Deputy Prices Commissioner (Vict.), alleging in their statement of claim that they had received from the

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last-mentioned defendant a notice in writing (dated 23rd August 1945) stating that the maximum rates of commission (as defined in the notice) which might be charged by them on the sale of real estate were fixed in accordance with the scale stated in the notice.

The notice purported to have been given in pursuance of par. 8 of *Prices Regulation Order* No. 1015, which was as follows: "Notwithstanding anything contained in this order, I fix and declare the maximum price or rate at which any goods or services specified in a notice given in pursuance of this paragraph may be sold or supplied by any person to be such price or rate as is fixed by me by notice in writing to that person." The plaintiffs claimed (*a*) a declaration that par. 8 of the order was in excess of the powers conferred by the Regulations and was void; (*b*) a declaration that, by reason of the invalidity of par. 8 of the order, the notice was void; (*c*) alternatively, a declaration that the notice was in excess of the powers conferred by par. 8, and was void by reason of its uncertainty.

The defendants demurred to the statement of claim, and the demurrer now came on for hearing. At the suggestion of the Court, counsel for the plaintiffs began.

Coppel K.C. (with him *D. I. Menzies*), for the plaintiffs. The notice given in this case depends for its validity on par. 8 of *Prices Regulation Order* No. 1015, which itself depends (so far as "services" are concerned) on reg. 23 (2) of the *Prices Regulations*. That sub-regulation contemplates that there will appear in the Government *Gazette*, so that anyone interested may see it, either an order stating the price or rate fixed for a particular service or an order specifying a particular service and in some way specifying persons in respect of whom the price or rate for the service is to be fixed by notice. An order of the latter kind will at least put the public on inquiry as to notice given to the persons indicated. Paragraph 8 of the Order now in question is a mere repetition of reg. 23 (2) (*b*) (i); its publication in the *Gazette* serves no purpose; it conveys no information as to persons whose charges for services are affected (or are to be affected) by notice or as to the kind of services for which charges are to be fixed by notice. [He referred to *Fraser Henleins Pty. Ltd.* v. *Cody* (1); *Arnold* v. *Hunt* (2); *Ex parte Byrne*; *Re King* (3); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (4).] Even if par. 8 is valid, it does not apply to the present case; the business of an estate agent does not involve any "service" within the

(1) (1945) 70 C.L.R. 100.
(2) (1943) 67 C.L.R. 429.
(3) (1945) 45 S.R. (N.S.W.) 123, at p. 126; 62 W.N. 104, at p. 106.
(4) (1943) 67 C.L.R. 335.

definition in reg. 3 of the *Prices Regulations* as it stood when this Order was made. The kind of service contemplated by the Regulations at that time was one the supply of which was available to fulfil the same end in every case, such work as that of a boot-repairer or a hairdresser. It would not include, for instance, professional work, where each case requires individual treatment and the service rendered cannot be specified in advance. The work of an estate agent rather resembles professional work in this respect. The amendment of reg. 3 by Statutory Rules 1945 No. 113 does not affect the matter. In so far as that statutory rule purports to give an extended operation retrospectively to declarations of the Minister or to Prices Regulation Orders, it contravenes s. 48 (2) of the *Acts Interpretation Act* and is, therefore, void. *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1) is not an authority to the contrary. The decision of the majority in that case was that the regulation in question did not operate retrospectively. Accordingly, the notice given in this case is ineffectual. Moreover, even if par. 8 of the Order is valid and applies to this case, the notice is still bad because it does not specify the services for which a maximum rate or price is fixed. The notice purports to fix a rate by relation to the transaction between the vendor and the purchaser, that is, a transaction in the course of which services of various kinds may be performed, but it does not specify any service to which the rate is to apply. The notice contains no specification of a service unless one is content to say that all the functions of an estate agent constitute a specified service.

P. D. Phillips, for the defendants. There is no justification for an assumption that what is to be published in the *Gazette* must give the public any definite information as to prices. Even an order under reg. 23 (2) (*a*) fixing a maximum rate will not necessarily give the public any definite idea of the rate fixed. It need not do so in order to be valid. This is established by *Fraser Henleins Pty. Ltd.* v. *Cody* (2), which upheld par. 3 of the present Order (No. 1015). That paragraph fixed " ceiling " prices and rates in respect of " any goods or services " which had been declared ; all the public can gather from it is that a trader must not charge any more than his price or rate as at the date of the Order. Unless a purchaser knows what that price or rate was, the Order is not at all informative ; nevertheless, it was held to be valid. A fixation and declaration in respect of " any declared service " is sufficiently performed by a fixation and declaration in respect of *all* declared services *in toto* in a " blanket " order.

(1) (1942) 66 C.L.R. 161. (2) (1945) 70 C.L.R. 100.

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It follows from *Fraser Henleins' Case* (1) that the words of reg. 23 (2) (*b*), " any such service " (which have the same meaning as " any declared service " in reg. 23 (2) (*a*)), are satisfied by a declaration in respect of " all services." If the Commissioner can fix and declare the maximum rate for all declared services in one general declaration, there is no reason why he cannot declare that the maximum rate at which all declared services may be supplied by any person shall be such as is fixed by notice in writing. Accordingly, the Commissioner is not bound to pick out and define in the Order any particular service. Likewise there is no need to specify the persons who are to be notified; no purpose would be served by publishing the names of the traders in the *Gazette*. The service performed by the plaintiffs is a service in a commercial enterprise and is within the Regulations as they stood before the amendment: Cp. *Forget* v. *Baxter* (2). In any event, it is within the amended Regulations, and s. 48 (2) of the *Acts Interpretation Act* does not affect the matter. In order to validate a notice given after the date of the amendment it is not necessary to give Order No. 1015 any retrospective effect. [He referred to the *Acts Interpretation Act*, s. 46 (*b*).]

Coppel K.C., in reply, referred to *Ex parte Cullen*; *Re Maher* (3).

Cur. adv. vult.

Nov. 22.

The following written judgments were delivered :—

LATHAM C.J. Demurrer to a statement of claim in an action by the plaintiffs, who carry on business as real estate agents in partnership. The *National Security* (*Prices*) *Regulations*, S.R. 1940 No. 176 as amended, provide in reg. 22 that " the Minister may, by notice in the Gazette, declare any goods or services to be declared goods or services for the purpose of these regulations." The Minister made a very general declaration, the validity of which was upheld in *Victorian Chamber of Manufactures* v. *The Commonwealth* (4). The declaration of the Minister was held to be valid, although it referred to all goods and services, with only certain limited exceptions.

Under reg. 23, the Commissioner may, with respect to declared goods and services, fix prices or rates. The provisions relating to declared services are contained in reg. 23 (2) and following sub-regulations. No declared services, as already stated, have been separately specified in the Minister's declaration. Therefore, the Commissioner's powers under reg. 23 (2) enable him to deal with any of the indefinitely

(1) (1945) 70 C.L.R. 100.
(2) (1900) A.C. 467, at p. 475.
(3) (1943) 44 S.R. (N.S.W.) 324.
(4) (1943) 67 C.L.R. 335.

large number of services which are covered by the Minister's general declaration. The regulation provides that, with respect to any declared service, the Commissioner may, "by order published in the Gazette—

(*a*) fix and declare the maximum rate at which any declared service may be supplied or carried on generally or in any part of Australia or in any proclaimed area; or

(*b*) declare that the maximum rate at which any such service may be supplied or carried on—

(i) by any person shall be such rate as is fixed by the Commissioner by notice in writing to that person; or

(ii) by any body or association of persons, or any member of any such body or association, shall be such rate as is fixed by the Commissioner by notice in writing to that body or association."

The Commissioner made, and published in the *Gazette*, an order under these provisions (Prices Order No. 1015) the terms of which are substantially set out in *Fraser Henleins Pty. Ltd.* v. *Cody* (1). A general provision fixing what were called "ceiling prices and rates for goods and services of a kind previously sold and supplied," contained in par. 3 of the Order, was held to be valid by the Court and was applied in that case.

Paragraph 8 of the Order is in the following terms:—"Notwithstanding anything contained in this Order, I fix and declare the maximum price or rate at which any goods or services specified in a notice given in pursuance of this paragraph may be sold or supplied by any person to be such price or rate as is fixed by me by notice in writing to that person." The Commissioner, acting in pursuance of this paragraph, gave a notice in writing to the plaintiffs stating that the maximum rates of commission (as defined in the notice) which might be charged by them on the sale of real estate were fixed in accordance with the scale stated in the notice.

The plaintiffs claim a declaration that par. 8 of the Order is in excess of the powers conferred by the Regulations and is void, and a declaration that, by reason of the invalidity of par. 8, the notice is void. Alternatively, they claim a declaration that the notice is in excess of the powers conferred by par. 8, and is void by reason of its uncertainty.

Regulation 23 in sub-regs. 2 (*a*) and (*b*) provides for two different methods of fixing rates by the Commissioner after services have been declared by the Minister. The first method is that stated in par. *a*.

(1) (1945) 70 C.L.R. 100.

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In that case, the rate must be ascertainable by reference to an order published in the *Gazette*. The other method is found in par. *b*. This procedure requires two steps—an order in the *Gazette* and also a notice in writing. Paragraph *b* is introduced by the word "declare," whereas par. *a* is introduced by the words "fix and declare." Thus, under par. *a*, the order in the *Gazette* fixes and declares a rate. Under par. *b*, the order which is published in the *Gazette* only declares that the maximum rate will be a rate to be fixed by notice in writing. It is the notice in writing given to a person which results in the fixing of a rate. The notice in writing must plainly be given to a particular person. It is therefore argued, and in my opinion rightly, that the words "any person" at the beginning of par. *b* (i) must refer to a particular person; "that person" is the same person as the "any person" referred to in the paragraph. In other words, the identity of the person to whom the notice in writing is to be given must be stated in the order in the *Gazette*—his name must be stated. This opinion is not inconsistent in any way with the decision in *Victorian Chamber of Manufactures* v. *The Commonwealth* (1). The provision there interpreted was a regulation stating that the Minister might declare any services to be declared services. There was nothing corresponding to the collocation of words found in reg. 23 (2) (*b*) (i) referring first to "any person" and then requiring what must be a notice in writing given to some particular person.

Upon any other view, the Commissioner could, by merely repeating in an order in the *Gazette* the words of reg. 23 (2) (*b*) (i), become entitled to fix a price by a notice in writing to any person whatever. The result would be that, after such an order had been made by the Commissioner, the Regulations would have the same effect as if they had directly provided that the Commissioner might fix prices by a notice in writing given to any person. In my opinion, that was not the intention of the Regulations. The order published in the *Gazette* was intended to specify the person in respect of whom the Commissioner proposed to take the power of fixing rates by notices in writing addressed to that person.

This view is supported by a consideration of par. *b* (ii) of reg. 23 (2) referring to "any body or association of persons." Subsequent provisions contained in reg. 23 (3) show that the Commissioner must deal with bodies or associations of persons one by one, and not en bloc. This fact goes to support the opinion expressed with reference to sub-reg. 23 (2) (*a*). But the provisions of sub-par. ii itself, without any reference to reg. 23 (3), are, I think, sufficient to show

(1) (1943) 67 C.L.R. 335.

that bodies and associations of persons must be dealt with individually.

In my opinion, the demurrer should be overruled on the ground stated. This decision determines the whole case without reference to the other grounds of demurrer which were argued. A declaration should be made that par. 8 of Prices Order No. 1015 is void and that the notice given to the plaintiffs on 23rd August 1945 is of no effect.

RICH J. I consider that Prices Order 1015, clause 8, is not warranted by reg. 23 (2) (*b*) (i) of the *National Security* (*Prices*) *Regulations*. It follows that the notice dated 23rd August 1945 to the plaintiffs pursuant to that clause is invalid because, as I interpret the Regulations, the Commissioner's declaration and order do not pursue them.

The reasons of the Chief Justice and my brother *Dixon* sufficiently express my opinion and I refrain from elaborating them.

I agree that the demurrer should be overruled and that declarations should be made substantially to the effect of the first and second prayers of the statement of claim.

STARKE J. Demurrer to a statement of claim which sought a declaration that par. 8 of the Prices Order No. 1015 and a notice given pursuant to that Order were beyond the powers conferred by the *National Security* (*Prices*) *Regulations* made from time to time under the *National Security Act* 1939-1943.

The regulation under which the Order was made is referable to reg. 23 (1) (*b*) and 23 (2) (*b*). But the only provision relevant to this case is that contained in reg. 23 (2) (*b*), which provides that the Commissioner of Prices might with respect to any declared service (that is, a service declared pursuant to reg. 22 (2)), from time to time, in his absolute discretion, by order published in the *Gazette*—

> (*b*) declare that the maximum rate at which any such service may be supplied or carried on—
>
> (i) by any person shall be such rate as is fixed by the Commissioner by notice in writing to that person.

A similar provision is made as to goods in reg. 23 (1) (*b*).

The provision that an order made pursuant to these Regulations be published in the *Gazette* results in Parliament retaining control over it (Cf. *Acts Interpretation Act* 1901-1937, s. 48 ; *National Security Act* 1939-1943, s. 5 (4)), and gives notice, to those interested, of the authority assumed by the Commissioner. In this setting, the natural construction of the regulation is that the service and the person or persons who would be affected by any notice in writing given pursuant

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to the Order should be described in a manner sufficient to identify them.

Clause 8 of Order No. 1015 fails to do so. It provides that, notwithstanding anything contained in the Order, the Commissioner fixed and declared the maximum price at which any goods or services specified in a notice given in pursuance of the clause might be sold or supplied by any person to be such price or rate as is fixed by the Commissioner by notice in writing to that effect. But it is said that this construction cannot be reconciled with the construction given to reg. 22 in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1), or with that given to reg. 23 (1) (*b*) in *Fraser Henleins Pty. Ltd.* v. *Cody* (2). But these cases were dealing, in a different setting, with other regulations and do not conflict with the construction now given to reg. 23 (1) (*b*) and reg. 23 (2) (*b*).

Order No. 1015, par. 8, and the notice in writing given pursuant to it, are bad, and the demurrer must therefore be overruled.

DIXON J. This suit is brought by a firm of estate agents for a declaration of right declaring that a notice, dated 23rd August 1945, from the Commonwealth Prices Commissioner, fixing the maximum rates of commission the firm may charge, is void. The question comes before us on demurrer to the statement of claim.

The notice the validity of which is impugned depends upon Prices Order No. 1015 made on 13th April 1943. The chief clause or clauses of that order were upheld by this Court as valid and effectual in *Fraser Henleins Pty. Ltd.* v. *Cody* (2), but some other clauses which had been attacked in the argument of that case were held to be severable and the question of their validity was left undecided. Among these was clause 8, under which the notice now in question was given to the plaintiffs. That clause is in the following terms :— "Notwithstanding anything contained in this Order, I fix and declare the maximum price or rate at which goods or services specified in the notice given in pursuance of this paragraph may be sold or supplied by any person to be such price or rate as is fixed by me by notice in writing to that person."

The clause depends for its effect in relation to services upon sub-par. i of par. *b* of sub-reg. 2 of reg. 23, though it is true that some of the phraseology of par. *a* has been transcribed into the clause. Sub-regulation 2 (*b*) is as follows :—" The Commissioner may with respect to any declared service from time to time, in his absolute discretion, by order published in the Gazette . . . (*b*) declare

(1) (1943) 67 C.L.R. 335. (2) (1945) 70 C.L.R. 100.

that the maximum rate at which any such service may be supplied or carried on—

(i) by any person shall be such rate as is fixed by the Commissioner by notice in writing to that person ; or

(ii) by any body or association of persons, or any member of such body or association, shall be such rate as is fixed by the Commissioner by notice in writing to that body or association."

It will be seen that the power which these paragraphs give the Commissioner involves two steps. The first is to make an order published in the *Gazette* providing for the notification of the maximum rate by notice in writing, and the second, the giving of a notice in writing fixing the rate. The first step may be described as a procedural condition and the second as the operative determination or direction.

The reason or policy underlying the requirement of the procedural condition is not altogether clear, but apparently it was considered desirable that, before the Commissioner proceeded to prescribe maximum rates specifically for an individual, or for a particular body or association, he should make a public declaration that in those cases rates would be fixed in that way. Both the nature of the provision and the terms in which it is expressed suggest that it was intended that the order gazetted should contain a particular statement of the operative determination or direction the Commissioner was taking power to give. No purpose could be served by the Commissioner's publishing in the *Gazette* an order in the same general terms as par. i or ii of sub-reg. 2. Yet that, in effect, is what the Commissioner has done in clause 8 of the Order. It appears to me to be evident that sub-reg. 2 intended him to make and gazette an order calling forth for particular application the otherwise dormant power of fixing rates for individual cases. It may be that it was meant that the service or class of services to be dealt with by special notification should be particularly described in the order gazetted and there is no necessary inconsistency between that view and the construction given to reg. 22 in *Victorian Chamber of Manufactures* v. *The Commonwealth* (1). But, however that may be, I think that the manner in which the sub-regulation is expressed suggests that the person, body or association upon whom the order is to operate must be named or otherwise particularly identified. No doubt more than one person may be covered by one order but identification of everyone included is still required. The expressions " any person . . . by notice to that person " and any " body or association of persons . .

(1) (1943) 67 C.L.R. 335.

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by notice to that body or association " must receive the same construction and their natural meaning involves particular reference to or identification of the person, body or association intended. In the case of a body or association, sub-reg. 3 confirms the view that the body or association must be specified, if, indeed, it does not completely exclude any other view. It must be remembered, too, that the separation into two sub-paragraphs of the analogous par. *b* of sub-reg. 1 relating to goods was done as a matter of draftsmanship by S.R. No. 264 of 1943. In its earlier form, it described the power as one by order published in the *Gazette* to " declare that the maximum price at which any such goods may be sold by any person or body or association of persons shall be such price as is fixed by notice by the Commissioner in writing to that person or body or association of persons." There could hardly be any doubt that the body or association must be identified in the order and, by consequence, so must be the person.

So construed, reg. 23 (2) (*b*) (i) has not been complied with by the publication in the *Gazette* of clause 8 and, accordingly, the notice is bad.

It is, perhaps, desirable to point out that reg. 45B introduced by S.R. No. 24 of 1945, being later in date than Order No. 1015, cannot affect the present case. I should add, too, that, as appears from the foregoing, I find myself unable to agree in the construction given to reg. 23 (2) (*b*) by the Supreme Court of New South Wales in *Ex parte Byrne*; *Re King* (1).

In the view I have expressed, it is unnecessary for me to consider the other objections raised to the validity of the notice.

In my opinion, the demurrer should be overruled.

McTIERNAN J. In my opinion, the demurrer should be overruled.

Clause 8 of the present Prices Order depends upon reg. 23 (2) (*b*) of the *Prices Regulations*. This sub-regulation gives power to fix the maximum rate at which any declared service may be supplied or carried on by any person. Two steps are necessary to exercise this power. The first is a declaration by an order published in the *Gazette* that the maximum rate at which any such service may be supplied or carried on " by any person " shall be such rate as is fixed by notice " to that person." The second is the giving of the notice fixing the rate to that person.

I think that what the language of the sub-regulation clearly requires is that the person to whom the notice is to be sent is a person whose identity can be ascertained from the terms of the declaration.

(1) (1944) 45 S.R. (N.S.W.) 123, at p. 126.

It seems to me that the first step is not complete if the ascertainment of the person to observe the rate fixed by the notice is left to be done by the notice. The office of the notice is to fix the maximum rate; it is to be sent to a person ascertained by the declaration. I think that the Commissioner could not make an effective declaration under the sub-regulation binding any unascertained person. It is a fatal defect in clause 8 that it gives no particulars about any person or persons to be bound by a maximum rate to be fixed by a notice. I think that, upon a fair construction of the language of the sub-regulation, clause 8 is bad and the notice falls with it. This construction of this sub-regulation is not precluded by any decision of the Court.

WILLIAMS J. I have had the advantage of reading the reasons for judgment of the Chief Justice and my brother *Dixon*, and I agree, substantially for the reasons therein stated, that par. 8 of Prices Order 1015 is not authorised by reg. 23 (2) (*b*) (i) of the *National Security* (*Prices*) *Regulations*. The plaintiffs were not named or otherwise identified in the Order so that the notice in writing given to them on 23rd August 1945 was void. The demurrer should, in my opinion, be overruled and declarations made as claimed in the first and second prayers of the statement of claim.

Demurrer overruled. Judgment for plaintiffs with costs for a declaration that par. 8 *of Prices Order No.* 1015 *is void and that the notice given to the plaintiffs on* 23*rd August* 1945 *is of no effect.*

Solicitors for the plaintiffs, *Cornwall, Stodart & Co.*

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

E. F. H.