[HIGH COURT OF AUSTRALIA.]

FRASER HENLEINS PROPRIETARY LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

CODY . . . . . RESPONDENT.
COMPLAINANT,

CROWTHER . . . . . APPELLANT;
DEFENDANT,

AND

CODY . . . . . RESPONDENT.
COMPLAINANT,

H. C. OF A. 1945.

SYDNEY, *April* 30; *May* 1.

BRISBANE, *June* 15.

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

National Security—Black marketing—Offence—Price control—Declared goods—Port wine—Sale at price greater than fixed price—Maximum price—Fixation—Relation to sale of goods "substantially identical" upon "terms and conditions substantially identical"—Vagueness and uncertainty—Validity of Order—Severability of clauses in Order—Admissions—Director of company—Authority to bind company—Black Marketing Act 1942 (*No.* 49 *of* 1942), *ss.* 3-5—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *ss.* 5 (5), 10 (4)—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 46 (*b*)—*National Security* (*Prices*) *Regulations* (*S.R.* 1940 *No.* 176—1942 *No.* 513), *reg.* 23 (1), (1A) (*g*) (*h*)—*Prices Regulation Order No.* 1015.

The meaning of the words "substantially identical goods" and "terms and conditions substantially identical" in relation to the sale of goods, as used in the definition of "ceiling date" in clause 2 and in clause 3 of Prices Regulation Order No. 1015, is not so vague and uncertain as to make the Order invalid as not fixing a price. Even if some other clauses of the Order are bad, which was not decided, the validity of clause 3 is preserved by the operation of s. 5 (5) of the *National Security Act* 1939-1943 and s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941.

Principles governing severability under the *Acts Interpretation Act* 1901-1941, discussed.

A manager of a company who has general authority to act in and in relation to the business of the company has authority to deal with any inquiry by government officials into the affairs of the company in relation to a possible breach of the law by the company in the ordinary conduct of its business, and a statement made by him in relation to such a matter is admissible in evidence against the company.

Constitutional Law — Judicial power — Black marketing — Offence — Prosecution —Consent of the Attorney-General—Report from Minister—Advice of committee —Administrative or judicial—Summarily or upon indictment—Penalty—Maximum and minimum prescribed—The Constitution (63 & 64 *Vict. c.* 12), *s.* 71—*Black Marketing Act* 1942 (*No.* 49 *of* 1942), *s.* 4 (2), (3), (4).

Section 4 (4) of the *Black Marketing Act* 1942, which provides that the offence of black marketing—which may be prosecuted summarily or upon indictment and for which maximum and minimum penalties are prescribed—shall not be prosecuted without the written consent of the Attorney-General after report from the Minister administering the regulations in relation to which the offence was committed and advice from a committee appointed by the Attorney-General and consisting of a representative from each of the three specified Commonwealth Departments, does not involve any exercise of judicial power and, therefore, is not an infringement of s. 71 of the Constitution.

Ex parte Coorey, (1944) 45 S.R. (N.S.W.) 287; 62 W.N. 167, approved.

ORDERS NISI to review.

Upon the complaint of Herbert Bede Cody, an officer of the Department of Trade and Customs, Fraser Henleins Pty. Ltd. was charged under s. 4 of the *Black Marketing Act* 1942 before a magistrate for that, on 19th August 1943 at Townsville in the State of Queensland, it was guilty of the offence of black marketing in that it did sell one quarter cask of port containing thirty-eight gallons of Berri Ruby Port to Leandro Cattana for the sum of £28 15s., a price greater than the maximum price, namely £20 7s. 2d., fixed under the *National Security* (*Prices*) *Regulations* for the sale thereof.

Upon another complaint laid by Cody, Reginald Arthur Crowther was charged under s. 5 of the Act for that, on the same date and at the same place, he was deemed to be guilty of the offence of black marketing in that he on the said date was the managing director actively concerned in the conduct of the business of Fraser Henleins Pty. Ltd., a body corporate, which was on the said date guilty of the offence of black marketing inasmuch as it did on the said date sell one quarter cask of port containing thirty-eight gallons of Berri Ruby Port to Leandro Cattana for the sum of £28 15s., a price greater than the maximum price, namely £20 7s. 2d., fixed under the *National Security* (*Prices*) *Regulations* for the sale thereof.

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Section 3 of the *Black Marketing Act* 1942 includes a provision that " black marketing " means, *inter alia*, selling any goods at a greater price than the maximum price fixed by or under any regulations made under the *National Security Act* 1939, as amended. Section 4 provides, so far as material: (1) that any person who does any act or thing, or is guilty of any omission or conduct which constitutes black marketing within the meaning of s. 3 shall be guilty of the offence of black marketing; (2) that the offence of black marketing may be prosecuted summarily or upon indictment; (3) that the punishment for black marketing shall have regard to prescribed maximum and minimum penalties; and (4) that the offence of black marketing shall not be prosecuted without the written consent of the Attorney-General after a report from the Minister administering the regulations in relation to which the offence was committed and advice from a committee appointed by the Attorney-General, and consisting of a representative from each of three specified Commonwealth Departments. Section 5 provides that " where a person guilty of the offence of black marketing is a body corporate, every person who, at the time of the commission of the offence, was a director . . . actively concerned in the conduct of the business of the body corporate shall be deemed guilty of the offence, unless he proves that the offence was committed without his knowledge and that he used all due diligence to prevent the commission of the offence or of offences of the same character."

The company and Crowther were charged with a breach of Prices Regulation Order No. 1015 in relation to the sale of goods. This Order was made on 13th April 1943, and relates to the fixing of prices for goods and rates for services. Clause 2 of the Order defines " ceiling date " as a date of prior sale of such goods on substantially identical terms and conditions: if such sale took place on 12th April 1943, that date is the ceiling date; if no such sale took place on that date, then the ceiling date is the last date, prior to 12th April 1943, upon which such a sale took place. Clause 3 deals with the prices of goods of a kind previously sold. By this clause the Prices Commissioner fixes and declares the maximum price at which any person may sell such goods, on any terms and conditions, to be the price at which that person sold substantially identical goods on the " ceiling date " on terms and conditions substantially identical with the first-mentioned terms and conditions. Clause 4 relates to prices and rates for goods and services not previously sold or supplied. Where such goods or services are not substantially identical with any goods or services sold or supplied by the seller or supplier on or prior to 12th April 1943, the maximum

price or rate is to be the cost of the goods or services to the seller or supplier. " Cost " is defined in relation to goods in clause 2, but there is no definition of " cost " in relation to services. Clause 6 allows certain price or rate differences to be observed " where a seller or supplier of any goods or services has customarily allowed any difference in price or rate " in certain cases. Clause 7 provides that the Order shall not apply to perishable primary products, including specifically mentioned products. Clause 8 provides that, notwithstanding anything contained in the Order, the Commissioner fixes and declares the maximum price or rate at which any goods or services specified in a notice given in pursuance of the clause may 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 person. Regulation 23 of the *National Security* (*Prices*) *Regulations* provides that the Commissioner may, by order published in the *Gazette*, (*a*) fix and declare maximum prices, or (*b*) declare that the maximum price at which goods may be sold by any person shall be such price as is fixed by the Commissioner by notice in writing.

The case for the prosecution was that the sale alleged to constitute the offence was a sale by the company, on 19th August 1943, of thirty-eight gallons of Berri Ruby Port to Leandro Cattana at 12s. 6d. per gallon ; that there was a sale by the company of nineteen and two-tenth gallons of Berri Ruby Port on substantially identical terms and conditions to one T. McIlrath on 4th March 1943 at 8s. 1d. per gallon ; so that the latter date was the " ceiling date," and 8s. 1d. per gallon the fixed price.

The sale to Cattana was proved by reference to documents in the possession of the company and by the evidence of Cattana, who was called for the prosecution. The sale was recorded as a cash sale. The sale to McIlrath was proved by an entry in the books of the company. Further evidence was given of interviews between an investigating officer and Crowther. The investigating officer examined the transactions of the company over a considerable period, and prepared a schedule purporting to give particulars of sales of commodities and prior sales of the same commodities for the purpose of identifying ceiling dates. Crowther was invited to point out any particulars in which the schedule was incorrect. The schedule included reference to the sales to Cattana and McIlrath, and Crowther was asked to point out whether the sale to McIlrath was the last sale of that particular line of liquor prior to 12th April 1943. Crowther was allowed to take the schedule away and to examine it in detail. He did not challenge the accuracy of the schedule with respect to the transactions with Cattana and McIlrath, either

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as to the identity of the liquor or as to the identity of the terms and conditions of sale. The sale to Cattana was described in the books of the company as a sale of Berri Ruby Port. The sale to McIlrath was described in the town day book as a sale of port wine. The investigating officer gave evidence that, referring to the schedule which described the sale to McIlrath as a sale of Wine Berri (Bulk) Ruby Port, he said to Crowther, " This sale to McIlrath for Wine Berri Bulk Port, that is correct isn't it ? " and that Crowther replied, " Oh yes. That's the Berri price." Crowther also said that the sale to McIlrath was Berri Ruby Port and that 8s. 1d. per gallon was " our usual price for Berri Ruby Port." This evidence was corroborated by another investigating officer. Neither the company nor Crowther called evidence in either prosecution, except the evidence of the auditor of the company, who gave evidence in the proceedings against the company with respect to the wholesale purchase of Berri Ruby Port by the company.

The company was convicted and was fined £2,000 and ordered to exhibit continuously for a period of three months notices of the conviction, both inside and outside its place of business—*Black Marketing Act* 1942, s. 12.

The evidence given in the case against the company was taken as the evidence, subject to objections, in the case against Crowther.

The magistrate found, *inter alia*, that at all material times Crowther was the managing director actively concerned in the conduct of the business of the company and that he had not proved that the offence of which the company was convicted was committed without his knowledge or that he used all due diligence to prevent the committing of the offence. Crowther was convicted and sentenced to imprisonment for four months with hard labour.

Upon applications made by the company and Crowther respectively pursuant to s. 209 of *The Justices Acts* 1886 *to* 1942 (Q.), *Dixon* J. granted orders nisi to review and quash the convictions on grounds which related to sufficiency of evidence to prove the offence, admissibility against the company of admissions made by Crowther, the validity of Prices Regulation Order No. 1015 and the validity of s. 4 (4) of the *Black Marketing Act* 1942.

The provisions of relevant statutes, regulations and orders thereunder, and articles of association of the company are set forth in the judgments hereunder.

Spender K.C. (with him *Barwick* K.C. and *Maguire*), for the appellants. The conviction in each case depended upon an admission made by the appellant Crowther, who, it is conceded for the purpose

of this argument, was the managing director of the appellant company. Without that admission, there would not have been established any case whatever as to what was the price for substantially identical goods at the relevant date under Prices Regulation Order No. 1015. A managing director, or any agent, unless specially authorized so to do, has no authority to make an admission binding his principal, except in relation to a transaction that he had authority to carry out. Crowther had no such authority. The mere fact that he was the managing director of the company did not authorize him, in respect of a transaction long since passed, to make an admission binding the company in respect of an investigation which was being made as a prelude to a prosecution. Except, perhaps, when questioned under reg. 17 of the *National Security* (*Prices*) *Regulations*, a managing director has no authority to make an admission in relation to past transactions. Crowther was not interrogated under that regulation. The questions were directed to him in his own personal capacity. The answers to those questions are admissible only as against him (*Ex parte Gerard & Co. Pty. Ltd.*; *Re Craig* (1); see also *Casey* v. *Wentworth* (2)). The tendering of the appellant company's articles of association did not bring the admission within that case or within *Butcher* v. *Longwarry & District Dairymen's Co-operative Association Ltd.* (3). There is a vital distinction between this type of matter and a person dealing with a company in the ordinary course of business, such as contracts or civil matters, on principles which are well developed by the Court, which entitle him to assume that everything has been done to give an officer of the company power to exercise the authority he pretends to exercise. No person can bind a company except in relation to a transaction which he is then carrying on and has authority to carry on: *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 290, par. 476. An authority to do something is limited to the doing of it and does not extend to making admissions thereafter to bind a principal thereafter as to how it was done: *Restatement of the Law*, "*Agency*," par. 286. The authority to bind must be actual and not merely implied.

[STARKE J. *Wilson* v. *Church* (4) seems to show that in civil proceedings rules cannot be carried to the extent pressed for by you.]

The appellant Crowther had no authority to make statements in respect of past transactions which have terminated, particularly statements which criminally involved his principal, the appellant company. In dealing with criminal matters, it is not a question of

(1) (1944) 44 S.R. (N.S.W.) 370, at pp. 376, 381; 61 W.N. 232, at p. 237.
(2) (1877) Knox 16.
(3) (1939) V.L.R. 263.
(4) (1878) 9 Ch. D. 552, at p. 555.

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what is within the apparent scope of a person's authority. The question is whether he has or has not the authority to do the particular thing. This is a stronger case than *Ex parte Gerard & Co. Pty. Ltd.*; *Re Craig* (1). Prices Regulation Order No. 1015 is bad for uncertainty. Although it deals with different subject matters, the Order is one scheme, therefore, if any portion of it is bad for uncertainty, the whole Order is bad for uncertainty. In principle, this Order is exactly the same as the Order considered in *Vardon* v. *The Commonwealth* (2). That case and *Bendixen* v. *Coleman* (3), *Ex parte Zietsch*; *Re Craig* (4) and *Ex parte Gerard & Co. Pty. Ltd.*; *Re Craig* (1) show that, if there is not marked out to persons to whom the Order is directed the extent of their duty in sufficiently clear terms, the Order is bad. The expressions "directly incurred" in the definition of "cost" in par. 2 of the Order, and "substantially identical" in par. 3, are ambiguous and are not sufficiently clear to the persons to whom the Order is directed. The Order is not a good exercise of the powers conferred by reg. 23 (1) (*a*), (*b*) of the *National Security* (*Prices*) *Regulations*. It is not a price-fixing order, it is a fiscal order. The purported fixing of prices is capricious. It is evident that an inquiry was not made prior to the said fixing of prices. The words "substantially identical goods . . . on terms and conditions substantially identical" in par. 3 of the Order are too indefinite to be an exercise of the power conferred by reg. 23. Variations in goods and in terms and conditions are limitless. The actual facts in the case establish a variation between the terms and conditions relating to the subject sale and the terms and conditions relating to the alleged comparable sale. The Order should be sufficiently clear to give traders a rule by which they can determine with reasonable certainty the price or prices they are permitted to charge. The respondent has not discharged the onus of proving beyond a reasonable doubt that the terms and conditions of the respective sales were "substantially identical." Paragraph 4 of the Order is bad and is not severable, therefore the Order is bad in its entirety. To provide that the cost of a service to a person shall be the price of that service is not a fixation of price. The words "customarily allowed" in par. 6 of the Order are too uncertain to mark out the content of the obligation to the person to whom it is directed. Similarly, the words "primary products" in par. 7 are too uncertain and indefinite (*Producers' Co-operative Distributing Society Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (5)). When the

(1) (1944) 44 S.R. (N.S.W.) 370; 61 W.N. 232.
(2) (1943) 67 C.L.R. 434.
(3) (1943) 68 C.L.R. 401.
(4) (1944) 44 S.R. (N.S.W.) 360; 61 W.N. 211.
(5) (1944) 69 C.L.R. 523.

power under reg. 23 (1) (*b*) is exercised, the name of the person must be stated in the *Gazette* and the maximum price shall be such price as is stipulated by notice in writing to him. The words " by any person " mean " by any specified person." The word " or " after reg. 23 (1) (*a*) is clearly disjunctive. The Commissioner may exercise one or other of those powers, but he is not permitted to exercise both at the same time. The provisions of s. 4 (4) of the *Black Marketing Act* 1942 infringe s. 71 of the Constitution : See *Ex parte Gerard & Co. Pty. Ltd.* ; *Re Craig* (1) and *Ex parte Coorey* (2). Regard must be had to the substance and not to the form of the Act.

Weston K.C. (with him *Holmes*), for the respondent. The schedule prepared by the respondent and shown to the appellant Crowther contained full particulars of the relevant sales. The inference was that the sale to McIlrath was the prior sale of a comparable article as compared with the sale to Cattana. The admissions or statements made by Crowther were so made within the general scope of his authority, both as managing director and as manager (*Butcher* v. *Longwarry & District Dairymen's Co-operative Association Ltd.* (3)). A managing director has authority to deal with matters affecting the business of the company in relation to which there is some investigation by a Commonwealth officer and in the course of exercising that authority says things of the nature under consideration. (He was stopped on this point.)

The point that the magistrate was not at liberty to find that the wine sold to Cattana was supplied upon substantially identical terms and conditions as the wine sold to McIlrath was not taken before the magistrate. What took place between the respondent and Crowther was equivalent to an admission by Crowther that the sales were comparable in all respects, and were made under substantially identical terms and conditions. It was open to the magistrate to draw the inference that Crowther was aware of the terms and conditions of both sales and that, by consent, the sale to McIlrath was treated as coming within the ambit of the definition, that is to say, it was treated as the supply of substantially identical goods on substantially identical terms and conditions. The magistrate's findings are in accordance with the evidence. The word " or " which appears immediately after reg. 23 (1) (*a*) is conjunctive ; the methods of fixation prescribed may be exercised concurrently (*Ex parte Byrne* ; *Re King* (4)). Regulation 23 (1A) (*h*) supports

(1) (1944) 44 S.R. (N.S.W.), at p. 374 ; 61 W.N., at p. 235.
(2) (1944) 45 S.R. (N.S.W.) 287 ; 62 W.N. 167.
(3) (1939) V.L.R., at p. 269.
(4) (1944) 45 S.R. (N.S.W.) 123 ; 62 W.N. 104.

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an alternative fixation and reinforces the view that the word " or " after reg. 23 (1) (*a*) is conjunctive. Paragraph 8 of the Order is simply a reproduction of the relevant part of reg. 23, and complies with a mode of fixation there indicated. By the procedure followed, the Commissioner fixed a formula which enables the price to be ascertained. *Vardon* v. *The Commonwealth* (1) and *Bendixen* v. *Coleman* (2) show that the money price does not have to be fixed; it is sufficient if there is a formula. The words used in pars. 2 and 3 of the Order are clear and unambiguous. There were not any difficulties in this case. Just as in *Stephen* v. *Naylor* (3) the words " to be admitted " had an important controlling effect, so here the words " terms and conditions attaching to the sale " apply. The difficulty in deciding in some particular cases what is a substantially identical thing is unimportant.

[STARKE J. referred to *Arnold* v. *Hunt* (4).]

The function of par. 2 of the Order is to fix a date. Whatever be the meaning of reg. 23 (1), this has been specifically authorized by reg. 23 (1A) (*h*). Paragraph 4 of the Order is a true price-fixing provision (*Ex parte McMillan*; *Re Craig* (5)). Even if some parts of the Order are bad, they are severable, therefore the other parts would remain effective by the operation of s. 5 (5) of the *National Security Act* 1939-1943 and s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 (*The Commonwealth* v. *Grunseit* (6)). Section 46 of the *Acts Interpretation Act* shows conclusively that it was the intention of Parliament that legislation and regulations, and orders thereunder, should not be wholly vitiated merely because they contained provisions which were *ultra vires*; if severable, effect should be given to the provisions within power and the provisions in excess of power should be discarded (*Pidoto* v. *Victoria* (7); *R.* v. *Poole*; *Ex parte Henry* [No. 2] (8)). Paraphrased, the position under s. 15A and s. 46 of the *Acts Interpretation Act* is that Prices Regulation Order No. 1015 made under reg. 23 of the *National Security* (*Prices*) *Regulations* shall be construed subject to reg. 23 and so as not to exceed the power under reg. 23 to the extent that, if par. 4 and par. 8 of the Order are bad, the Order shall nevertheless be a valid instrument as regards par. 2 and par. 3. Paragraphs 4 and 8 deal exclusively with the future and are clearly severable from the other provisions of the Order. The scheme was that there was to

(1) (1943) 67 C.L.R. 434.
(2) (1943) 68 C.L.R. 401.
(3) (1937) 37 S.R. (N.S.W.) 127, at pp. 140, 141.
(4) (1943) 67 C.L.R. 429.
(5) (1944) 45 S.R. (N.S.W.) 229, at pp. 231, 238; 62 W.N. 99, at p. 101.
(6) (1943) 67 C.L.R. 58, at p. 67
(7) (1943) 68 C.L.R. 87.
(8) (1939) 61 C.L.R. 634.

be a universal fixation of prices as at the "ceiling date." The conclusion is irresistible that existing traders were to be tied to existing prices. Almost all of that scheme comes within the operation of pars. 2 and 3 of the Order. "Cost" is sufficiently defined in par. 2 in relation to goods. Paragraph 4 is certainly valid as to goods. There is nothing in the remotest degree judicial in what is done by the committee constituted under s. 4 (4) of the *Black Marketing Act* 1942. Upon the launching of a prosecution under that Act, the judicial function is performed by the magistrate and not by the committee. It is entirely for the legislature to say whether there shall be a choice of liabilities; there is nothing judicial about the function. The Attorney-General only determines which judicial tribunal shall consider a particular matter; he does not determine what punishment shall be awarded to an offender (*King-Emperor* v. *Benoari Lal Sarma* (1)).

Spender K.C., in reply. The use of the words "substantially identical" in the *Trade Marks Act* have no application to this case. *Stephen* v. *Naylor* (2) was in respect of an entirely different subject matter and therefore that case is inapplicable. The words "substantially identical" are so vague as to mean nothing *qua* price fixing. Either there must be a price fixed or there must be given clear directions as to how the price can be ascertained (*Vardon* v. *The Commonwealth* (3); *Bendixen* v. *Coleman* (4); *Ex parte Thomson*; *Re Clarke* (5)). In an economic scheme, it is impossible to divorce the cost of services from the cost of goods, therefore, as the provisions in the Order relating to services are bad, the whole Order is bad. "Service" is a vital and inseparable feature in price fixing. The meaning of the words "substantially identical" as applied to goods is uncertain; it is even more uncertain as applied to services, particularly having regard to the infinite variety of commercial and industrial undertakings, and reduces par. 3 of the Order to an absurdity. If the bad provisions were severed from the Order, a result entirely different from that intended would be produced (*The King* v. *Poole*; *Ex parte Henry* [*No.* 2] (6)). The evidence shows that there were many dissimilarities between the sale of wine to Cattana and the sale of wine to McIlrath.

Cur. adv. vult.

(1) (1945) A.C. 14, at pp. 28, 29.
(2) (1937) 37 S.R. (N.S.W.) 127; 54 W.N. 50.
(3) (1943) 67 C.L.R., at pp. 443-445, 448, 450, 454.
(4) (1943) 68 C.L.R., at pp. 417, 419, 421, 423, 424, 426.
(5) (1945) 45 S.R. (N.S.W.) 193, at p. 198; 62 W.N. 159, at p. 162.
(6) (1939) 61 C.L.R., at pp. 651, 652.

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June 15.

The following written judgments were delivered :—

LATHAM C.J. These are appeals, by way of order nisi to review, from two convictions, one of the appellant company, and the other of the appellant Reginald Arthur Crowther, for offences against the *Black Marketing Act* 1942. The company was charged for that on 19th August 1943 at Townsville it was guilty of the offence of black marketing, in that it did sell goods, namely one quarter cask of port containing thirty-eight gallons of Berri Ruby Port, to Leandro Cattana for the sum of £28 15s., a greater price than the maximum price, namely £20 7s. 2d., fixed under the *National Security* (*Prices*) *Regulations* for the sale of the said goods. The charge was laid under s. 4 of the Act. Section 4 of the Act provides that any person who does any act or thing, or is guilty of any omission or conduct, which constitutes black marketing within the meaning of s. 3 shall be guilty of the offence of black marketing. Section 3 includes a provision that " black marketing " means, *inter alia*, selling any goods at a greater price than the maximum price fixed by or under " the Regulations " (that is, regulations made under the *National Security Act* 1939 as amended) for the sale of those goods. Crowther was charged with the offence of black marketing for that on the same date he was the managing director actively concerned in the conduct of the business of the company which was on the said date guilty of the offence of black marketing alleged in the complaint against the company. This charge was laid under s. 5 of the Act, which is in the following terms :—" Where a person guilty of the offence of black marketing is a body corporate, every person who, at the time of the commission of the offence, was a director, officer or servant actively concerned in the conduct of the business of the body corporate shall be deemed guilty of the offence, unless he proves that the offence was committed without his knowledge and that he used all due diligence to prevent the commission of the offence or of offences of the same character." It was proved that Crowther was a director of the company, and that he managed the business of the company. The sale to Cattana, which was alleged to be an offence against the Act, was actually made by him. Accordingly, if the company was guilty of the offence charged against it, Crowther was guilty of the offence charged against him. The company was fined £2,000, and ordered to exhibit notice of the conviction upon its premises—*Black Marketing Act*, s. 12. Crowther was sentenced to imprisonment for four months with hard labour.

The grounds of appeal relate to sufficiency of evidence to prove the offence, admissibility against the company of admissions made

by Crowther, validity of Prices Regulation Order No. 1015, and validity of s. 4 (4) of the *Black Marketing Act.*

Prices Regulation Order No. 1015, made on 13th April 1943, relates to the fixing of prices for goods and rates for services. The defendants were charged with a breach of the Order in relation to the sale of goods, and it is necessary, in the first place, to consider the provisions of the Order with respect to the sale of goods. The provisions relating to the fixing of rates for services are not directly relevant to the prosecution, though it will be necessary to consider these provisions in relation to certain objections to the validity of the Order.

Clause 3 of the Order deals with the prices of goods of a kind previously sold. By this clause, the Prices Commissioner fixes and declares the maximum price at which any person may sell such goods on any terms and conditions to be the price at which that person sold substantially identical goods on " the ceiling date " on terms and conditions substantially identical with the first-mentioned terms and conditions. Clause 2 defines " ceiling date " as a date of prior sale of such goods on substantially identical terms and conditions : if such a sale took place on 12th April 1943, that date is the ceiling date : if no such sale took place on that date, then the ceiling date is the last date prior to 12th April upon which such a sale took place.

The case for the prosecution was that the sale alleged to constitute the offence was a sale by the company on 19th August 1943 of Berri Ruby Port to one L. Cattana at 12s. 6d. a gallon : that there was a sale by the company of Berri Ruby Port on substantially identical terms and conditions to one T. McIlrath on 4th March 1943 at 8s. 1d. per gallon ; so that the latter date was the ceiling date, and 8s. 1d. per gallon the fixed price.

1. *Sufficiency of evidence.* The sale to Cattana was proved by reference to documents in the possession of the company and by the evidence of Cattana, who was called for the prosecution. The sale was recorded as a cash sale. The sale to McIlrath was proved by an entry in the books of the company. Further evidence was given of interviews between an investigating officer, H. B. Cody, and Crowther. The investigating officer examined the transactions of the company over a considerable period, and prepared a schedule purporting to give particulars of sales of commodities and prior sales of the same commodities for the purpose of identifying ceiling dates. Crowther was invited to point out any particulars in which the schedule was incorrect. The schedule included references to the sales to Cattana and McIlrath, and Crowther was asked to point out whether the sale to McIlrath was the last sale of that particular

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line of liquor prior to 12th April. Crowther was allowed to take the schedule away and to examine it in detail. He did not challenge the accuracy of the schedule with respect to the transactions with Cattana and McIlrath, either as to the identity of the liquor or as to the identity of the terms and conditions of sale. The sale to Cattana was described in the books of the company as a sale of Berri Ruby Port. The sale to McIlrath was described in the town day book as a sale of port wine. The investigating officer gave evidence with respect to the entry in the schedule with respect to Berri Ruby Port which set out the two sales in question. He gave evidence that, referring to the schedule which described the sale to McIlrath as a sale of Wine Berri (Bulk) Ruby Port, he said to Crowther, "This sale to McIlrath of Innisfail for Wine Berri Bulk Port, that is correct isn't it?", and that Crowther replied, "Oh yes. That's the Berri price." Crowther also said that the sale to McIlrath was Berri Ruby Port and that 8s. 1d. per gallon was "our usual price for Berri Ruby Port." This evidence was corroborated by another investigating officer, R. A. Irish. The defendant called no evidence in either prosecution, except the evidence of the auditor of the company, who gave evidence in the proceedings against the company with respect to the wholesale purchase of Berri Ruby Port by the company.

It is difficult to contend that there was no evidence from which the magistrate might conclude that a substantially identical commodity, namely Berri Ruby Port, was sold on each of the two occasions. It has been argued, however, that there was no evidence that the sale to McIlrath was on substantially identical terms and conditions with the terms and conditions of the sale to Cattana, and it is suggested that the sale to Cattana was a cash sale, and that the evidence is consistent with the sale to McIlrath being a sale on credit. The suggestion is unreasonable in itself, namely that 12s. 6d. a gallon was the price on a cash sale, whereas 8s. 1d. was the price on a sale on credit. There is no evidence to support the suggestion, and the evidence given was sufficient to entitle the magistrate to find that the sale to McIlrath was a sale before 12th April 1943 of goods, namely Berri Ruby Port, substantially identical with the goods sold to Cattana on 19th August 1943, and that the two sales were on terms and conditions which were substantially identical.

2. *Admissibility of evidence.* The next objection on behalf of the appellant is that the statements made by Crowther, a director and the manager of the company, were not admissible in evidence as against the company. It was argued that his authority in relation

to past transactions related only to the carrying out of those transactions, and not to making admissions in respect of them after they were completed. But Crowther, as the manager of the company, must be regarded as having authority to deal with any inquiry into the affairs of the company in relation to a possible breach of the law by the company. He was the person who would naturally represent the company if any inquiry were made into such matters. See *Kirkstall Brewery Co.* v. *Furness Railway Co.* (1), where it was suspected that a railway porter had stolen a parcel which was in the custody of the railway company. The stationmaster who had the sole management of the station from which the parcel was stolen made statements to a police officer who was inquiring into the matter, and it was held that his authority extended to putting the police in motion in order to secure the stolen goods; and because he had this authority the statements made by him to the police were admissible in evidence against the company. In the present case, the authority of Crowther was more extensive than the authority of the stationmaster in relation to the company and was more extensive than that of a person who held only the position of director of a company. He was also the general manager of the business of the company. He was not an agent whose authority in relation to a past transaction was limited to the carrying out of that transaction; he had general authority to act in and in relation to the business of the company, and therefore to deal with investigating officers in any matter concerning that business. In *Ex parte Gerard & Co. Pty. Ltd.*; *Re Craig* (2), upon which the appellant company relied, it was held that when a director was answering questions under compulsion he was not acting in the usual course of business of the company or in the course of a business transaction of the company. In the present case, the questions were not answered on compulsion and the director was also the manager of the whole business of the company. If he could not bind the company by an admission, no-one could do so. It has never been held that only a formal act by the board of a company can bind the company by way of admission. In my opinion, the objection to the admissibility of the evidence fails.

3. *Validity of Prices Order.* The appellants challenge the validity of the Prices Regulation Order No. 1015 upon various grounds.

In the first place, it is said that the words " substantially identical goods " and " terms and conditions substantially identical," which appear in clause 3 and in the definition of " ceiling date " in clause 2, are so vague that the Order cannot be said to fix a price, and reference

(1) (1874) L.R. 9 Q.B. 468. (2) (1944) 44 S.R. (N.S.W.) 370; 62 W.N. 232.

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is made to the decisions of this Court in *Vardon* v. *The Commonwealth* (1) and *Bendixen* v. *Coleman* (2). It is urged that it is so difficult to determine whether particular goods are substantially identical with other goods, or whether particular terms and conditions are substantially identical with other terms and conditions, that no certain provision is made whereby persons can determine whether or not they are observing the law. The Regulations, it is said, should be so expressed that any person can determine for himself whether or not he is selling at a price greater than that fixed by the Order.

It is true that it may be difficult in some cases to determine whether goods or terms and conditions are substantially identical with other goods or other terms and conditions. But this argument only shows that questions of degree may arise in the application of the provisions in question, not that the meaning of those provisions cannot be ascertained. It is often a difficult thing to determine whether a particular set of facts falls within a particular description, but that fact does not in itself show that the description is uncertain. I venture to refer to what I said in *Bendixen* v. *Coleman* (3) as to the possible difficulty of determining whether a particular liquor was whisky or not. In many cases, the legal liability of an individual depends upon whether his acts were what the law regards as " reasonable " in the circumstances. In such a case, there will be room for difference of opinion, but it does not follow that no criterion of conduct is provided in such a case.

Reference may usefully be made to similar provisions in other legislation. The *Trade Marks Act* 1905-1936, in ss. 25, 27 and 28, makes the determination of the rights of proprietors of trade marks dependent upon a decision upon the question whether one trade mark is identical, or nearly identical, with another trade mark. Section 31 (*c*) refers to matter " which does not substantially affect the identity of the trade mark." The proviso to s. 50 refers to trade marks which are " substantially the same." The question as to whether a trade mark has been infringed or not is declared by s. 53 to depend upon whether or not there has been a use of a mark substantially identical with a trade mark, or so nearly resembling it as to be likely to deceive. Another provision which may be mentioned in this connection is to be found in the *Acts Interpretation Act* 1901-1941, s. 49, which provides that no regulation " being the same in substance " as a disallowed regulation shall be made unless certain conditions are specified. I refer to the examination of this provision in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (4). In all these cases the

(1) (1943) 67 C.L.R. 434.
(2) (1943) 68 C.L.R. 401.
(3) (1943) 68 C.L.R., at p. 416.
(4) (1943) 67 C.L.R. 347.

application of the legislative provision may involve questions of degree. In some cases, there may be what could be called complete identity of the subjects of comparison though, strictly, anything can be identical only with itself. In other cases, there may be no resemblance whatever. In other cases, there may be complete identity in relevant particulars and difference in other particulars. In other cases, there may be great similarity amounting to substantial identity. When liability depends upon whether or not there is substantial identity in a particular case, the question must be determined as a question of fact. Opinions upon such a subject obviously may vary, but that fact does not make the legislation uncertain, whether that legislation is to be found in a statute or in a regulation.

It should be pointed out, in order to avoid misunderstanding, that the application of the Order in question does result in fixing a definite price, namely the actual price in the prior transaction upon the relevant date in respect of substantially identical goods sold on substantially identical terms and conditions. If the provisions relating to substantial identity are not themselves so uncertain as to be incapable of application by the tribunal before whom a matter comes, then there can be no objection to the Order upon the ground that a definite price is not fixed. In my opinion, this objection to the validity of the Order fails.

It was further argued that the *Prices Regulations* did not give the Commissioner power to fix prices for individual traders in respect of goods, but only for goods considered apart from the identity of vendors. This objection is met by reg. 23 (1A) (*h*), which expressly gives power to fix and declare prices by reference to prices charged by individual traders on any date specified by the Commissioner.

The validity of the Order was attacked upon another ground, namely, that other clauses in the Order are invalid and inseverable, so that the whole Order should be held to be invalid. The attack was directed against clauses 4, 6, 7 and 8.

It has already been mentioned that the Order relates to rates of charge for supply of services, as well as to prices to be charged upon a sale of goods. Clause 3 relates to prices and rates for goods and services of a kind previously sold or supplied. Clause 4 relates to prices and rates for goods and services not previously sold or supplied. Where the goods or services are not substantially identical with any goods or services sold or supplied on or prior to 12th April 1943 by the seller or supplier, the maximum price or rate is to be the cost of the goods or services to the seller or supplier. "Cost" is defined in relation to goods in clause 2, but there is no definition

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of "cost" in relation to services. It is therefore argued, and with much weight, that, as far as services are concerned, the Order does not fix any rate in the case of the services dealt with by clause 4, because the term "cost" is uncertain unless its meaning can be determined by other provisions in the relevant legislation: See *Vardon* v. *The Commonwealth* (1) and *Bendixen* v. *Coleman* (2).

Clause 6 allows certain price or rate differences to be observed "where a seller or supplier of any goods or services has customarily allowed any difference in price or rate" in certain cases. It is contended that the word "customarily" is so vague that it is in effect meaningless. In my opinion, there is no substance in this objection. The question whether an allowance has customarily been made can be determined as a question of fact, although such a determination may involve a decision upon matters of degree.

Clause 7 provides that the Order shall not apply to perishable primary products, including specifically mentioned products. It is urged that the term "primary products" is so vague as, in effect, to be incapable of application. Here again there is no difficulty in determining that certain things are primary products. There may be much argument as to whether other things are or are not primary products, but once again, in my opinion, any difficulty in the application of the term does not affect the question whether or not the provision is so vague as to be incapable of forming a basis for legal rights or duties.

Clause 8 provides that, notwithstanding anything contained in the Order, the Commissioner fixes and declares the maximum price and rate at which any goods or services specified in a notice given in pursuance of the clause may 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 person. The *Prices Regulations*, under which the Order is made, provide in reg. 23 that the Commissioner may, by order published in the *Gazette*, (*a*) fix and declare maximum prices, or (*b*) declare that the maximum price at which goods may be sold by any person shall be such price as is fixed by the Commissioner by notice in writing to that person, and there is a similar provision with respect to a body or association of persons. It is contended that these powers are mutually exclusive, that is, that the Commissioner may (*a*) fix and declare a maximum price by order in the *Gazette*, *or* (*b*) declare that the maximum price shall be that which is fixed by notice in writing, but that he may not do both (*a*) and (*b*) in the same order. It is said that that has been done in the Order in question, because clauses 3 and 4 fix prices in the manner provided

(1) (1943) 67 C.L.R. 434. (2) (1943) 68 C.L.R. 401.

by (*a*), whereas clause 8 fixes prices in the manner referred to in (*b*). It is further objected that under reg. 23 (1) (*b*) the name of the person in respect of whom this particular power is exercised must appear in the order published in the *Gazette*; that clause 8 of the Order does not name any person, and is therefore invalid. (It may be observed that, if the second objection is well-founded, the first objection fails, because clause 8 would not then be an actual exercise of the power contained in reg. 23 (1) (*b*) simultaneously with the exercise of the power contained in reg. 23 (1) (*a*).) These points have been considered by the Full Court of the Supreme Court of New South Wales in *Ex parte Byrne*; *Re King* (1), where both were decided adversely to the contention now advanced.

I do not find it necessary, however, to determine whether or not the objections to the validity of clauses 4, 6, 7 and 8 are well-founded, though, as I have said, I can see no ground for any objection to clauses 6 and 7. In my opinion, these clauses are all severable from clause 3. The *Acts Interpretation Act* 1901-1941, s. 46, provides that "where an Act confers upon any authority power to make, grant or issue any instrument . . . (*b*) any instrument so made . . . shall be read and construed . . . so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power." In my opinion, the application of this provision to the Prices Regulation Order produces the result that, even if clauses 4, 6, 7 and 8 are invalid, the validity of clause 3 is unaffected. These provisions are not connected as a matter of legislation, whatever may be said as to their inter-relation from the economic point of view. It is obviously possible to fix the price of goods without fixing the price of services, and to fix the price of services without fixing the price of goods. In the past, the prices of many services have been fixed; for example tram and railway fares, and other charges made to the public have been fixed, whereas before the war it was not usual to fix the price of goods. It is entirely a matter of policy whether the prices of all goods and all services or of all goods and no services or of all services and no goods or of some of each only should be fixed. The *Acts Interpretation Act* contains a declaration that provisions which are valid should be held to be valid notwithstanding the presence in the instrument in question of invalid provisions. In this case, no difficulty arises from the use of general

(1) (1944) 45 S.R. (N.S.W.) 123; 62 W.N. 104.

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words which include both valid and invalid provisions. The provisions in clauses 4, 6, 7 and 8 are separately expressed from those in clause 3. If the former regulations are all struck out the only result is that they fail to operate, and, if those regulations are regarded as struck out with a blue pencil, clause 3 operates in exactly the same way in which it would operate if they were present and valid. In my opinion, therefore, clause 3 is unaffected by the invalidity of any of the other clauses mentioned (if they are invalid), because they are severable and should be severed under s. 46 of the *Acts Interpretation Act*.

4. *Black Marketing Act*, *s.* 4 (4). Finally, it is objected that the *Black Marketing Act* is invalid by reason of the presence in it of s. 4 (4). This sub-section is as follows:—"The offence of black marketing shall not be prosecuted without the written consent of the Attorney-General after report from the Minister administering the Regulations in relation to which the offence was committed and advice from a Committee appointed by the Attorney-General and consisting of a representative of the Department administered by that Minister, a representative of the Attorney-General's Department and a representative of the branch of the Department of Trade and Customs known as the Prices Branch." It was said that this section constitutes an infringement of s. 71 of the Constitution, which provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court and other courts. It is plain that the committee referred to in the section is not a court. It is contended that the committee exercises judicial powers because it performs a function which determines the penalty to be imposed upon a person prosecuted under the Act.

Section 3 of the Act defines "black marketing" as meaning certain acts or omissions which are breaches of regulations made under the *National Security Act*. If a person is prosecuted under the *National Security Act*, he becomes subject to the penalties provided by that Act in s. 10—if the offence is prosecuted summarily, a fine not exceeding £100 or imprisonment for a term not exceeding six months, or both; or, if the offence is prosecuted upon indictment, a fine of any amount or imprisonment for any term, or both. The *Black Marketing Act*, s. 4 (2), provides that the offence of black marketing may be prosecuted summarily or upon indictment, and s. 4 (3) provides that "the punishment for the offence of black marketing shall be (*a*) if the offence is prosecuted summarily—imprisonment for not less than three months and not more than twelve months or, if the offender is a body corporate, a fine of not less than One thousand pounds and not more than Five thousand

pounds; and (*b*) if the offence is prosecuted upon indictment—imprisonment for any term not less than twelve months or, if the offender is a body corporate, a fine of any amount not less than Ten thousand pounds."

Some of the arguments addressed to the Court assumed that it is a condition precedent to a prosecution under the Act that the committee shall actually advise a prosecution under sub-s. (4). An examination of the terms of the section shows, however, that the provision is only that the offence of black marketing shall not be prosecuted without the written consent of the Attorney-General after a report from a Minister and advice from the committee. The committee may or may not advise prosecution. But, whatever the advice of the committee is, the Attorney-General may determine to prosecute, and, if he gives his written consent, the absence of a *recommendation* for prosecution by the committee would not affect the regularity of the proceedings if the committee had given *advice* in relation to the matter.

I find it difficult to understand how it can be said that the requirement that the Attorney-General, before instituting a prosecution, shall consult with a Minister and a committee involves any exercise of judicial power by the Attorney-General, the Minister, or the committee. In the first place, the committee only gives advice which may or may not be accepted. The advice does not affect the legal position of any person as to either rights, duties or liabilities. In the next place, even if the committee advises prosecution and the advice is adopted and a prosecution is instituted in accordance with the advice, it is still the case that the action of the committee does not impose any liability of any kind upon the person who is prosecuted. The whole matter of the guilt of the accused is determined by a court. The nature and quality of the penalty which may be inflicted depends upon a statute. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law.

It is true that a prosecution under the *Black Marketing Act* exposes the accused to a greater penalty than a prosecution under the *National Security Act*. The determination to prosecute or not to prosecute is made by the Attorney-General after a report from a Minister and advice from a committee. But, in all cases of public prosecutions, there must first be a decision by some public authority whether to prosecute or not to prosecute. The risk of infliction of a penalty depends upon the decision of a non-judicial authority or person as to whether any prosecution at all should be instituted.

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But such a decision is in no respect an exercise of judicial power. Further, many offences may be prosecuted either summarily or upon indictment; and, in the latter case, possible penalties are more severe. If they are prosecuted upon indictment, the accused has the right to a trial by jury. This is not the case if they are prosecuted summarily. It is for the Attorney-General or other law officer of the Crown to determine whether or not an indictment should be presented. But a decision to present an indictment is not a judicial decision, although it exposes the accused to penalties greater than would be the case if it were determined not to prosecute upon indictment. It is not a judicial decision because it makes no adjudication upon rights or duties or liabilities, or, indeed, upon anything. It imposes no penalties, though it does expose a person to the possibility of a particular penalty. If, before making a decision to present an indictment, the Attorney-General received advice from his officers in the ordinary course of administration, that fact plainly would not involve exercise of judicial power on his part. Section 4 (4) only requires him to receive a report from a Minister and advice from a committee before determining whether to prosecute under the Act or not. In my opinion, these provisions do not constitute any invasion of the judicial functions of the courts referred to in s. 71 of the Constitution.

This matter has received consideration in the cases of *Ex parte Gerard & Co. Pty. Ltd.* (1) and *Ex parte Coorey* (2), in each of which cases *Jordan* C.J. has expressed the opinion that s. 4 (4) does constitute an infringement of s. 71 of the Constitution. In the latter case the question was exhaustively examined by *Davidson* J. and *Nicholas* C.J. in Eq., who did not agree with the opinion of the Chief Justice. I concur as to this matter in the opinions of *Davidson* J. and *Nicholas* C.J. in Eq. in *Coorey's Case* (2).

Accordingly, in my opinion, all the objections raised on behalf of the appellants fail, and the appeals should be dismissed.

STARKE J. Orders nisi to quash convictions of the appellants under the *Black Marketing Act* 1942, ss. 4, 5.

The appellant company was prosecuted summarily on complaint that it was guilty of black marketing in that it sold goods at a greater price than the maximum price fixed under the *National Security (Prices) Regulations* for the sale of the goods and the appellant Crowther was also prosecuted summarily on complaint for that the company being guilty of the offence of black marketing the appellant

(1) (1944) 44 S.R. (N.S.W.) 370; 62 W.N. 232.

(2) (1944) 45 S.R. (N.S.W.) 287; 62 W.N. 167.

Crowther at the time of the commission of the offence was the managing director actively concerned in the conduct of the business of the company and was deemed, pursuant to s. 5 of the Act, guilty of the offence. These convictions have been attacked upon several grounds :—

(1) That the *Black Marketing Act* infringes the provisions of s. 71 of the Constitution, which prescribed that the judicial power of the Commonwealth shall be vested in certain courts.

The nature and functions of judicial power have been recently examined in this Court and do not require further examination in this case (See *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1)).

The *Black Marketing Act* provides in s. 4 (4) that the offence of black marketing shall not be prosecuted without the written consent of the Attorney-General after report from the Minister administering the regulations in relation to which the offence was committed and advice from a committee appointed by the Attorney-General. And s. 4 (2) provides that the offence of black marketing may be prosecuted summarily or upon indictment.

The offences known as black marketing were offences, it was said, under National Security legislation and the result of these sub-sections enabled the Attorney-General to determine under which provision the offence should be charged and the method of trial. This confers no judicial power upon anyone ; it neither declares nor enforces any rights or liabilities. It is but an administrative provision for the purpose of assisting the Attorney-General in determining under which provision a prosecution should be launched and how it should be prosecuted. As *Simon* L.C. said in *King-Emperor* v. *Benoari Lal Sarma* (2), in another connection, " it may be that as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime ; but that is a question of policy, not of law." There is nothing underlying the Constitution " which debars the executive authority . . . from giving directions after the accused has been arrested and charged with crime as to the choice of court which is to try him " (3).

Again, it was said that s. 4 (3) in prescribing for black marketing maximum and minimum penalties is an exercise of judicial power. But prescribing sanctions for prohibited acts is not an exercise of judicial power but of legislative power conferring jurisdiction and authority upon Courts or other tribunals to impose the punishment prescribed. It cannot be disputed that the legislature has power

(1) (1944) 69 C.L.R. 185. (2) (1945) A.C. 14. (3) (1945) A.C., at p. 28.

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to prescribe sanctions for the acts which it prohibits. And, if a maximum penalty, why not a minimum penalty; that is a matter of policy and not of law, however harsh and unwise the legislation.

Consequently, the contention that the *Black Marketing Act* contravenes s. 71 of the Constitution fails, as was also held by a majority of the Supreme Court of New South Wales in *Ex parte Coorey* (1).

(2) That the Prices Regulation Order No. 1015, purporting to have been made pursuant to the *National Security* (*Prices*) *Regulations*, is invalid.

Clause 3 is as follows:—"I fix and declare the maximum price or rate, as the case may be, at which any person may sell or supply any goods or services on any terms and conditions to be the price or rate at which that person sold or supplied substantially identical goods or services on the ceiling date" (that is, 12th April 1943) "on terms and conditions substantially identical with the first-mentioned terms and conditions or, if any lower maximum price or rate is fixed by or under any order made under the National Security (Prices) Regulations, and in force immediately prior to the commencement of this Order, that lower price or rate."

It was said that this is a mere "standstill" order and fixes no price or rate whatever.

I agree that it is a "standstill" order, which operates in such a manner that it fixes and declares as many prices and rates as there are persons selling goods or supplying services at differing prices or rates. It may be, as was said, an objectionable form of legislation because no uniform price or rate is prescribed and therefore results in inequalities amongst persons selling or supplying the same goods or services. But we are concerned with the power to make the Order in this form and not with its wisdom or fairness.

The *National Security* (*Prices*) *Regulations* authorize the Prices Commissioner to fix and declare the maximum prices and rates at which declared goods or services may be sold or supplied. Such a provision would not, I dare say, warrant a "standstill" order. But the Regulations go much further and provide that the Commissioner may fix and declare maximum prices and rates according to or upon any principle or condition specified by the Commissioner or relative to prices or rates charged by individual traders or suppliers on any date specified by him with such variations (if any) as in the special circumstances of the case he thinks fit or so that such prices shall vary in accordance with a standard or time or other circumstance (See reg. 23). Under a power so extensive, including,

(1) (1944) 45 S.R. (N.S.W.) 287; 62 W.N. 167.

it will have been observed, authority to fix prices and rates " relative to " prices and rates " charged by individual traders " or suppliers, the " standstill " order, which has been attacked, is within power.

The further argument, that the Prices Order is *ultra vires* because of uncertainty, cannot be sustained.

The uncertainty resides, so it was contended, in the introduction of the words " substantially identical goods or services " into the Order. But there is no more uncertainty in that phrase than in the phrase " identical goods or services," for in each case the rule, in its ordinary signification, is clear and explicit. The difficulties in proof of " identity " or " substantial identity " do not arise from any want of clarity in the rule, but from the facts surrounding each particular case.

Next, it was contended that the Prices Order was a connected scheme and that its provisions were dependent one upon the other. Then it was said that certain other regulations (e.g. reg. 4) were bad and consequently brought down the whole Order.

In form, the provisions are not dependent one upon the other, and, in substance, the *National Security Act* 1939-1943, s. 5 (5), coupled with the *Acts Interpretation Act* 1901-1941, s. 46, renders the contention untenable.

Lastly, it was contended that the findings of the magistrate were wrong and against evidence.

But this contention is not a matter of any public importance and all I need say is that the evidence sustains the findings. And it was also contended that some statements made by the managing director of the appellant company to the prosecuting officer were not admissible in evidence against the company. But, in my opinion, the statements were made by the managing director in the ordinary course of the business of the appellant company and in the course of his duty. Consequently the statements were admissible in evidence against the company.

The appeals should be dismissed.

DIXON J. These are appeals against convictions under the *Black Marketing Act* 1942. One appeal is by a trading company convicted pursuant to s. 3 (*a*) of the offence of black marketing by reason of the sale by it of a cask of port wine at a greater price than the maximum price. The other appeal is by the managing director of the company, who was convicted of the same offence pursuant to s. 5, upon an information alleging active concern in the conduct of the business of the company.

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The grounds of the appeal extend from an attack upon the validity of the material provisions of the Act down to the sufficiency of the proofs of some of the facts constituting the offence.

The basis of the offences constituting black marketing is the contravention of regulations under the *National Security Act*. In effect, the *Black Marketing Act* gives the name "black marketing" to certain descriptions of conduct already penalized under the *National Security Act* as a result of the operation of regulations and orders thereunder and affixes graver penal consequences to that conduct when the conviction is obtained for the offence so named on prosecution under the *Black Marketing Act*. The punishment for the offence of black marketing, if the conviction is summary, is imprisonment for not less than three months and not more than twelve months or, in the case of a corporation, a fine of not less than £1,000 and not more than £5,000; if the conviction is upon indictment, the punishment is imprisonment for not less than twelve months, or, in the case of a corporation, a fine of not less than £10,000 (s. 4 (3)). But, for the same conduct, amounting to an offence under the regulations, the *National Security Act* prescribes as punishment, on summary conviction, a fine of not more than £100, or imprisonment for a term not exceeding six months, or both, and, upon conviction on indictment, a fine of any amount or imprisonment for any term or both: s. 10 (3) of the *National Security Act*. Section 8 of the *Black Marketing Act* authorizes the prosecution of the offender under either law but enacts that he shall not be liable to be punished twice for the same offence. It will thus be seen that it rests with the responsible authorities, by choosing in what form an offender shall be prosecuted, to decide in respect of which of the four scales of punishment he shall be exposed to liability. Recognizing this fact, s. 4 (4) provides that the offence of black marketing shall not be prosecuted without the written consent of the Attorney-General after report from the Minister administering the regulations in relation to which the offence was committed and advice from a committee appointed by the Attorney-General and consisting of officers representing certain departments. It is contended that the situation that results from these provisions amounts to an attempt to infringe upon the judicial power of the Commonwealth and that, accordingly, the material parts of the enactment are void. The argument is based upon the dissenting judgment of *Jordan* C.J. in *Coorey's Case* (1), which fully sets out the considerations adduced in support of it. I have had the opportunity of studying his Honour's reasons and those of the two learned Judges who

(1) (1944) 45 S.R. (N.S.W.) 287; 62 W.N. 167.

formed the majority of the Supreme Court, *Davidson* J. and *Nicholas* C.J. in Eq. It is enough, I think, for me to say that I am prepared to adopt the reasoning of the majority, which appears to me effectually to answer the contention. The attack upon the validity of ss. 3 and 4 of the *Black Marketing Act* should, in my opinion, fail.

The validity of the Prices Regulation Order, which the appellant company has been found guilty of contravening, was impugned. It is Order No. 1015 made on 13th April 1943 and published in the *Gazette* of the same day. The Order was made in the exercise of the powers conferred by reg. 23 of the *National Security* (*Prices*) *Regulations*. That regulation gives the Commonwealth Prices Commissioner a general power to fix and declare the maximum price at which goods, which have already been the subject of a declaration by the Minister, may be sold (sub-reg. 1). It does the same thing with respect to " services," an expression the Regulations define (sub-reg. 2 of reg. 23 and reg. 3). But reg. 23 proceeds to particularize specific things which the Commissioner may do in the exercise of this general power. Among them is power to fix and declare maximum prices on landed or other cost together with a percentage thereon or a specified amount or both, maximum prices according to or upon any principle or condition specified by the Commissioner, and maximum prices relative to prices charged by individual traders on any date specified by the Commissioner with such variations, if any, as in the special circumstances of the case the Commissioner thinks fit.

Prices Regulation Order No. 1015 contains ten lengthy clauses, but the general policy which they disclose is to take the prices at which goods were sold as at 12th April 1943 by the respective vendors and the rates at which " services " were then supplied by the respective persons performing them and adopt those prices and rates as the maximum prices and rates for like goods and " services " thereafter sold or supplied. There are some qualifications. For instance, perishable goods are excepted. If a person has not sold or supplied any particular goods and services before the date of the Order, he is to do so afterwards only at cost, unless and until he obtains from the Commissioner a price or rate for his case. If goods or services are already the subject of fixed maximum prices or rates, which are lower than those otherwise resulting from the Order, they are to remain the maximum prices or rates. Further, there is an overriding provision enabling the Commissioner to fix prices or rates in the case of any individual by notice to him.

The Order was attacked, as a whole, on the ground that, in seeking to give effect to the foregoing policy or principle, it was not a real

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exercise of the power to fix prices, but amounted only to an attempt to prohibit any upward change of prices hitherto charged by traders considered individually. It involves, it was contended, no examination of prices in relation to commodities or production or trade and no determination of what prices were fair, proper or expedient and was, in fact, nothing but a " standstill " order. The bare statement of this ground of attack shows that it assumes that the purpose of the regulation is confined to the fixing of prices of commodities and services according to an objective standard of some sort, presumably economic in character, and that the Regulations do not extend to fixing prices in the sense of establishing them at the maximum rates charged by traders for the time being, in short, to repressing increases in prices by the individual trader. The text of the Regulations does not, in my opinion, justify this assumption. It contains no satisfactory indication that the purposes of the powers given by the Regulations are limited in the way suggested.

But the Order was also attacked on other grounds. The clause directly governing the present case was said to be too vague to amount to a " fixing " of prices, and other clauses were impugned on a number of grounds of greater or less cogency. Indeed, on the part of the respondent, no defence was attempted of one of these clauses, that dealing with services supplied for the first time after 12th April 1943. It is convenient to dispose at once of the questions raised as to the validity of clauses not directly governing the facts of the present case. In my opinion, we are not called upon to consider whether these provisions of the Order are good or bad because, in my opinion, the validity of the whole Order or of the clause applying to the present case does not depend upon their validity. Section 5 (5) of the *National Security Act* 1939-1943 operates, I think, to make s. 46 (*b*) of the *Acts Interpretation Act* apply to the Order. It is true that the latter part of s. 5 (5) says that, for the purposes of s. 46, orders, rules and by-laws shall be deemed to be Acts. Probably the word " Acts " is a verbal error for " Regulations," but we cannot rectify an Act of Parliament. To treat orders as equivalent to Acts would mean that instruments issued in pursuance of the orders are construed as required by pars. (*a*) and (*b*) of s. 46. The question here is whether orders as instruments issued in pursuance of regulations are governed by s. 46 (*b*). I think they are.

The earlier general words of s. 5 (5) are enough to submit orders themselves to the operation of the whole *Acts Interpretation Act*, including the directions contained in par. (*b*) of s. 46, and it is plain that this was the intention. Indeed, it is possible that in the case of any statutory regulation par. (*a*) of s. 46 operates without more

to make par. (*b*) applicable. It follows that the Order in question is to be " read and construed subject to the " (regulation) " under which it was made, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power."

This provision, and the analagous provision contained in s. 15A of the Act, has been discussed in this Court on a number of occasions : See *Australian Railways Union* v. *Victorian Railways Commissioners* (1) ; *Huddart Parker Ltd.* v. *The Commonwealth* (2) ; *R.* v. *Burgess* ; *Ex parte Henry* (3) ; *R.* v. *Poole* ; *Ex parte Henry* [*No.* 2] (4) ; *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (5) ; *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (6) ; *The Commonwealth* v. *Grunseit* (7) ; *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (8) ; *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (9) ; *Pidoto* v. *Victoria* (10) ; *Minister of State for the Army* v. *Dalziel* (11).

The device of expressly providing against the consequences of some parts of a statute proving *ultra vires* originated in the United States and has there been developed. An elaborate discussion of the effect of such provisions will be found in an article entitled " Separability and Separability Clauses in the Supreme Court " by Robert L. *Stern*, (1937) 51 *Harvard Law Review* 76. It can at least be said of them that they establish a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions. In the case of the Order now in question, I do not think that any such indication sufficiently appears.

The provision specifically governing the present case is clause 3 of the Order. So far as material, it fixes and declares, with respect to goods, the price at which any person may sell any goods on any terms and conditions to be (*sic*) the price at which that person sold

(1) (1930) 44 C.L.R. 319, at pp. 373, 385.
(2) (1931) 44 C.L.R. 492, at pp. 500, 507, 512, 529.
(3) (1936) 55 C.L.R. 608, at pp. 654, 659, 672, 689.
(4) (1939) 61 C.L.R., at pp. 642, 651, 653, 656.
(5) (1939) 61 C.L.R. 735, at p. 807.
(6) (1942) 66 C.L.R. 161, at pp. 174, 196.
(7) (1943) 67 C.L.R. 58, at p. 67.
(8) (1943) 67 C.L.R. 116, at pp. 144, 154.
(9) (1943) 67 C.L.R. 413.
(10) (1943) 68 C.L.R., at pp. 107, 118, 126, 130.
(11) (1944) 68 C.L.R. 261, at pp. 288, 310.

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substantially identical goods, stated shortly, on or last before 12th April 1943, on terms and conditions substantially identical with the first-mentioned terms and conditions. This provision appears to me to be referable to the power to fix and declare maximum prices according to or upon any principle or condition specified or to that to fix and declare maximum prices relative to prices charged by individual traders on any date specified (reg. 23 (1A) (*g*) and (*h*)). I think that it might be supported as an exercise of either power or possibly of both in combination. I am aware that in the latter power the word "on" in reference to a "specified" date creates a difficulty, but, having regard to the context and to the fact that it is given by a sub-paragraph in a catalogue of particulars by way of elucidation of the main power, I do not think that close literalness is demanded.

The weight of the attack on the validity of the clause of the Order was directed against the words "substantially identical," both where they qualify the word "goods" and where they are used with reference to "terms and conditions." It was said that they imparted an inadmissible vagueness to the whole clause. It may be conceded, and, 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. Otherwise the price is not "fixed." But I am unaware of any principle relating to the interpretation of statutory powers or the judicial examination of their exercise which would disable the Commissioner from introducing this very natural qualification of the epithet "identical" in describing commodities or terms of sale in an Order made in pursuance of powers in the form of those conferred upon him by reg. 23. In my opinion, the material parts of the Order are valid and effectual.

The appellants, however, contend that, even so, there is no sufficient admissible evidence to establish that the appellant company contravened the clause. The contention depends upon the admissibility against the company, and the effect, of some statements which the other appellant, its managing director, was proved to have made to officers of the Commonwealth Prices Commission. It was said that the evidence of these statements should have been rejected because they were not made in the course of the company's business but to officers investigating a transaction, passed and closed, with the view of putting penal laws in motion against the company. To make admissions on behalf of a corporate body in these circumstances, it was argued, fell outside the province even of a managing

director. I do not take that view. The conduct of the business of a trading company involves, in the conditions now prevailing, a continual or, at all events, a frequent necessity of communicating with departments of government about compliance with regulations, orders and other forms of control, and a readiness to deal with inquiries as to the company's transacting its business in conformity with them. The managing director and his wife appear to be the only directors of the company. The authority of the former is enough to cover everything incidental to the conduct of the business of the company. A perusal of the evidence shows that the admissions were made while investigating officers were conducting and completing a thorough examination of the company's transactions. I think that to answer their questions was not outside the scope of the authority of the managing director.

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Upon the effect of the admissions, the question, which was argued with exactness and care, is whether they are enough to establish in a criminal matter the substantial identity of the goods (bulk Berri Ruby Port) and the substantial identity of the conditions of sale. The admissions related to items shown on invoices and on a schedule prepared from invoices. There was no doubt of the description of the goods forming the subject of the sale alleged to amount to "black marketing." The issue was as to the description of the goods forming the subject of the sale prior to 12th April 1943 which the prosecution relied upon as establishing the maximum ceiling price. According to one version of the admission, the managing director said, "That was Berri Ruby Port. That was our usual price for Berri Ruby, 8s. 1d. a gallon." I think that is quite enough to establish the identity of the goods. It is true that there is some evidence suggesting that adherence to trade descriptions was a matter somewhat lightly regarded by the company, but that is no reason for treating this evidence as meaning less than it says.

As to the substantial identity of the conditions of sale, both transactions were with hotel keepers; the sales were by the gallon, the quantities were not small, and the wine in each instance was delivered in a cask. No reason appears for suspecting any variation of conditions and in all the discussions with the officers none was suggested on the part of the company. It may be that one buyer was a regular customer with a conventional "quota" and the other was not, but that is not a matter going to the conditions of the transaction, but only to its setting. In my opinion, this point also fails.

I think that the appeals should be dismissed with costs and the orders nisi discharged.

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McTIERNAN J. In my opinion, these appeals should be dismissed. The appellant company was charged with the offence of black marketing. This offence is defined by ss. 3 (*a*) and 4 (1) of the *Black Marketing Act* 1942. The alleged incriminating sale was a cash sale of Berri Ruby Port. The company made this sale on 19th August 1943 at 12s. 6d. per gallon. It was necessary for the prosecutor to prove that this price exceeded the maximum at which the company was permitted by the Prices Regulation Order No. 1015 to sell Berri Ruby Port for cash on the above date. The prosecutor relied upon a sale of port wine on 4th March 1943 to prove that such maximum price was 8s. 1d. per gallon. On this date, the company sold port wine to a buyer named McIlrath at 8s. 1d. per gallon. There is no evidence that this was not a cash sale: in the absence of such evidence it does not seem open to doubt that it was a cash sale. It is necessary for the prosecutor's case that it was the company's last sale of Berri Ruby Port prior to 12th April 1943. The invoice describes the goods sold to McIlrath as port wine. Proof that it was Berri Ruby Port was furnished by the Commonwealth officers who conducted an investigation into the company's observance of the above Prices Regulation Order. This evidence was that Crowther, the company's manager and managing director told them in the course of such investigation that the port wine so sold to McIlrath was Berri Ruby Port. It was argued that evidence that Crowther said that the wine was Berri Ruby Port was not admissible because he had no authority to make an admission which would be binding on the company about a past transaction. I do not agree with this argument. It was within the scope of Crowther's duty and authority as the manager of the company's business to communicate to the officers making the above investigation what information he had as to the identity of any goods which the company sold in the past to enable them to ascertain the maximum price at which the company was permitted under the above Prices Regulation Order to sell such goods: Cf. *Kirkstall Brewery Co.* v. *Furness Railway Co.* (1).

In my opinion, the evidence given upon the prosecution proves beyond reasonable doubt that the company sold Berri Ruby Port on 19th August 1943 at a price exceeding the maximum price at which the company was permitted under clause 3 of the above Order to sell that wine: and, unless the company's attack on the Order or the *Black Marketing Act* succeeds, its conviction for the offence of black marketing cannot be disturbed.

(1) (1874) L.R. 9 Q.B. 468.

which reversed the decision of the Court of Appeal (1); but there is no suggestion in the higher Courts that the evidence was wrongly admitted.

Article 42 of the articles of association of the appellant company enables the board of directors to confer upon a managing director authority to exercise all the powers of the company. In *Biggerstaff* v. *Rowatt's Wharf Ltd.* (2) *Lindley* L.J. said: "What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give the managing director all the powers of the directors except . . . The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide." More recent cases appear to have somewhat restricted this statement of the law. The most recent English case is, I think, *British Thomson-Houston Co. Ltd.* v. *Federated European Bank Ltd.* (3), where these cases are discussed, and I agree with *Tucker* J. in *Clay Hill Brick & Tile Co. Ltd.* v. *Rawlings* (4), that they were correctly summarized by the reporter when he said that they show that "if the articles merely empower the directors to delegate to an officer authority to do the act, and the officer purports to do the act, then—(*a*) if the act is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot assume that the directors have delegated to the officer power to do the act; and if they have not done so, the plaintiff cannot recover . . (*b*) if the act is one which is ordinarily within the powers of such an officer, then the company cannot dispute the officer's authority to do the act, whether the directors have or have not actually invested him with authority to do it" (5). I agree with *Lowe* J. in *Butcher* v. *Longwarry and District Dairymen's Co-operative Association Ltd.* (6), that a company must have power to make admissions in relation to its business, and that the board of directors of a company, in whom the management of the business is vested by the articles, must have power to make such admissions on its behalf. It was, therefore, a power which the board of directors of the appellant company was authorized to confer upon Crowther, and one which a stranger

(1) (1892) A.C. 201.
(2) (1896) 2 Ch. 93, at p. 102.
(3) (1932) 2 K.B. 176.
(4) (1938) 4 All E.R. 100, at p. 105.
(5) (1932) 2 K.B., at p. 184.
(6) (1939) V.L.R. 263.

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was entitled to presume had been delegated to him if it was part of the ordinary duty of the manager of a business to answer inquiries with respect to the conduct of that business. It is to be noted that, in *Garth* v. *Howard* (1), *Tindal* C.J. thought that a declaration of a shopkeeper that his master had received goods might probably have been evidence against the master if the transaction out of which the action arose had been one in the ordinary trade of the master as a pawnbroker, in which trade the shopman was his agent, as it might be held within the scope of such agent's authority to give an answer to such inquiry made by any person interested in the goods deposited with the pawnbroker. Under modern legislation, even in peace-time, authority is given to many types of officials, for instance under industrial, health, and taxation Acts, to inspect premises and books and to extract information with respect to the carrying on of a business, including information relating to past transactions, so that some person or persons engaged in the business must be presumed to have authority to answer their questions. One of such persons must be, I think, the manager of the business. Crowther must therefore be presumed to have been authorized to make the admission because the power to answer such questions on behalf of the company was a power which was vested in the board of directors, so that it was a power which the board could delegate to Crowther under the articles of association, and the company cannot dispute that the power had been delegated, since the act was one which would ordinarily be within the powers of the manager of a company.

The second ground urged by Mr. *Spender* was that par. 3 of the Order is void for uncertainty, or alternatively that this paragraph forms part of a general scheme for fixing the prices of goods and rates of services as at 12th April 1943, so that, if any part of the Order is void, the whole fails. For this purpose, he attacked the validity of several other parts of the Order and in particular that portion of par. 4 by which the Prices Commissioner fixed and declared the maximum rate at which any person might sell or supply services which were not substantially identical with any services which he sold or supplied prior to 12th April 1943 to be the cost of the services to that person. It is probable that pars. 3 and 4 of the Order were intended to be complementary, par. 3 fixing the ceiling

(1) (1832) 8 Bing. 452 [131 E.R. 468].

prices and rates for goods and services of a kind sold or supplied previously to 12th April 1943, and par. 4 fixing prices and rates for goods and services not sold or supplied previously to that date. It is also difficult to uphold the validity of the challenged portion of par. 4. But reg. 22, which authorizes the Minister by separate declarations to declare any goods or services to be declared goods or services for the purposes of the Regulations, and reg. 23, which authorizes the Commissioner to fix prices and rates with respect to any declared goods or services, clearly contemplate that all or any goods or all or any services, in their totality or separately, may have their prices and rates declared and fixed. Further, the *Acts Interpretation Act* 1901-1941, s. 46 (*b*), provides that, where any Act confers upon any authority power to make any instrument, any instrument so made shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power, while the *National Security Act* 1939-1943, s. 5 (5), provides that the *Acts Interpretation Act* shall apply to the interpretation of any orders made in pursuance of the regulations in like manner as it applies to the interpretation of regulations and for the purposes of s. 46 of that Act those orders shall be deemed to be Acts. The reference to Acts in the sub-section is intended, I think, to make orders notional Acts for the purposes of the second limb of s. 46 (*a*). In these circumstances, it seems to me that if par. 3 fixes and declares a price within the meaning of the Regulations, s. 46 (*b*) must operate to preserve its validity, although other parts of the Order may be invalid. It is clearly severable from these other parts, and will continue to operate in the same manner with respect to the goods and services to which it applies as it would have done if the Order as a whole had been valid.

The only question is, therefore, whether par. 3 is valid. Reference was made to the decisions of this Court in *Vardon* v. *The Commonwealth* (1), *Bendixen* v. *Coleman* (2) and the unreported case of *Claxton* v. *Cody* (3), where the decision of the Supreme Court of New South Wales in *Ex parte Zietsch*; *Re Craig* (4) was approved.

(1) (1943) 67 C.L.R. 434.
(2) (1943) 68 C.L.R. 401.
(3) December 1944.
(4) (1944) 44 S.R. (N.S.W.) 360; 61 W.N. 211.

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Reference was also made to the recent decisions of the same Supreme Court in *Ex parte McMillan*; *Re Craig* (1) and *Ex parte Byrne*; *Re King* (2). I adhere to the view expressed in *Vardon* v. *The Commonwealth* (3) and *Arnold* v. *Hunt* (4) that the legislation is contained in the *Prices Regulations*, and that the declaration and fixation of prices of goods and rates of services by the Commissioner is an executive act: Cf. *R.* v. *City of Westminster Assessment Committee*; *Ex parte Grosvenor House (Park Lane) Ltd.* (5), where *Scott* L.J. said that the assessment committee, except when performing certain quasi judicial functions, "is an executive or ministerial body of an expert character, whose function is to make the list on the lines laid down by the relevant legislation." If the Commissioner does not define the price, either specifically or by means of a formula the application of which will determine the price, he has not exercised the power because he has not fixed any price. Paragraph 3 purports to fix a price by a formula. The ingredients which constitute the formula are clearly prescribed. The difficulty, if any, is to ascertain whether the two sales are of substantially identical goods sold upon substantially identical terms and conditions. Since traders are unlikely to have altered their business methods since April 1943, this difficulty is probably more argumentative than real. As *Jordan* C.J. said in *Ex parte O'Sullivan*; *Re Craig* (6), "a thing can be identical only with itself. Absolute identity between two different things is, in the nature of things, impossible. To say of two things that they are substantially identical means that they are exactly similar in everything that matters for all relevant purposes. Whether two things are substantially identical is a question of fact which may be difficult of determination in a particular case, but the problem is clearly enough set." Regulation 23 (1A) (*h*) contains express power for the Commissioner to fix maximum prices relative to prices charged by individual traders on any date he specifies; reg. 23 (2A) (*g*) contains a similar power in the case of services, and this is what he has done in the present case. I can see no necessity to name any individuals in the exercise of this power. Paragraph 3 of the Order, so far as it relates to goods, is therefore

(1) (1944) 45 S.R. (N.S.W.) 229; 62 W.N. 99.
(2) (1944) 45 S.R. (N.S.W.) 123; 62 W.N. 104.
(3) (1943) 67 C.L.R. 434.
(4) (1943) 67 C.L.R. 429.
(5) (1941) 1 K.B. 53, at p. 62.
(6) (1944) 44 S.R. (N.S.W.) 291, at p. 298; 61 W.N. 197, at p. 199.

Clause 3 of the Order, to the extent to which it applies to the selling of goods, is within the terms of reg. 23 (1A) (*g*) and (*h*) of the *National Security* (*Prices*) *Regulations*. The validity of clause 3 is challenged on the ground that its provisions are too uncertain to enable any person selling any goods to which it applies to determine the maximum price at which he may sell them. The principles which are stated in *Vardon's Case* (1), and *Bendixen's Case* (2), are relied upon by the appellant to support this challenge. It is based upon the use of the words " substantially identical." These words, it is argued, fail to give a sufficiently certain direction about the goods or the terms and conditions to which the provisions of clause 3 intend to refer. The challenge should not succeed. In this context the words " substantially identical " are not vague. They point out with reasonable certainty the particular sale by reference to which clause 3 purports to fix the maximum price of any goods to which the clause applies.

Most, if not all, of the other clauses of the Order, besides clause 3, were challenged on various grounds. It is necessary for the success of the appeal, not only that one or more of the other clauses of the Order should be bad, but also that clause 3 should fall with any other clause or clauses that are bad. I do not infer from the terms of the Order that the provisions which are made by clauses 3 and 4 for fixing the prices of goods and services respectively are interwoven or that the intention and policy of the Order are that, if the provisions regarding the prices of services or any of the provisions subsequent to clause 4 should fail, the provisions of clauses 3 and 4 regarding the price of goods should not operate. These provisions are, in my opinion, valid and severable, even if any other provisions of the Order are invalid.

Finally, it was submitted that the *Black Marketing Act* 1942 vests in the Attorney-General and the Minister administering the Regulations, and the committee powers which are of a judicial nature and is, therefore, an infringement of the provisions of the Constitution relating to the vesting of judicial power of the Commonwealth in courts. If this submission were correct, the Act would not be within the legislative powers of the Parliament. Section 3 of the *Black Marketing Act* includes acts which are offences under s. 10 of the *National Security Act* 1939-1943. It is argued

(1) (1943) 67 C.L.R. 434. (2) (1943) 68 C.L.R. 401.

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that s. 4 of the *Black Marketing Act* purports to vest judicial power in the Attorney-General, the Minister and the committee, because it leaves it to them to predetermine in advance of the Court whether a person charged with an act which is an offence under s. 10 of the *National Security Act* and s. 4 of the *Black Marketing Act* should be liable to the minimum punishment provided by s. 4 of the latter Act or to the punishment provided by s. 10 of the former Act. In my opinion, the power which the Attorney-General has under s. 4 (4) of the *Black Marketing Act* is of the same nature as the power which he has under s. 10 (4) of the *National Security Act*. I am unable to see any resemblance between the power of the Attorney-General under s. 4 (4) and judicial power. The functions which the Minister and the members of the committee have under the section resemble those exercised by officers whose duty it is to advise and make recommendations about prosecutions. These functions are not part of the judicial power of the Commonwealth. If the view that s. 4 of the *Black Marketing Act* purported to vest judicial power in the Attorney-General had not the support of *Jordan* C.J. in *Ex parte Coorey* (1), I should not have thought that the view was tenable at all. *Davidson* J. and *Nicholas* C.J. in Eq. did not agree with the view of the Chief Justice. With respect, their conclusion on this question was, in my opinion, correct.

The appellant Crowther was prosecuted for an offence against s. 5 of the *Black Marketing Act*. The evidence conclusively established that at the relevant time Crowther was a director of the appellant company and was the manager of its business and was actively engaged in its management. The conviction of the company cannot be disturbed. It follows that Crowther's appeal must be dismissed.

WILLIAMS J. These are appeals by the company and its managing director, Crowther, against their convictions under the *Black Marketing Act* for selling Berri Ruby Port to one Cattana on 13th August 1943 at a price in excess of that fixed by par. 3 of Prices Regulation Order No. 1015. The sale to Cattana was for cash at 12s. 6d. per gallon, and the case for the Crown was that the fixed price for such a sale under the Order was 8s. 1d. per gallon, that being the price at which the same brand of port was sold by the company to one

(1) (1944) 45 S.R. (N.S.W.) 287; 62 W.N. 167.

McIlrath for cash on 4th April 1943, that being the last sale by the company prior to 12th April 1943 of Berri Ruby Port.

The Crown called Cattana as a witness to prove the sale on 13th August, and also tendered in evidence copy invoices in the books of the company relating to both sales. The invoice of the sale to Cattana stated that the wine was Berri Ruby Port, and that the sale was for cash, but the invoice of the sale to McIlrath only stated that the goods were port wine and that the price was 8s. 1d. In order to prove its case, it was necessary for the Crown to establish that the two sales were sales of substantially identical goods sold on substantially identical terms and conditions. It was open to the magistrate on the evidence, I think, to draw the inference that the sale to McIlrath was a sale for cash, but this still left a gap in the Crown case as to the brand of port sold to McIlrath. The Crown purported to bridge this gap by giving evidence of an admission made by Crowther, who, it was proved, was the managing director of the company, to two investigating officers at an interview in August 1944 that the wine sold to McIlrath was Berri Ruby Port. At this interview, Crowther was expressly warned that he was not being examined under reg. 17 of the *National Security* (*Prices*) *Regulations*, and that he need not answer questions, particularly where they might incriminate him.

The first ground urged by Mr. *Spender* in support of the appeal was that this admission related to a past transaction, and was therefore not admissible in evidence against the company. In *Taylor* on *Evidence*, 12th ed. (1931), par. 602, it is stated that " the admission or declaration of his agent binds him " (i.e. the principal) " only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. When the agent's right to interfere in the particular matter has ceased the principal can no longer be affected by his declarations, any more than by his acts, but they will be rejected in such case as mere hearsay."

One of the authorities relied upon in support of this statement is *Kirkstall Brewery Co.* v. *Furness Railway Co.* (1), which was referred to during the argument. There the statements made to the police by the stationmaster were made in the course of his authority to take steps to cause to be apprehended a porter whom he reasonably suspected of having stolen a parcel, and the case is not, in my

(1) (1874) L.R. 9 Q.B. 468.

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opinion, any authority for the proposition that an agent can make admissions on behalf of his principal otherwise than in the course of some act that he is authorized to do. Thus, reports to the police of the servants of a dockyard company, not possessing a similar authority, relating to the theft of goods in its control made to the police subsequent to the occurrence were held to be inadmissible against the company in *Lampson & Co.* v. *London and India Dock Joint Co.* (1). But there are some agents who derive from their employment an implied authority of a sufficiently wide nature to make their admissions admissible against the principal even with respect to past transactions, provided that, at the time the admissions are made, they are still in the employment of their principal. This is because their employment is such that they must be presumed to have authority to give information with respect to such transactions, so that it is given in the course of an act they are authorized to do. Thus in *Meux's Executors' Case* (2) where the executors of a deceased shareholder applied to the board of directors of a company to ascertain the extent of his interest in and liability to the company, and the board replied that his liability was less than it was in fact, the company was held bound by the reply. In *In re Devala Provident Gold Mining Co.* (3), *Fry* J. said " In *Meux's Case* (2) . . . the statement was part of the transaction."

The duties of a manager of a business would usually be to conduct the business on behalf of his employers, and, when he is found so acting, anything that would ordinarily be done in the usual course of the business which he is transacting may be presumed, until the contrary is shown, to be within the scope of his authority: *Bank of New South Wales* v. *Owston* (4). In *Simmons* v. *London Joint Stock Bank*, as appears from the report in the *Law Times Reports* (5), the plaintiff tendered part of the evidence of the manager of a bank given in a previous case as to the practice of the bank in making loans to customers. The defendant objected that it was not within the authority of a bank manager to make admissions, but *Kekewich* J. admitted the evidence as statements made by an officer of the bank as to its general course of dealing. The case went to the Court of Appeal (6) which affirmed *Kekewich* J., and to the House of Lords

(1) (1901) 17 T.L.R. 663.
(2) (1852) 2 DeG. M. & G. 522 [42 E.R. 975].
(3) (1883) 22 Ch. D. 593, at p. 596.
(4) (1879) 4 A.C. 270, at p. 289.
(5) (1890) 62 L.T. 427, at p. 429.
(6) (1891) 1 Ch. 270.

valid, and I express no opinion as to the validity of other parts of the Order.

The third ground urged by Mr. *Spender* was that the *Black Marketing Act* 1942 is invalid because s. 4 (4) infringes the judicial power of the Commonwealth. This sub-section provides that the offence of black marketing shall not be prosecuted without the written consent of the Attorney-General after report from the Minister administering the regulations in relation to which the offence was committed and advice from a committee appointed by the Attorney-General and consisting of a representative of the department administered by that Minister, a representative of the Attorney-General's Department and a representative of the branch of the Department of Trade and Customs known as the Prices Branch. It is true that the same set of facts will constitute an offence under the *Prices Regulations* or under the Act, and that, under the Regulations and the Act, this offence may be tried summarily or upon indictment. But the determination whether the accused is to be charged under the Regulations or the Act is, I think, a purely administrative function of the same essential quality as the determination whether an accused shall be tried summarily or on indictment for an offence triable summarily or on indictment under a single Act, and the determination is still administrative whether it is made by the Attorney-General or any other law officer of the Crown on his sole initiative or upon or after any report or advice from any specified person or body of persons. The whole prosecution, when it is launched, takes place in a court, the accused is found innocent or guilty by a court, and Parliament is entitled to make the punishment of an offence upon conviction what it likes, and to make it differ according to the alternative sections of an Act or Acts under which the charge is laid. The view that the whole function is administrative receives support, I think, from the judgment of the Privy Council in the recent case of *King-Emperor* v. *Benoari Lal Sarma* (1). There special courts were set up by the Governor-General of India by an ordinance made under the *Government of India Act* 1935, read with the *India and Burma (Emergency Provisions) Act* 1940, and it was held that the ordinance was not invalidated by reason of provisions which left it to the local government or some officer of the local government empowered by it in that behalf to

(1) (1945) A.C. 14.

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direct what offences or classes of offences and what cases or classes of cases which would otherwise be tried in the ordinary courts should be tried by the special courts because this was an administrative function, and not delegated legislation.

For these reasons, I am of opinion that all the grounds fail, and that the appeals should be dismissed.

Appeals dismissed. Orders nisi discharged.

Solicitors for the appellants, *S. G. Sommers & Stewart.*

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

J. B.