[HIGH COURT OF AUSTRALIA.]

CANN'S PROPRIETARY LIMITED . . . PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1946.

MELBOURNE, *Feb.* 20-22;

SYDNEY, *April* 9.

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

National Security—Price control—Fixing of prices by reference to a standard—Order—Validity—Uncertainty—National Security (Prices) Regulations (S.R. 1940 *No.* 176—1944 *No.* 113), *reg.* 23—*Prices Regulation Orders Nos.* 1454, 1878.

A prices regulation order purported to fix maximum prices to be charged by manufacturers for various articles of women's outerwear by methods which involved the determination of the cost of the materials of which the articles were made; in the case of some articles, of the "cost" of a specified length "of the material used" was to be ascertained and, in the case of others, of the "actual cost of the material used" was to be ascertained. The order contained the following definitions:—"'Actual cost of the material used' . . . means, in relation to any article . . . one-tenth of the cost of the shortest length of material or materials . . . of the same width as that used in the 'article' from which ten such articles . . . may be cut." "'Cost' means in respect of any material . . . the actual purchase price of that material . . . or where such material . . . has been purchased with other material . . . that part of the total purchase price which is properly attributable to such first-mentioned material." "'Material' means . . . the principal material or materials used and does not include any material used for linings, facings or trimmings."

Held, by *Latham* C.J., *Starke* and *Williams* JJ. (*Dixon* J. dissenting), that the order was not a valid exercise of the power conferred by reg. 23 of the *National Security (Prices) Regulations* in as much as the methods it prescribed involved elements of estimation, approximation and apportionment and it therefore did not establish a certain objective standard by reference to which prices could be calculated.

King Gee Clothing Co. Pty. Ltd. v. *The Commonwealth*, *ante*, p. 184, applied.

DEMURRER.

In an action in the High Court against John Albert Beasley and the Commonwealth the plaintiff in its statement of claim (indorsed on the writ and dated 25th October 1945) pleaded substantially as follows :—At the material times the plaintiff carried on the businesses of manufacturer and retailer of women's and girls' outerwear in Melbourne. On 29th February 1944 one McCarthy, acting as the Assistant Prices Commissioner of the Commonwealth, purported to make Prices Regulation Order No. 1454 under the *National Security* (*Prices*) *Regulations* purporting to fix and declare the maximum price at which any manufacturer might sell women's and girls' outerwear. The Order was published in the Commonwealth *Gazette* on 2nd March 1944. The defendants contended that the provisions of the Order No. 1454 applied to the plaintiff and to its operations ; that the purported Order was invalid and a nullity on the ground that it was not authorized by the *Prices Regulations*, and on the further ground that it was uncertain. The defendant John Albert Beasley was a member of the Federal Executive Council acting for and on behalf of the Attorney-General of the Commonwealth. The defendant Beasley for and on behalf of the Attorney-General informed the Supreme Court of Victoria and charged that on various dates in July and August 1944 the plaintiff had contravened the *Black Marketing Act* 1942 by selling articles of women's outerwear at prices greater than the maximum prices fixed for the articles by the *Prices Regulations* and the Order No. 1454. The information and charges stood to be tried by a judge and jury in the Supreme Court at the November sittings of that year.

The plaintiff claimed a declaration that Prices Regulation Order No. 1454 was void and of no effect.

The defendants demurred to the statement of claim on the grounds that (*a*) it disclosed no cause of action ; (*b*) Prices Regulation Order No. 1454 and every part thereof was a valid exercise of the power conferred on the Commonwealth Prices Commissioner by the *National Security* (*Prices*) *Regulations*.

After the delivery of the demurrer the Order No. 1454 was amended by Prices Regulation Order No. 1878, and on the hearing of the demurrer the plaintiff's claim was treated as relating to Order No. 1454 as so amended.

The provisions of Order No. 1454, and the amendments thereto, sufficiently appear in the reasons for judgment hereunder.

In addition to the claim for a declaration, the plaintiff claimed an injunction restraining the defendants from proceeding with the criminal charges, but no argument was directed to this claim, and

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the Court was informed that the proceedings in the Supreme Court had been adjourned to await the outcome of the present proceedings.

At the instance of the Court, counsel for the plaintiff began.

Tait K.C. (with him *Phillips* K.C.), for the plaintiff. Prices Regulation Order No. 1454 is the only order mentioned in the statement of claim and the demurrer and the only one relevant to the indictment. The plaintiff challenges the validity of pars. 5 and 6 of that Order; par. 4 is also material, as it contains definitions of expressions in the schedules to which pars. 5 and 6 refer. Order No. 1878 amends par. 4 (*a*) (definition of "actual cost of the material used") of Order No. 1454 to correct an error. The original par. 4 (*a*) was meaningless, and it would still be open to the plaintiff to rely on that defect for the purposes of the indictment. All the amendment does is to insert the words "the cost of" after the words "one-tenth of" in the original par. 4 (*a*). Order No. 1878 also amends par. 6 of Order No. 1454, but not in such a way as to affect the plaintiff's contentions here. Whether in their original form or as amended, pars. 4 (*a*) and 6 (as well as par. 5 and other definitions in par. 4) are, in the plaintiff's submission, invalid because no principle, standard or rule is laid down from which a price can be calculated with exactness or certainty. The methods prescribed by par. 5 and those prescribed by par. 6, when those paragraphs are read with the definitions in par. 4, involve matters of estimation, judgment and discretion which do not allow the ascertainment of prices with certainty, and, accordingly, each of those paragraphs is invalid (*King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1)). The plaintiff has an interest in challenging both par. 5 and par. 6. In the future it may or may not keep the records mentioned in par. 6. For the purposes of the indictment the plaintiff claims that it has kept the records, but the Crown alleges that it has not. For the future it will be concerned with par. 5 and with par. 6 according as it does or does not keep records. Referring first to par. 5, prices are fixed by the methods set out in the First Schedule to the Order. The schedule describes various garments, and for each of them the maximum price is to be the sum of a number of items. For some garments one of the items is the "cost" of a specified length "of the material used"; for other garments the corresponding item is, in some instances, "actual cost of material used" and, in others, "actual cost of material and linings." For the meaning of those expressions one must refer to the definitions in par. 4 of "Cost" (sub-par. *b*), "Material" (sub-par. *e*), "Actual cost of the material used," &c. (sub-par. *a*). The definition

(1) *Ante*, p. 184.

of " cost " in relation to materials is of primary importance ; cost of material is relevant to the price of every garment to which the Order relates. According to par. 4 (*b*), cost of material means (1) the actual purchase price of the material or (2) where the material " has been purchased with other material . . . that part of the total purchase price which is properly attributable to such first-mentioned material." The determination of what is " properly attributable ", where, for example, several materials are bought for a lump sum without any specification of a price for any one material, necessarily involves estimation or apportionment and is therefore a matter of judgment and discretion. This has the effect of vitiating both branches of the definition. It is not possible to sever the second branch and leave the first branch—actual purchase price of the material—standing ; to do so would give the order an effect substantially different from that which is intended by the definition in both its branches. The definition of " material " (par. 4 (*e*)) has a similar vice. It means " the principal material or materials used " in a garment. This involves a decision by someone as to what is the " principal " material, which is a matter of judgment. According to the definition, there may be more than one " principal " material in a garment made of several materials, and it seems clear that differences of opinion on such a matter would be inevitable. According to par. 4 (*a*) (as amended), " actual cost of the material used " means " in relation to any article . . . one-tenth of the cost of the shortest length of material or materials . . . of the same width as that used in the " article " from which ten such articles may be cut." The definitions of " cost " and " material " must be read into this clause. It therefore has the vices of those definitions. Moreover, the ascertainment of " the shortest length of material . . . from which ten . . . articles may be cut " is plainly a matter calling for the exercise of skill and judgment. The results may vary with different cutters ; thus, no certain standard is provided. The operation of par. 5 of the Order depends to such an extent on these definitions that it fails to provide any such standard as will pass the test laid down in the *King Gee Clothing Co. Pty. Ltd.'s Case* (1). Paragraph 6 is open to the same objections. It requires the ascertainment of cost of material (see Third Schedule). This brings in the definitions of " cost " and " material " already mentioned and introduces the same elements of uncertainty as par. 5. Paragraph 6 has further vices of its own, as will be seen by reference to the proviso to that paragraph and the Fifth and Sixth Schedules, which, although not mentioned in the proviso, must be read with it. The proviso

(1) *Ante*, p. 184.

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requires a periodical adjustment of the aggregates of the figures relating to labour costs in the Third Schedule. This shows that the detailed costs record in the Third Schedule does not purport to record the figures of an exact expenditure in respect of a particular garment. It necessitates a pre-estimate. Then an adjustment may be necessary by relation to the actual labour cost. Accordingly, quite apart from any mere difficulty of interpretation, par. 6 is defective in that it does not set up any certain standard.

Barry K.C. (with him *Gillard*), for the defendants. The argument for the plaintiff fails to distinguish between the validity and the effectiveness of the Order. An order may be a perfectly valid exercise of power and yet, because of obscurity in its terms, fail to achieve its object. Uncertainty from the point of view of interpretation is not a test of validity, and the mere fact that an order presents difficulties in interpretation does not invalidate it: See *Bendixen* v. *Coleman* (1); *Fraser Henleins Pty. Ltd.* v. *Cody* (2); *King Gee Clothing Co. Pty. Ltd.'s Case* (3), per *Dixon* J.; *Gill* v. *City of Prahran* (4); *Potts or Riddell* v. *Reid* (5); *Leyton Urban District Council* v. *Chew* (6). The definition of "cost" does not involve any matter of estimation. The phrase "properly attributable" calls for a mathematical computation excluding any question of estimation. Looking at a particular transaction, the question is whether any sum is "properly attributable." If no certain sum can be attributed, the case is simply one for which the Order does not provide. The difficulty of devising a formula to cover every situation may well have the result that some transactions are not covered, but that does not go to validity *qua* the transactions which are covered. It merely means that as regards some transactions the formula is not effectual. The formula must be regarded as having been designed to deal with the ordinary run of transactions. Its validity is not to be tested by imagining extraordinary cases in relation to which difficulties can be conceived. The plaintiff's contention that opinions might differ as to what was "properly attributable" is met by the submission that the definition is directed to computations that can be made upon which all reasonable people would agree, having regard to the facts of a particular transaction. Even if the second branch of the definition of "cost" is bad for the reason advanced by the plaintiff, it is severable. There is no reason why the first branch—which, it is conceded, is not objectionable—should not

(1) (1943) 68 C.L.R. 401, at p. 416.
(2) 70 C.L.R. 100.
(3) *Ante*, p. 184.
(4) (1926) V.L.R. 410, at p. 413.
(5) (1943) A.C. 1.
(6) (1907) 2 K.B. 283.

remain. The second branch is merely an alternative directed to special cases, and it can be dropped. If the first branch does not provide a formula for all cases, the only practical result is that some cases are outside the scope of the Order; that is to say, no price is fixed in such cases. The plaintiff's objection to the definition of "material" is unreal. What is a "principal" material is a question of fact. Any difficulty that may be found in answering the question is merely a difficulty of applying the law to the facts and is not a matter that goes to validity. The principal material in a garment is that of which it is mainly made, that is, as a matter of quantity. For this purpose a garment could have two or more principal materials, so long as they are materials which make up the garment as apart from immaterial additions which add appearance to the garment but do not give it its character as a garment. No real difficulty arises in treating more than one material as a principal material. Where the matter to be determined is the cost of a specified length of material, it would not be a breach of the Order to take the cost per yard of any one of the principal materials and multiply that by the number of yards stipulated. Accordingly, the manufacturer could legitimately charge the cost of the specified length of the highest-priced principal material used, notwithstanding that it represented more than his actual expenditure. That cost would be the maximum which he could not exceed; it would not be an amount which he must charge; he could, if he chose, charge the lower figure representing actual cost. In any event it is only in relation to the first four articles described in the First Schedule that any difficulty in this regard will be encountered. These could be severed without affecting the validity of the remaining provisions. The definition of "actual cost of the material used," &c., applies only to the First Schedule. It is implicit in the expression "shortest length of material . . . from which ten . . . articles . . . may be cut" that a common general standard is referred to; the standard, it is submitted, is that of the reasonably expert cutter, and, if so, the provision is not defective in the matter of a standard. Where a garment is made up in various sizes it would be consistent with the definition to take each size separately; that is, in respect of a small size the "actual cost of the material used" in one coat of that size would be one-tenth of the cost of the shortest length from which ten garments *of that size* might be cut, and likewise as to larger sizes. Accordingly, par. 5 of the Order is not invalid. As to par. 6, the "prescribed records," so far as here relevant, are those in the Third, Fifth and Sixth Schedules: See definition in par. 4 (*f*). The plaintiff's objections to par. 6, to the extent to which they depend on the definitions of "cost" and

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"material," have already been dealt with. So far as the Third Schedule is concerned, the plaintiff's argument is misconceived. The form in the schedule is described as, and is, a detailed costs *record*, not an estimate. It is a prescribed record which has to be kept of each garment; it is not an estimation at all. It is the work ticket for each garment. It provides the data from which the Fifth Schedule is compiled. It is desirable to have both forms so that one can be checked against the other. The proviso to par. 6 is in no way ambiguous or uncertain. It comes into operation only when the time worked, as recorded in the detailed costs record (Third Schedule), exceeds the time worked by employees as recorded in the wages book or other such record kept by the employer. A margin of error of five per cent is allowed. If that margin is not exceeded, the proviso does not come into operation at all. When the proviso is read with the definition of "prescribed records" in par. 4 (*f*) and with the Sixth Schedule, it is seen that the reconciliation is made in relation to each successive period of four weeks, that is, four consecutive working weeks. There is no basis for a suggestion that the four-weekly periods may overlap. It would not be practicable to use the form in the Sixth Schedule in that way. The effect of the proviso is clearly that, if for a four-weekly reconciliation period there is an excess of more than five per cent, prices are reduced as prescribed for the ensuing four-weekly period. Thus, in cases in which the proviso operates there is no uncertainty as to prices at any time.

Phillips K.C., in reply.

Cur. adv. vult.

April 9.

The following written judgments were delivered:—

LATHAM C.J. This demurrer raises questions with respect to the validity of Prices Regulation Order No. 1454, relating to women's and girls' outerwear. The Order was made under the *National Security* (*Prices*) *Regulations*. Regulation 23 (1) enables the Prices Commissioner to fix by order the maximum price of any declared goods. Regulation 23 (1A), par. *g*, enables the Commissioner to fix maximum prices according to or upon any principle or condition specified by him, and par. *h* enables him to fix prices "so that such prices shall vary in accordance with a standard, or time or other circumstance, or shall vary with profits or wages, or with such costs as are determined by the Commissioner." The Assistant Prices Commissioner may exercise the powers and functions of the Commissioner (reg. 7A (2)).

In the Prices Regulation Order now under consideration, the Assistant Prices Commissioner has exercised the powers conferred upon him by reg. 23 (1A). The Order does not specify particular prices as maximum prices in respect of the garments to which it applies, but it provides for a means of determining such prices by reference, in one class of cases, to cost of material, fixed allowances for certain labour, sales tax (in the case of retail orders), with percentage additions to cover other expenses and to provide for profit, and in another class of cases by reference to detailed costs records for which the Order provides.

In the case of *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1), it was held that where the Commissioner fixes prices by reference to a standard, the standard must not be such that any element therein can be ascertained only by the exercise of discretion in apportionment, allotment, allocation, or otherwise. Accordingly, where the determination of the maximum price for male outerwear depended upon a calculation of the value of what was described as "indirect labour," and the ascertainment of such value involved matters of estimate, judgment and discretionary apportionment, it was held that the application of such a standard did not result in fixing a price, and that a part of the order was invalid for this reason.

Order No. 1454 deals with the prices of women's and girls' outerwear to be charged by manufacturers, semi-manufacturers, wholesale merchants and retailers, and also fixes maximum charges for making up such outerwear. The plaintiff is a manufacturer and retailer of such outerwear. The maximum prices at which a manufacturer may sell for sales other than by retail and for sales by retail are dealt with in pars. 5 and 6 of the Order.

The Order prescribes two methods of fixing prices in the case of sales by manufacturers. Paragraph 5 provides as follows:—

"I fix and declare the maximum price at which any manufacturer who does not keep the prescribed records may sell any women's or girls' outerwear of the descriptions set out in the First Schedule to this Order to be the price specified in that Schedule."

(Paragraph 6, which will be considered later, relates to manufacturers who keep the prescribed records.)

When a manufacturer does not keep the prescribed records, the prices are those "specified in the First Schedule." The First Schedule relates to sixteen classes of garments, two of the classes containing several sub-divisions. In the case of women's top coats and dresses, the maximum price is defined as the sum of either four or five items. Women's top coats made of materials not exceeding

(1) *Ante*, p. 184.

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forty-eight inches in width may be taken as an example. In this case the maximum price is—

"The sum of—

(*a*) Cost of $2\frac{3}{4}$ yards of the material used;

(*b*) 7s. 6d. for linings;

(*c*) 5s. for making and trimmings;

(*d*) Sales tax (in respect of sales by retail only);

(*e*) an amount calculated as follows:—

(i) for sales other than by retail—25 per cent. of the sum of (*a*), (*b*) and (*c*);

(ii) for sales by retail—50 per cent. of the sum of (*a*), (*b*), (*c*) and (*d*)."

Similar provisions apply to other top coats and to two classes of dresses, except that the specified length of material varies in the different cases, and that there is no provision relating to linings in the case of dresses. In the other twelve classes of garments there is no reference to length of material used, but the first item is "actual cost of material and linings" or "actual cost of material used" or "actual cost of material and linings used."

It is evident that these provisions cannot be applied unless it is possible to determine (in the case which I am taking as an example) the "cost" of $2\frac{3}{4}$ yards of the "material" used.

"Cost" is defined in par. 4 (*b*) of the order in the following terms:—

"'Cost' means in respect of any material, linings or trimmings, the actual purchase price of that material or those linings or where such material, linings or trimmings is or has been purchased with other material, linings or trimmings or other goods, that part of the total purchase price which is properly attributable to such first-mentioned material, linings or trimmings."

It will be observed that there is no provision relating to the actual purchase price of trimmings, but only of material or linings, although the initial words of the definition would lead one to expect that "cost" would be defined in relation to each of these three constituents of a garment. This omission may possibly be explained by the fact that throughout the First Schedule a definite rate is fixed for "making and trimmings" (except in the case of costumes and suits when the word "trimming" is used); for example, in the case which I have quoted the allowance is "5/- for making and trimmings."

It is not suggested that there is any difficulty in applying the first part of the definition, which determines "cost" by reference to "the actual purchase price." But the definition was attacked in relation to its second part, which deals with cost where material, &c., has

been purchased with other material or goods. In such a case "cost" means "that part of the total purchase price which is properly attributable" to the material, linings or trimmings in question. Thus where there is no actual separate purchase price of the material (that is, in all cases except where the material was purchased at so much a yard or separately at a lump sum) this provision makes it necessary to estimate what part of a single "total purchase price" should be attributed to material, linings or trimmings purchased with a quantity of other things—possibly quite heterogeneous. Such an estimate would, it was argued, necessarily be subjective, and would involve just the elements of estimation, approximation and apportionment which were regarded in the *King Gee Case* (1) as preventing an order from validly fixing a price.

On the other hand, it is contended that the difficulty of applying a provision in a particular case does not in itself raise any question as to the validity of the provision. In the last resort, it would be for a court to determine what part of the total purchase price was properly attributable to the material in question. It is true that there may be room for difference of opinion on such a question, but that is often the case in respect of matters in relation to which the opinion of a court is the decisive factor in determining the liabilities of individuals. I agree that, to take an example, when a man is charged with being drunk and disorderly, the court decides whether he was drunk and disorderly, and that is the end of the matter, although there may be room for genuine differences of opinion with respect to it. An answer to this contention is, in my opinion, provided in the present case by the decision in the *King Gee Case* (1), namely, that the power given by the regulation to fix prices is well exercised only when it really fixes a price, either in figures or by reference to a standard which excludes subjective differences of opinion. The basis of this decision appears to me to be the proposition that, given the elements referred to in the Order, the application of the prescribed standard must be such as to bring about the same result in the case of all persons applying the standard to those elements. If a person bought a job lot of different things, including some material which he made up into women's outer garments, and paid a single price for all the goods, the determination of the question of how much of that price was properly attributable to that material would necessarily involve the exercise of discretion, judgment and apportionment, and therefore the application of such a standard would not result in fixing a price in the manner required by the Regulations as interpreted in the *King Gee Case* (1). Thus, when it

(1) *Ante*, p. 184.

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was necessary, in order to ascertain the maximum price, to apportion a total price between different materials and goods, it would have to be held that no price was fixed by the Order in such a case.

This consideration, taken by itself, however, leaves untouched the first part of the definition. That part is unaffected in its application or operation by the fact that the second part of the definition cannot be validly applied in other cases. Thus, if this objection is considered alone, the only result would be that the Order would fail to reach some cases to which it was intended to apply, but that in other cases the Order would be applicable in the manner intended.

Another objection relied upon by the plaintiff relates to the words, "cost of $2\frac{3}{4}$ yards" (or other length) "of the material used," in the First Schedule.

"Material" is defined as follows (par. 4):—

"'Material' means, in relation to sales by a manufacturer or semi-manufacturer of women's or girls' outerwear, the principal material or materials used and does not include any material used for linings, facings or trimmings."

The express use of the phrase "principal material or materials" shows that there may be, for the purposes of the Order, two or more "principal materials" in some cases. When two such materials are used, how can anyone say what is the cost of two and three-quarter yards of those materials? Unless the cost per yard of each material were the same, any one of an infinite number of amounts would be equally accurate as a reply to the question, according to the length of each material taken. Any length less than two and three-quarter yards of either material could be taken, the balance being made up by the other material. It is clear that there is here no objective standard. Accordingly, the Order cannot be held to fix a price in cases where more than one principal material is used for the making of a garment. As to this objection, it may also be said that, if it stood by itself, the failure of the Order to reach these cases might be held not to affect the operation of the rest of the Order.

In the case of garments other than top coats and dresses, the first element in prices specified in the First Schedule is "actual cost of material and linings" or "of material used" or "of material and linings used."

Paragraph 4 contains a definition of the terms "actual cost of the material used" and "actual cost of the material and lining used." (It will be observed that the word "the" appears in the definition clause. This word is omitted throughout the First Schedule and the word "used" is omitted in one instance, but it was evidently intended that the definition should apply to the phrases actually

used. Otherwise the definition would have no application at all.)

The definition in Prices Order No. 1454 as promulgated was as follows:—

" ' Actual cost of the material used ' or ' actual cost of the material and lining used ' means, in relation to any article of women's or girls' outerwear, one-tenth of the shortest length of material or materials or material and lining or materials and lining of the same width as that used in the outerwear from which ten such articles of apparel may be cut."

It is obvious that some words were omitted before the words " shortest length of material." By an amendment made by Prices Regulation Order No. 1878, dated 27th December 1944, the definition as quoted was omitted from the Order and a new definition was provided which inserted the words " cost of the " before the words " shortest length of material." The claim of the plaintiff in the statement of claim is that the Order is invalid. The Court must deal with the Order as it now stands.

In the first place, this definition requires the ascertainment of one-tenth of the cost of a certain length of material. Accordingly it imports the definitions of " cost " and " material " to which reference has already been made, and is therefore open to the objections which have been mentioned in relation to those definitions.

In the second place, it is argued that different cutters may make different estimates of the shortest length of material or materials, or material and lining, or materials and lining " from which ten such articles of apparel may be cut ", especially in the case of patterned materials and where more than one " principal material " was used. There is no evidence on the matter, but it appears to me that there would almost necessarily be some difference in the application of the standard prescribed, depending not only upon the skill and experience of a particular cutter, but also upon his taste. The result is that, in my opinion, no price is properly fixed for garments where the Order requires the ascertainment of " the actual cost " of materials or linings. This is the case in twelve out of sixteen classes of garments mentioned in the First Schedule, that is to say, in the case of all garments except top coats and dresses.

The result is that the Order purports to deal in the First Schedule with sixteen classes of garments. In the case of twelve of these, no price is validly fixed. In the case of the other four classes, no price is fixed in cases where the material used in the manufacture of top coats or dresses has been bought for a single price with other articles, or where more than one principal material has been used in the making of the garment.

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I now proceed to consider the provisions relating to manufacturers who keep the prescribed records—par. 6. Prescribed records are defined as meaning " detailed records of costs of manufacture." The term includes (in the case of manufacturers) records as set out in the Third Schedule to the Order and (in the case of makers-up) records as set out in the Fourth Schedule, and in both cases weekly and four-weekly reconciliation statements of hours recorded as specified in the Fifth and Sixth Schedules, and in any case any other detailed costs records approved by the Commissioner. The terms of the Third and Fourth Schedules show that the records referred to are records of details in respect of each separate garment. In the Third Schedule, for example, which applies to manufacturers, the heading is " Detailed Costs Record." It provides for a description of the garment, its style, direct labour costs, sundries and overhead costs, costs of material, linings, trimmings, cornelli work (if not done on premises). Direct labour is sub-divided under various headings, examining, cutting, machining, overlocking, &c., and the schedule requires a statement of the time in minutes spent in each operation, the rate of wages paid and the labour cost for each operation, with a statement of the total time and total direct labour cost.

A proviso to par. 6 of the Order brings about a downward adjustment in prices if the number of hours recorded in the detailed costs records of a manufacturer exceeds the number of hours his employees were engaged on direct labour in respect of the goods to which the detailed costs relate by more than five per cent in any four consecutive weeks.

It was argued for the plaintiff that the Third and Fourth Schedules required the calculation of averages for all materials and labour time and costs in respect of classes of garments, and that the reconciliation statements in the Fifth and Sixth Schedules were unintelligible. The result of the discussion in argument was, in my opinion, to show that the Third and Fourth Schedules represented work tickets for separate garments, recording facts and not estimates in relation to time and labour cost, and that there would be no difficulty in the trade in understanding and applying all the schedules so far as these elements were concerned.

But the Third and Fourth Schedules are, in my opinion, open to other objections. In the first place, the Third Schedule requires a record of—

" Material	yards at	per yard	..
Lining	yards at	per yard	..
Trimmings	.. ..		.. "

The heading of the Schedule is "Detailed Costs Record." At the foot of the various items there appear the words "total cost." Thus "Material —— yards at —— per yard ——" must mean the cost of such material in order to produce a figure which can be included in "total cost." Such "cost" must be ascertained in accordance with the provisions of the Order. Accordingly, the objection to the second part of the definition of "cost" (depending upon the words "properly attributable") is as applicable in the case of manufacturers keeping the prescribed records according to the Third Schedule as in the case of manufacturers not keeping the prescribed records—First Schedule.

In the next place, the Third Schedule uses the word "material." "Material" is defined in the manner which has already been set out. In cases where there are two or more principal materials, no prices can be fixed by the application of the Third Schedule.

Further, the Third Schedule requires the cost of trimmings to be stated. Cost of trimmings is defined only in the part of the definition of "cost" which depends upon a proper attribution of part of a total purchase price to portion of the quantity of goods purchased. For reasons which I have stated, this provision cannot validly be included in a prices order. Where trimmings are made by the manufacturer, there is no definition of "cost" and the Order therefore fails to fix a price in such cases (*Vardon* v. *The Commonwealth* (1)).

The Fourth Schedule contains the Detailed Cost Record for makers-up—par. 4 (*f*), (*b*). The "material" is supplied to the maker-up by a semi-manufacturer—par. 4 (*d*). The Schedule provides for a record of the cost of lining and trimmings, and is therefore open to the objections already stated.

In my opinion, pars. 5 and 6 of the Order are invalid for the reasons stated and the demurrer should be overruled. It is unnecessary for me to consider further objections to the Order.

The interest of the plaintiff company in the Order is as a manufacturer and a retailer (par. 2 of statement of claim). It is unnecessary for the purposes of this case to consider the provisions of the Order relating to sales by persons other than manufacturers and retailers.

Order XXIV., Rule 10, of the Rules of Court is as follows:—

"Subject to the power of amendment, when a demurrer to the whole of any pleading, so far as it relates to a separate cause of action, is allowed or overruled, the Court shall give such judgment as to that cause of action as upon the pleadings the successful party appears to be entitled to."

(1) (1943) 67 C.L.R. 434.

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The plaintiff is, in my opinion, entitled to a declaration that pars. 5 and 6 of Prices Regulation Order No. 1454 (as amended by Prices Regulation Order No. 1878) is void.

STARKE J. Demurrer to a statement of claim, claiming that Prices Regulation Order No. 1454 is void and of no effect.

Prices control is no doubt necessary and within constitutional power in war-time. But the Order must fix the price or state some principle, standard, rule or guide from which the price can be calculated with certainty (*King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1)). The Order No. 1454, as amended by Order No. 1878 operating on and from 15th January 1945, is certainly very elaborate. The amending Order was published in December 1944 after the delivery of the statement of claim but I propose to consider the Order as amended. It regulates the prices of women's and girls' outerwear. Thus, to take clause 6, the Order fixes and declares the maximum price at which a manufacturer who keeps prescribed records may sell women's or girls' outerwear to be :—

"(*a*) For sales other than by retail—exclusive of sales tax—the cost thereof as recorded in the detailed costs records as specified in the Third Schedule or approved by the Commissioner and kept by that manufacturer plus 25 per cent thereof.

(*b*) For sales by retail, inclusive of sales tax—the cost thereof, as recorded in the detailed cost records as specified in the Third Schedule or approved by the Commissioner and kept by that manufacturer, plus—

(i) in respect of working garments—65 per centum thereof ; or

(ii) in respect of women's or girls' top coats, house coats, frocks, dresses, smocks, gowns, dirndls, blouses, blousettes, skirts or tunics, where the cost of any such article is less than £1 5s.—70 per centum thereof ; or

(iii) in respect of all other garments not included in sub-paragraphs (i) or (ii)—77½ per centum thereof ;

Provided that where the number of hours recorded in such detailed costs records of any manufacturer . . . exceeds the number of hours his employees were engaged on direct labour in respect of the goods to which those detailed costs relate by more than 5 per cent in any four consecutive weeks the maximum prices for the sale of women's or girls' outerwear by that manufacturer in the next

(1) *Ante*, p. 184.

succeeding four weeks shall be the maximum prices fixed by the foregoing provisions of this paragraph less in each case $2\frac{1}{2}$ per cent of those prices for every 5 per cent by which the hours recorded in such detailed costs records exceeds the hours his employees were engaged on direct labour as aforesaid."

The " 'prescribed records' means detailed records of costs of manufacture including . . . (*a*) in the case of manufacturers the detailed costs records as specified in the Third Schedule to this Order and the weekly and four-weekly reconciliation statements of hours recorded as specified in the Fifth and Sixth Schedules to this Order." The Third Schedule contains a form of detailed costs record for a manufacturer. It provides for an arbitrary costs account which is applicable to the manufacture of any particular article or to a batch or quantity of articles. The Schedule requires the ascertainment or estimation of the direct labour cost and 25 per cent on that cost, the cost of material plus the various percentages set forth in clause 6 (*a*) and (*b*).

" 'Cost' means in respect of any material, linings or trimmings, the actual purchase price of that material or those linings or where such material, linings or trimmings is or has been purchased with other material, linings or trimmings or other goods, that part of the total purchase price which is properly attributable to such first-mentioned material, linings or trimmings."

" 'Material' means, in relation to sales by a manufacturer . . . of women's or girls' outerwear, the principal material or materials used and does not include any material used for linings, facings or trimmings."

The manufacturer in calculating the price at which he may sell any article must therefore necessarily dissect the cost of material which may no doubt, in many cases, be derived from the relative invoices but would require a proper attribution of the cost of general stock or bulk purchases, a matter requiring considerable judgment and experience. And he must also dissect labour costs and ascertain the proportion applicable to any garment or batch or quantity of garments. Time sheets would no doubt show in detail the work upon which workers had been occupied and form the basis of dissection. But dissected they must be, if the direct labour cost of any particular garment or batch of garments is to be ascertained, and that also is a matter requiring considerable judgment and experience.

Indeed, accurate costing is a matter of much skill and experience.

And the Fifth and Sixth Schedules recognize this. They provide for reconciliation of time recorded in cost records with time worked by employees for weekly periods and for four-weekly periods. The

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times recorded may be inaccurate or wrongly estimated though formed with as much care and skill as is possible in the circumstances.

The proviso to clause 6 attempts to correct variations by a downward adjustment of prices in four-weekly periods. The result is that the prices which clause 6 purports to fix and declare as maximum prices are always in a state of flux. They largely depend upon the skill, experience and estimates of each particular manufacturer and afford no principle, standard or guide from which any price can be calculated with certainty. In my opinion, the method of price-fixing adopted in clause 6 cannot be justified under the *National Security* (*Prices*) *Regulations* or under any other law or regulation in force at the present time.

The demurrer is too large and should therefore be overruled.

DIXON J. In this suit the plaintiff, a company carrying on the business of manufacturing and retailing clothing for women and girls, claims a declaration of right declaring void a price-regulating order which purports to fix maximum prices for women's and girls' outerwear. It is Prices Regulation Order No. 1454, gazetted on 2nd March 1944.

An indictment of the plaintiff under the *Black Marketing Act* 1942 charging breaches of the order is pending in the Supreme Court of Victoria, and, as a consequential form of relief, the plaintiff also claims an injunction restraining the further prosecution of the indictment. An application to stay the suit was made at chambers on the ground that an injunction to restrain the Attorney-General from proceeding with an indictment was entirely anomalous and that, as the validity of the Prices Regulation Order was an issue open under a plea to the indictment of not guilty, it was a question pending before another competent Court and ought not to be made the subject of an independent suit for a declaration of right. As suits against the Commonwealth by traders for declarations of right declaring price-regulating orders to be invalid have been repeatedly entertained by this Court without question and have been determined, I refused to stay the suit, taking the view that the pendency of the prosecution was not in itself a sufficient ground for denying to the plaintiff a right to maintain a proceeding otherwise open to it, but I gave no countenance to the claim for an injunction.

The suit has now come before the Court upon demurrer to the statement of claim, and the sole question raised is the validity, in whole or in part, of Prices Regulation Order No. 1454. Its validity is impugned upon the ground that its provisions do not afford the

means of calculating or ascertaining the maximum prices, which it assumes to prescribe, with the certainty demanded by the nature of the power conferred by reg. 23 of the *National Security* (*Prices*) *Regulations*. The Order deals, of course, with a trade which has its own established practices and peculiar terminology and not unnaturally takes these for granted and assumes that the persons to whom it is addressed will do the same and read and apply the provisions it contains accordingly. Demurrer is not a very satisfactory proceeding upon which to examine the validity of such an instrument. For it brings the document before the Court as a bare text without the explanations which evidence of practice and terminology can alone supply. Read in the abstract and without any information about the processes and procedures of the trade to which it applies, the Order, which embodies a considered plan of price fixing of some intricacy, does not always carry its own meaning. An uninstructed reader can only conjecture whether any or all of the difficulties of interpretation and uncertainties of application which he at first felt would be experienced by a mind bringing to the perusal of the document the familiar knowledge possessed by a clothing manufacturer. In this suit, however, it is for the plaintiff to establish the invalidity of the Order, and I think that, in strictness, the plaintiff's pleading must contain every allegation of fact, whether positive or negative, necessary to remove the possibility of the Order possessing in the trade a meaning or application sufficiently certain to amount to a valid exercise of the power.

As will appear from *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1), I do not take the view that doubts about the construction of an instrument made under reg. 23 can affect its validity. The interpretation of all written documents is liable to be attended with difficulty, and it is not my opinion that doubts and misgivings as to what the instrument intends, however heavily they may weigh upon a court of construction, authorize the conclusion that an order made under reg. 23 is ultra vires or otherwise void. If in some respects its meaning is unascertainable, then, no doubt, it fails to that extent to prescribe effectively rights or liabilities, but that is because no particular act or thing can be brought within the scope of what is expressed unintelligibly. But to resolve ambiguities and uncertainties about the meaning of any writing is a function of interpretation and, unless the power under which a legislative or administrative order is made is read as requiring certainty of expression as a condition of its valid exercise, as the by-law-making powers of certain corporations have been understood to do, the meaning of the

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order must be ascertained according to the rules of construction and the principles of interpretation as with any other document. What does take an order outside the power conferred by reg. 23 is, not uncertainty as to what it means, but the adoption by the order of a criterion or standard of price that is uncertain in the result that its application produces. The method of finding the maximum price must not involve discretionary elements. The order must either fix the price, or lay down a method of finding it which will produce the same result whoever applies it, so long as he uses it correctly. As to this I expressed my view in *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1) and I shall not repeat it.

Prices Regulation Order No. 1454 fixes maximum prices for manufacturers who do not keep the prescribed records of costs and lays down other methods of working out maximum prices from the prescribed records for manufacturers who do keep them. In both cases, the sufficiency of the directions given for ascertaining the maximum prices is attacked on the part of the plaintiff company, which contends that an adequate means of computing the maximums by reference to fixed or definite standards is not provided.

In the case of a manufacturer who does not keep the prescribed records of costs, a list is scheduled of different descriptions of garments giving for each description a formula for calculating the maximum. The formula specifies allowances for various items of cost. The first item relates to the material used, the others to linings and trimmings, making, and so on, to a fixed percentage upon the total cost of the previous items and to sales tax. The material is taken, in some cases, at the cost of a specified length, and, in others, at actual cost. Unfortunately an attempt is made to define the terms "material," "cost" and "actual cost of material used," or "material and lining used," and it is in the definitions that the plaintiff finds the basis of this part of its contention. An example of the obscurities relied upon is supplied by the first description of garment in the list, viz. "women's top coats made of materials not exceeding 48 inches in width." The maximum price prescribed is composed of several items of cost, the first of which is "cost of $2\frac{3}{4}$ yards of material used." This means that the manufacturer charges in respect of this item for two and three-quarter yards of material, whether he uses them or not. But, says the plaintiff, suppose he uses more than one material in a top coat, which does he take? The definition of material undertakes to answer the difficulty, but, according to the plaintiff, in so doing it only raises another difficulty. The word "material" is defined to mean the principal material or materials used, and not to include

(1) *Ante*, p. 184.

any material used for linings, facings or trimmings. This definition, it is said, in terms acknowledges the possibility of more than one principal material being used. Suppose a top coat is made of two materials to each of which the description "principal" might be applied, how do you discover the cost of two and three-quarter yards of them? In any case, when is a material principal?

In my opinion, these questions go to the application which the relevant provisions of the Order were intended to have to the state of facts assumed and will be solved by ascertaining the meaning of the text as a matter of interpretation. That meaning, I think, is to allow the manufacturer to charge the full cost of the material of which the coat is substantially composed, but to limit the length which may be charged for, and, at the same time, to give him the benefit of the saving, if he makes the coat without reaching the limit. I should doubt whether any manufacturer would feel at a loss to say what were the "principal materials" used in making a coat. If he used two principal materials and their total length exceeded two and three-quarter yards, he could, according to the meaning I attach to the Order, charge the full cost of the dearer for the length he in fact used up to two and three-quarter yards, and, if the length used of the dearer material was less than two and three-quarter yards, make up the difference at the cost of the cheaper material. If he used two principal materials and their total length was less than two and three-quarter yards, which I imagine would be a rare case, he would, I think, be entitled to charge the difference at the cost of the dearer material.

I do not regard these difficulties as amounting to or causing an uncertainty in the standard adopted for the fixing of a price, that is, as involving the introduction of a discretionary element into the factors from which the price is constructed. It is a failure to express clearly and unmistakably how a method of calculation, meant to depend on quite certain factors, applies in a particular case, logically possible but perhaps not common in practice. It is unfortunate that documents by which the conduct of men is governed, whether in business or in any other activity, should not always and in their application to all circumstances, carry upon their face an obvious and indisputable meaning; but there are not many legislative instruments that succeed in attaining such a miraculous combination of prescience and perspicuity. I do not know why a price-fixer should be expected to do better than the legislature itself. At all events, I do not think that the validity of an attempted exercise of his powers depends upon his success in avoiding equivocation or obscurity in the expression of his intention, providing that what he intends is ascertainable and is itself definite.

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But that is not the only matter of alleged uncertainty in the factors prescribed for obtaining the maximum price for those of the scheduled garments of which women's top coats are an example. The definition of cost enters into the computation, and that is said to be corrupted with vagueness because, after saying that the actual purchase price of material or linings shall be their cost, the definition proceeds to attempt to deal with the case where material, linings or trimming is bought with other material, linings or trimming and provides that then the cost shall be that part of the total purchase price which is properly attributable to the material &c. in question. To find what is properly attributable requires, it is claimed, an exercise of a discretionary judgment, a determination according to no objective standard and involving no uniform result. This claim depends upon the assumption that the questionable part of the definition contemplates a case where a miscellaneous collection of materials is bought for an inseparable lump sum so that there is no means of "attributing" part of the price to any one material, except by an arbitrary allocation of an amount considered fair or commercially appropriate.

I think that we ought not to place upon the provision so wide an interpretation. The words "properly attributable" are more naturally applied to cases where the nature of the transaction either discloses the price arithmetically or commercially belonging to the material in question or supplies factors from which it can be calculated. There is no need to extend it to cases where this cannot be done and the subjective judgment of some unnamed person must be invoked; and, if such an extension spells invalidity, it certainly should not be made.

A great number, in fact the greater number, of garments listed in the schedule fall within a system of computing prices which varies somewhat from the foregoing and employs the actual cost of material used, or of materials and linings used, as a chief factor in the computation. There is a definition of the expressions "actual cost of material used" and "actual cost of material and lining used" and, in spite of some want of correspondence with the precise forms of expression employed in the text, there seems no doubt that the definition is meant to apply.

Two questions arise upon the definition. As it stood at the time to which the indictment relates, it was defective. It defined the expressions "actual cost of material" and so on to mean one-tenth of the shortest length of material &c. of the same width as that used in the outerwear from which ten such articles of apparel may be cut. It is plain that "cost" could not mean a piece of material. But it is

denied that the intention sufficiently appears on the face of the definition that the actual cost of the material in the garment should be one-tenth of the cost of a length from which ten such garments could be cut. I think that any intelligent reader who studied the whole Order could see that this was the evident intention. By an amending Order (No. 1878), the sentence was made to read "one tenth of the (cost of the) shortest length," &c.

But it is objected that by taking as a constituent factor in the calculation a length of material from which ten of the articles in question could be cut, the definition adopts an uncertain standard, that the length of material will depend upon the skill of the cutter, that even the same cutter will consume less material as he goes on repeating his task and that the cutter's problem is influenced by designs in the material which increase the uncertainty of his result in economizing length. All this depends on what happens in practice in the trade, a thing about which we have no information. For all I know there may be a general understanding in the trade concerning what length of different materials may be required for ten of the various articles mentioned in the schedule. I presume that to assess the length required to cut a number of garments is a very ordinary process. There is no hint in the definition of dependence on the skill or ability of any particular cutter, of its being regarded as anything but an objective test. I do not think we can say of our own knowledge that such a degree of uncertainty is involved in the definition as to take it outside the power.

I am of opinion that we ought not to give effect to the objections to the part of the order relating to manufacturers who do not keep the prescribed records.

The attack upon the part of the Order relating to manufacturers who do keep proper records depends upon the nature of the directions as to the records to be kept and also upon the effect of a provision for adjustment. The directions as to the records to be kept are given with an economy of statement which has led to difficulties. I imagine that a reader alive to the practices of the trade and to its manufacturing procedures would intuitively see the application of the scheduled forms which, in effect, constitute the directions; but they do not provide their own commentary for the uninitiated and, required as we are to consider them in the abstract, it is not easy for us to be sure of the precise way the forms in the schedules are to be used in the practical operation of a factory.

My study of the document, however, has led me to the conclusion that the "Detailed Costs Record," set out for a manufacturer in the Third Schedule, is a form of costing record or work ticket to be used in

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connection with an individual garment and to be filled in with the particulars of the actual quantity of material, lining and trimmings used and the actual time spent on the garment in the various descriptions of work given under " direct labour," together with the money equivalent ascertained at the pegged rates as prescribed. The only doubt I have felt on this score has been occasioned by the fact that the sub-columns in the Fifth Schedule suggest that uniform times would be occupied in each respective description of work making up direct labour, so that the total for a week might be obtained by simple multiplication. But the schedules are necessarily set out in a very compact form in the *Gazette* and it is possible that, differently and more generously spaced, the Fifth Schedule would not convey this suggestion. At all events, I do not think it is inconsistent with the view I have adopted of the purpose of the Third Schedule.

Upon that view, I cannot see any lack of certainty in the standard of cost prescribed by the Third Schedule for calculating maximum prices.

The purpose of the Fifth Schedule is to provide a comparison between the totals for a given week of the times shown in respect of each description of work on the costs records for the individual garments (as I take the forms in the Third Schedule to be) and the total time for which the employees in question were paid, according to the wages book.

The total of the times of all pieces of work aggregated is scarcely likely to come out exactly at the same figure as the total of the times paid for. In a very careful system honestly pursued, the discrepancy might be one way or the other ; but when the purpose of recording the costs of the items of work on the garment is to obtain a figure on which to base a maximum price, it is neither unnatural nor unwise on the part of the price-fixing authority to take measures to check the result, for fear that otherwise the discrepancy would be apt always to favour a higher price. Hence the Fifth and also the Sixth Schedule. The latter provides for the ascertainment of the net variation over four weeks between the totals per week of the recorded times and the times actually worked by the employees, that is, what the Fifth Schedule specifies as the " total time paid for as per wages book." If this net variation shows an excess for the four weeks of the total times recorded of more than five per cent over the total time paid, then the provision for adjustment to which I have referred is brought into play. It is contained in a proviso to the direction for calculating the costs and for employing the schedules to that end.

The effect of the proviso, when such an excess brings it into play, is to reduce the maximum price which would otherwise govern the

goods sold by the manufacturer during the ensuing four weeks by two and a half per cent of those prices for every five per cent by which the total times exceed the total times actually worked by the relevant employees. It may seem odd that the reduction should be in the goods sold, not the goods manufactured, in the next four weeks. For the Order otherwise concerns itself with costs in connection with manufacturing over the selected intervals of time. But that is what the proviso says and, no doubt, there were reasons for effecting the compensatory reduction on that basis.

The proviso involves one difficulty of construction. It speaks of "any four consecutive weeks" and literally that might require a consideration at the end of each successive working week of the four consecutive weeks then ending, but I think the general sense is clear enough and that it means that successive periods of four weeks each are to be taken.

There is, in my opinion, no ground for regarding the proviso as invalid. I think that the attack upon the Order as a whole fails.

In my opinion, the defendant's demurrer to the statement of claim should be allowed.

WILLIAMS J. This is a demurrer to a statement of claim in which a declaration is sought that Prices Regulation Order No. 1454 is void and of no effect. Prior to the commencement of the action, this Order had been amended by Prices Regulation Order No. 1878 and the argument proceeded on the basis that the statement of claim should be regarded as containing a claim that the Order as amended was void and the demurrer disposed of accordingly. The only importance of the subsequent Order is that it amended the definition of "actual cost of the material used or actual cost of the material and lining used" in reg. 4 (*a*) by inserting after the word "one-tenth" the words "of the cost" and thus eliminated one of the many instances of uncertainty charged against the principal Order.

It was not contended on behalf of the plaintiff that any of the *Prices Regulations* are invalid but it was contended that the Order is not authorized by the Regulations because it does not enable prices to be determined with sufficient certainty.

The Order purports to fix the prices for women's and girls' outerwear and to do so by two alternative methods, the one where the prescribed records are not kept and the other where they are kept. The plaintiff is a manufacturer of such outerwear and is therefore only directly interested in the validity of pars. 5 and 6 which relate to sales by manufacturers, but it is probable that the objections raised to the validity of these paragraphs may also affect the validity

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of the other paragraphs. But in order to dispose of the demurrer it is only necessary to deal expressly with pars. 5 and 6 and the definitions and schedules so far as they relate thereto. The former paragraph fixes and declares maximum prices for sales by manufacturers where the prescribed records are not kept, while the latter fixes and declares such prices where the prescribed records are kept.

It is established by the decisions of this Court that where the maximum price is fixed by means of a formula as in the present case the application of the formula to the facts must enable the price to be calculated with certainty. If, therefore, the formula prescribes ingredients which require estimation or the exercise of skill and judgment so that, as *Dixon* J. said in *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1), there can be " no exactness, certainty or common agreement in the result ", no certain objective standard is prescribed and the formula is lacking in certainty. The prices fixed by par. 5 are the prices specified in the First Schedule. This schedule provides a number of formulae for calculating the maximum prices for sixteen items of outerwear. Except in the first four items, one of the ingredients in each formula is the actual cost of the material used or the actual cost of the material and linings used. In par. 4, these words are defined to mean " one-tenth of the cost of the shortest length of material or materials or material and lining or materials and lining of the same width as that used in the outerwear from which ten such articles of apparel may be cut." I agree with the contention that the words " may be cut " in this definition require an estimate to be made which would vary according to the degree of skill and experience of individual cutters so that no certain objective standard is prescribed, and these formulae therefore fail for uncertainty.

An ingredient in each of the formulae for fixing the price in the case of the first four items is the cost of a certain amount of the material used. In the first item, for instance, it is the cost of two and three-quarter yards of the material used. A lesser or greater amount of material than that prescribed might in fact be used, but this makes no difference. Three objections were raised to the certainty of the formulae: (1) that the definition of " cost " is uncertain; (2) that the definition of material is uncertain; and (3) that, where the material used comprises two or more principal materials, the cost is uncertain. As to (1), the second part of the definition of " cost " prescribes that where material, linings or trimmings are purchased with other material, linings or trimmings or other goods the cost means that part of the total purchase price which is properly attributable to such first-mentioned material, linings or trimmings. I agree with the

(1) *Ante*, p. 184.

contention that the extent to which the total purchase price is properly attributable to the material used is a matter of estimation upon which different persons might come to different conclusions, so that no certain objective standard is prescribed. As to (2), " material " is defined to mean the " principal material or materials used and does not include any material used for linings, facings or trimmings." It was contended that this definition is defective because it does not give directions for determining what is a principal material, but this determination is in each case a question of fact however difficult it may be to solve in some instances: *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1). As to (3), I agree with the contention that it is impossible to ascertain the manner in which the cost of the material used in the manufacture of the first four items is to be calculated where there are two or more principal materials and less or more of these combined materials is used than the amount prescribed.

It was contended that, even if the second part of the definition of cost is void for uncertainty so that cost is not defined where the material used is purchased with other materials for the one sum, the first part of the definition is nevertheless certain and severable. It was also contended that, even if there is uncertainty where there are two or more principal materials and less or more of these combined materials is used than the amount prescribed, there are many instances where the first part of the definition of cost would be applicable and where only one principal material would be used and that in these cases the application of the formulae would fix a price with certainty. But it seems to me that the definition of cost was intended to cover every purchase, and that the formulae for the first four items were intended to cover every manufacture of outerwear there described, so that the two parts of the definition are not independent provisions which are severable, and that there is nothing in the Order to indicate that the formulae in question were intended to operate in this distributive manner.

On this view, it is unnecessary to decide whether the omission of " trimmings " after the words " those linings " in the first part of the definition of " cost " was an oversight which it would be legitimate to remedy by implication, or whether this omission does not render the cost of trimmings in the Third Schedule uncertain where they are not manufactured on the premises.

For these reasons, I am of opinion that par. 5 and the First Schedule are void for uncertainty.

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Paragraph 6 fixes the maximum prices where prescribed records are kept. These are the records specified in the Third, Fifth and Sixth Schedules. The principal record is that specified in the Third Schedule. The records specified in the Fifth and Sixth Schedules are required for the purposes of the proviso to the paragraph. It was contended that the Third Schedule provides for an estimate of the total direct labour cost, that the purpose of the proviso is to adjust these costs where the estimate exceeds the actual cost, and that to require manufacturers to make such an estimate provides no certain objective standard. On this point, I adhere to the opinion expressed during the argument that the direct labour cost referred to in the schedule is not an estimate but a record of the time actually spent on the manufacture of each garment or garments. But two of the ingredients of the formula in the Third Schedule are the cost of the materials and of the trimmings. Since the definition of cost fails for uncertainty, this formula is also rendered uncertain. Further, even if the first part of the definition of cost can be severed from the second, the alternative methods of fixing a maximum price according to whether prescribed records are not or are kept are so interdependent that the avoidance of par. 5 would also invalidate par. 6.

In my opinion, therefore, par. 6 and the Third Schedule are void for uncertainty, and the Fifth and Sixth Schedules in their relation to this paragraph fail with the proviso.

For these reasons, I would overrule the demurrer and declare that pars. 5 and 6 of the Order and the First and Third Schedules, and the Fifth and Sixth Schedules in relation to par. 6 are void.

Demurrer overruled. Judgment for plaintiff for a declaration that pars. 5 *and* 6 *of Prices Regulation Order No.* 1454 *as amended by Prices Regulation Order No.* 1878 *are void.*

Solicitors for the plaintiff, *Oswald Burt & Co.*

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

E. F. H.