

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BROMHEAD AND ANOTHER ;

EX PARTE MISS DAVENEY PROPRIETARY LIMITED

National Security—Price control—Declared goods—Fixation of maximum price— H. C. OF A.
Purpose thereof—Control of profits—Notification—Validity—National Security 1946.
Act 1939-1946 (No. 15 of 1939—No. 15 of 1946), s. 5—National Security (Prices) {
Regulations (S.R. 1940 No. 176—1946 No. 93), regs. 17, 20, 22, 23 (1) (b) (i), SYDNEY,
(1A) (h), (2), 29—Prices Regulation Orders Nos. 1015, 2182. Nov. 26, 27 ;
 Dec. 23.

Pursuant to par. 8 of Prices Regulation Order No. 2182, a Deputy Prices Commissioner notified a company the maximum prices at which confectionery manufactured by it might be sold. This notification was given after correspondence and interviews which showed, that since 1939 the company had as a result of economy and greater turnover increased its rate of gross profit without increasing its selling prices ; that the Deputy Prices Commissioner desired the company to reduce its turnover by twenty per cent in order to reduce its rate of gross profit ; and that the company was not prepared to do so.

Held, by Latham C.J., Dixon and McTiernan JJ. (*Rich, Starke and Williams JJ. contra*), that the notification was valid even if the reduced prices were fixed for the purpose of reducing the profits of the company.

The Court being equally divided the decision of the Court was in accordance with the opinion of the Chief Justice, and the appeals were dismissed.

ORDERS NISI for prohibition.

Upon four informations laid by Francis Robert Alexander Elvidge, Miss Daveney Pty. Ltd. was charged that on or about 1st March 1946 at Drummoyne, New South Wales, it contravened reg. 29 of the *National Security (Prices) Regulations* in that it sold by wholesale certain declared goods, namely confectionery, at a price which was greater than the maximum price fixed in relation to those goods under the said regulations for the sale of those goods.

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The magistrate, William Swift Bromhead Esquire, found : 1. that the price at which the defendant company should sell goods was fixed by an order gazetted on 7th August 1945 and 31st January 1946, notice of the selling price being given to the defendant company by letter dated 8th February 1946 ; 2. that on 1st March 1946 the defendant company sold goods the subject of the charges at a greater price than that fixed by the notification of 8th February 1946 ; 3. that the prices of the goods the subject of the respective charges were stationary since before the war until the date of the sale alleged in the respective informations ; 4. that the gross profit of the defendant company in 1939 was small but had greatly increased by 1945 ; 5. that the price of the subject goods was fixed after correspondence between the defendant company and the Deputy Commissioner of Prices and an interview between an officer of the defendant company and officers of the Prices Branch ; and 6. that an officer of the Prices Branch suggested that profits should be reduced by a reduction of the defendant company's turnover. The magistrate overruled a submission made on behalf of the defendant company that the Order was not a true exercise of the price-fixing power but was one merely to control profits and, therefore, was outside the power of the Prices Commissioner and was invalid.

The defendant company was convicted on each of the four charges.

Upon the application of the defendant company, *Williams J.* ordered the magistrate and the informant to show cause before the Full Court of the High Court why a writ of statutory prohibition should not be issued to restrain each of them from further proceeding on or in respect of the said convictions upon the grounds, *inter alia*, (a) that upon the evidence the magistrate should have held that the notification of 8th February 1946 by the Deputy Prices Commissioner was not a valid exercise of the power of the Commonwealth Prices Commissioner under the *National Security (Prices) Regulations* but was designed solely to control the profits earned by the defendant company ; and (b) that upon the evidence the magistrate should have held that the said notification was not given bona fide in the exercise of the powers conferred on the Commonwealth Prices Commissioner by the *National Security (Prices) Regulations*.

Other material facts and relevant provisions of the *National Security (Prices) Regulations* are sufficiently set forth in the judgments hereunder.

A. R. Taylor K.C. (with him *Manning*), for the prosecutor. The evidence shows that the special notification by the Deputy Prices Commissioner was not made for the purpose of fixing prices but was

made for the purpose of controlling and regulating profits, which is a purpose outside the scope of the *National Security (Prices) Regulations*. Throughout, the Commissioner was concerned only with the company's profits and not with its prices. These prices had remained stationary since 1939. The Commissioner completely misconceived his functions. Although it is conceded that it was competent for the Commissioner to investigate profits in the process of determining what prices should be fixed, the point is that the Regulations do not contemplate the mere control of individual items in respect of the profits of the company's general business. The power given to the Commissioner by reg. 23 was an administrative power and not a legislative power. The order itself does not establish any new rule of conduct in the manner which a legislative provision does, nor does it alter or extend the law: See *Crowe v. The Commonwealth* (1); *The Commonwealth v. Grunseit* (2); and *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (3). A power given for a certain purpose is not validly exercised if it be exercised for another purpose (*Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (4); *Reid v. Sinderberry* (5); *Stenhouse v. Coleman* (6)). The regulations under consideration in those cases contained an express statement of the purposes for which those regulations had in fact been promulgated. There is no such express statement in the *Prices Regulations*. That being so the Court, when determining their meaning, is entitled to have regard to the nature of the Regulations, and, also, to the provisions of the *National Security Act 1939-1946*. The power given by reg. 23 is a power to fix the price of goods. The extent of the power so given must be determined by reference to the nature of the Regulations themselves. It is a power to fix the price of goods, and is not a power to fix the profits to be made by individuals apart from any consideration governing the question of prices. The purpose of the *Prices Regulations* was stated in *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (7). The only matter for consideration by the Commissioner is whether the prices being charged are excessive to the community. Regulation 23 (1A) (h) shows that if profit is taken into account it must be for the purpose only of fixing a price. It is not denied that the prevention of profiteering is one of the objects of the Regulations, but it cannot be said that in this case the order was made for the purpose of preventing profiteering. The extent of the Com-

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(1) (1935) 54 C.L.R. 69, at pp. 94, 95. (4) (1945) 72 C.L.R., at pp. 67, 68.
(2) (1943) 67 C.L.R. 58, at pp. 66, 82, (5) (1944) 68 C.L.R. 504.
83, 93. (6) (1944) 69 C.L.R. 457.
(3) (1945) 72 C.L.R. 37. (7) (1943) 67 C.L.R. 335, at p. 339.

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missioner's power cannot be affirmatively defined but it is not absolute in the sense that it can be exercised for any purpose (*Swan Hill Corporation v. Bradbury* (1)).

Badham K.C. (with him *Begg*), for the respondents. Upon a consideration of the powers conferred by the *National Security (Prices) Regulations*, and of the order which was made in respect of the company, the question involved is not one merely of price-fixing *qua* price fixing. There is a general power to fix prices. That power is not limited to price-fixing purposes or for the sake of price fixing. The Commissioner may, in the exercise of the powers conferred on him, fix prices in relation to various matters, such as the general economic condition of the community, if, in his opinion, it is advisable, or any matter which, in his opinion, is conducive to the stabilization of the economic structure of the community at the time of the exercise of those powers. Section 5 of the *National Security Act* gives the Governor-General the power to make these regulations for the purposes of defence, therefore when exercising the powers conferred by the Regulations the Commissioner should exercise them for the purposes of defence. The powers exercisable by the Commissioner are very wide powers and the Court will not go behind any exercise thereof by the Commissioner unless there is something which amounts to an entire failure to attempt to carry out the Regulations (*Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (2)). The limit as to the extent to which the Court will go behind an order to ascertain the reasons for the making of the order and its effect is shown in *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (3). The mere fact that an order was made for the purpose of regulating profits, or has that effect, does not necessarily make the order bad in relation to the power to control prices because it may very well be that in any given case the profits of a company or an individual may be such as to call for inquiry by the Commissioner and he may, in his discretion, fix prices for two purposes, firstly for the purpose of nominating prices at which goods may be sold, and, secondly, having in mind that they will in fact control the profits of the company or individual. There is not in the Regulations any suggestion or any statement as to the objects or reasons for making the Regulations. Regulation 17A shows that in considering the question of what price shall be fixed the Commissioner may consider, *inter alia*, the financial position,

(1) (1937) 56 C.L.R. 746, at p. 757.

(2) (1943) 67 C.L.R., at pp. 340, 342.

(3) (1943) 67 C.L.R., at p. 344.

profits and assets and liabilities of the particular company or individual concerned. That being so a price-fixing order or direction cannot, in any circumstances, be held to be invalid because it results in a limitation of profits, or because it is expressed to be made by reason of the fact that excess profits are being made. There is nothing to compel the Commissioner to fix prices with relation to the profits of any company or individual (*Ex parte Byrne; Re King* (1)). The question of whether or not the profits were excessive in the circumstances was entirely one for the Commissioner to determine and upon a determination that the profits were excessive the Commissioner was entitled to fix the maximum prices at which the company's goods were to be sold. The Commissioner's power to fix prices is a discretionary power and, in the absence of mala fides, that is to say, an improper use of the power, the reasons for his exercise of that discretionary power will not be inquired into by the Court: See *Progressive Supply Co. Ltd. v. Dalton* (2). The Court will examine closely any allegations against an officer upon whom certain powers have been conferred (*Reid v. Sinderberry* (3)). The only control is the control as to whether or not the Commissioner acted properly (*Farey v. Burvett* (4)). Even assuming that the evidence tendered by the company was admissible the onus is upon the company to show that the effect of that evidence is that the Commissioner exceeded his powers. Failing such proof it follows that the order or direction to the company was a good order or direction and valid *ex facie*.

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A. R. Taylor K.C., in reply. The powers of the Prices Commissioner under the *Prices Regulations* are not uncontrolled or uncontrollable (*Reid v. Sinderberry* (5); *Shrimpton v. The Commonwealth* (6); *Stenhouse v. Coleman* (7); *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (8)). The particular facts relied upon by the company are that there had not been any increase in its prices since a date prior to the war and that the effect of the Commissioner's order was to reduce the company's prices twenty per cent below those of its competitors. The company was within the scope of the general order made in August 1945 until the notification was given. Prior to August 1945 the company furnished to the Commissioner full details of all prices charged by it, and those prices were confirmed by the Commissioner.

Cur. adv. vult.

(1) (1944) 45 S.R. (N.S.W.) 123, at p. 126; 62 W.N. 104, at p. 106.

(2) (1942) 2 All E.R. 646.

(3) (1944) 68 C.L.R., at p. 510.

(4) (1916) 21 C.L.R. 433, at p. 442.

(5) (1944) 68 C.L.R. 504.

(6) (1945) 69 C.L.R. 613, at pp. 620, 621, 627, 629-632.

(7) (1944) 69 C.L.R. 457.

(8) (1945) 72 C.L.R. 37.

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Dec. 23.

The following written judgments were delivered :—

LATHAM C.J. These are four appeals from convictions for offences against the *National Security (Prices) Regulations*. The charge in each case was that the appellant company did sell by wholesale certain declared goods, namely confectionery, at a price which was a greater price than the maximum price fixed in relation to the said goods under the said regulations.

The *National Security (Prices) Regulations*, S.R. 1940, No. 176 as amended, provide in reg. 23 (1) that the Prices Commissioner may, with respect to any goods which had been declared as declared goods under reg. 22 from time to time in his absolute discretion by order published in the *Gazette* “(a) fix and declare the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area; or (b) declare that the maximum price at which any such goods may be sold—(i) by any person, shall be such price as is fixed by the Commissioner by notice in writing to that person . . .” On 3rd August 1945 the Assistant Prices Commissioner (who has the powers of the Commissioner—see reg. 7A (2)) made Prices Regulation Order No. 2,182. By par. 6 of that Order he declared the maximum price at which confectionery (which had been duly “declared”), the price of which was not otherwise fixed by the Order, might be sold to be the maximum price fixed for the sale of that confectionery by the provisions of Prices Regulation Order No. 1015. Order No. 1015 contained a provision determining prices by reference to prices charged on a “ceiling date.” Paragraph 8 of Order No. 2,182 provided :—“Notwithstanding the foregoing provisions of this order, I declare the maximum price at which confectionery specified in a notice in pursuance of this paragraph may be sold by any person to whom such notice is given to be such price as is fixed by the Commissioner by notice in writing to that person.” On 8th February 1946 a Deputy Prices Commissioner (who was entitled to exercise powers of the Commissioner by virtue of a delegation under reg. 46) notified to the company that the maximum prices at which confectionery manufactured by the company might be sold by wholesale were fixed as indicated in an annexed schedule. The prices fixed in the schedule were in fact about twenty per cent less than the prices which had been charged without alteration (except as to one small item) continuously by the company since the company began business in the year 1938.

It is admitted that if the notification last mentioned was authorized by the Regulations the appeals must fail. It is contended, however, that evidence shows that in this case the price-fixing power was

exercised for a purpose which was extraneous to the considerations which could properly be taken into account in the exercise of the power, namely for the purpose of reducing the profits earned by the company to a standard which was regarded by the prices authorities as sufficient and satisfactory. It is thus said that the power to fix prices was used not really in order to fix the prices of goods to purchasers who bought the goods, but in order to force upon the company a reduction of its profits.

Reference was made to cases in which it has been held by this Court that a power can be validly exercised only for the purpose for which it has been conferred. If such a purpose can be ascertained either by an express declaration in the provisions granting or creating the power or by reference to the nature of the subject matter or by reference to a purpose in relation to which alone the power can be validly conferred (e.g. the defence of the Commonwealth), then the use of the power for another and extraneous purpose is unauthorized and is invalid: See the cases cited in the judgments in *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (1).

Upon the proceedings before the magistrate, the prosecutor objected to the admission of any evidence tending to show the purpose for which the price-fixing power had been exercised. It was argued that the *Prices Regulations* plainly authorize the fixing of prices by a notification in writing such as was given to the appellant company, that this was done and it followed that the notification was plainly good. But, in my opinion, the authorities to which reference has been made show that it was open to the defendant to adduce evidence for the purpose of showing that the power was exercised for some indirect purpose not authorized by the Regulations.

The evidence upon which the company relies for the purpose of showing an indirect and unauthorized purpose consists of certain correspondence and of statements made at an interview between a representative of the company and officers of the department which administers the *Prices Regulations*. On 11th April 1945 the Deputy Prices Commissioner wrote to the company asking for particulars of confectionery manufactured, selling prices and cost. On 17th July this information was forwarded and was verified by statutory declaration. In August an interview took place between the secretary of the company and officers of the price-fixing department. This evidence was not subjected to cross-examination and was not contradicted. One of the officers suggested that the company might consider reducing its turnover by about twenty per cent, with the object of reducing its gross profit margin to fifteen per cent,

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which the officer said was the profit earned in what he described as the base year, namely the year ended 31st July 1939.

On 18th September the company wrote to the Deputy Prices Commissioner a letter in which it was contended that the increased profit which the company admittedly had earned was due to the efforts and economies of the company and to a substantially increased turnover. Reference was made to the suggestion that the profit margin should be reduced by reducing the turnover by twenty per cent. The company, however, submitted that it should not be asked to comply with this suggestion because its prices had been maintained unchanged since 31st August 1939, and its increase in profit had been brought about by elimination of unprofitable lines and by more efficient production and improved methods; and it also urged that reduction in turnover would mean reduction in output and reduction in the number of employees.

The secretary of the company gave evidence that the sales for the year ended 31st July 1939 were £12,170 and the net profit for that year was £605. The sales increased year by year to the year ended 31st July 1945, when they reached £33,503, and the net profit was £3,606. The witness said that in this period the company's rate of gross profit increased from approximately nineteen per cent to something about thirty-seven per cent. The defendant succeeded in obtaining and putting in evidence a report on the business of the company which was prepared by officers of the New South Wales Prices Branch. This report contains an analysis of the trading results of the company in the period 1939-1945 showing what is described as an "apparent excess gross profit" which totalled in 1945 £16,626. No evidence was given to explain the basis upon which these figures were calculated. The document bears annotations referring to another file of papers and stating that the prices of the company had been reduced by twenty per cent as from 8th February. This document shows that the rate of profit made was under the consideration of the prices authorities, and it is a reasonable conclusion from the other evidence that the reduction in prices notified to the company on 8th February was made in order to reduce the profits of the company. The question is whether, if it is taken as established that the reduced prices were fixed for the purpose of reducing the profits of the company, such action was within the powers conferred by the *Prices Regulations*.

In the first place, the appellant does not deny the obvious proposition that any fixing of prices in a trading business which alters existing prices necessarily has an actual effect upon profits. Nor is it denied that it is proper to take such an effect into account in

fixing prices. The relation between prices and price-fixing on the one hand and profits on the other hand is obvious. In order to procure production it is necessary to allow some profit. In order to prevent what is normally called profiteering (that is, overcharging in all the circumstances of the case) it is proper to consider the profit actually made by the vendors of the goods. It appears to me to follow that when power is given to fix prices it is proper for the person exercising the power to consider whether or not an excessive profit is being made by the vendors of the articles the prices of which are being fixed. The argument for the appellant appears to be that, although it is proper to consider whether traders are making excessive profits in determining what prices they shall be allowed to charge, yet, if this is the only matter which is taken into consideration, any fixing of prices in relation to a trader is invalid. This really means that, although the amount of profits of a trader is a relevant matter in fixing prices to be charged by him, no prices can be validly fixed unless some other relevant and separable matters are also taken into consideration. The simplest answer to this contention is that, when prices are reduced by reason of what is regarded as the making of excessive profits, the interests of purchasers of the goods are really the governing consideration. In such a case the reason for the fixing of lower prices is provided by the opinion that it is unjust or undesirable to maintain a price level which brings about very high profits to vendors.

It is a question of policy whether the same price should be fixed for the same goods, whoever sells them, or whether authority should be given to fix prices which vary, though for the same goods, in the case of different individuals. It might be thought to be sufficient to fix prices which vary only when the goods are different and to allow traders to make such profits, at those prices, as they can. Under such a system the fixing of a particular price might allow some traders to make large profits and perhaps to obtain the whole market, while other traders might make small profits or possibly be forced out of business. On the other hand, it might be thought desirable to give authority to fix prices which, by differentiation between traders, would reduce the profits of some traders and allow their competitors to charge higher prices, if they could obtain them. It is entirely a question of policy whether such differentiations should be allowed. The question in this case is whether the Regulations, upon their true construction, permit differentiation for the purpose of bringing about such results as those just mentioned. In my opinion, certain regulations authorizing differential treatment of traders selling the same goods show that it was intended that the

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price-fixing authorities should be at liberty to fix differing prices in the case of individual traders for the purpose of affecting their rates of profit respectively. The regulations which show that this is the case are regs. 17A and 20, considered together with reg. 23.

Regulation 17A provides that the Commissioner may require a trader to produce all balance sheets, manufacturing, trading, profit and loss, production and revenue accounts, &c., &c., and all documents relating to the conduct of his business. Regulation 20 is a provision under which the Commissioner may require any person to furnish a return of his costs and prices &c. These regulations show that it is the intention of the Regulations that the business of a particular trade and, therefore, the trading results of that business, may properly be taken into account in fixing prices. These regulations provide means of obtaining information which would be useful and almost essential in the application of any system of price-fixing, whether or not discrimination between individual traders was intended to be authorized. Taken by themselves, they are consistent with the view that the Regulations permit only the fixing of the same price for the same article in the case of all traders.

But reg. 23 provides for more than one method of fixing prices. The first method is that referred to in par. (a) of sub-reg. (1). Under this provision the Commissioner may fix and declare the maximum price at which goods may be sold generally or in any part of Australia or in any proclaimed area. Under par. (b) of the same sub-regulation the Commissioner may declare that the maximum price at which goods shall be sold by any person shall be such price as is fixed by the Commissioner by notice in writing to that person. It is this power which has been exercised in the present case. Under par. (a) a price is fixed with reference to the characteristics of goods, description of goods, quality, quantity, terms of sale, whether cash or credit &c. Under par. (b) prices are fixed in relation to a particular person. The object of par. (b) is to make it possible to fix different prices for the same goods when sold by different persons. The exercise of the power conferred by par. (b) necessarily involves a consideration of differences between individual persons in relation to their trading, that is, in relation to the economic results of their business activities. The most obvious such economic result is the profit which the individuals make.

It was strongly argued for the appellant that the fact that the appellant's prices had remained unchanged since 1938 showed that there was no profiteering in the sense of over-charging. But in my opinion this is not necessarily the case. The rate of gross profit on the appellant's own figures increased from about nineteen per cent

to about thirty-seven per cent. In my opinion, it cannot be said that a price-fixing authority is considering an irrelevant or extraneous circumstance if he acts upon the view that thirty-seven per cent is a gross profit which should not be made at the cost of the community in war-time. The economies and improved efficiency to which the company refers in the letter which it addressed to the Deputy Prices Commissioner on 18th September might well be thought to produce a more desirable economic result in conferring a benefit on the public by reduction of the prices charged by the company than in increasing either the dividends of its shareholders or the amount paid in taxation to the Government.

Price-fixing has been upheld by this Court as a legitimate form of Federal action under the defence power because it is directed to protecting purchasers in time of war from being overcharged by producers and to preventing profiteering and inflation (*Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1)). A purchaser may be overcharged because generally the price charge is excessive having regard to costs and profits in the trade generally ; but he may also be overcharged by a particular trader because that trader is in fact making a profit which is excessive. The price-fixing power can, in my opinion, legitimately be used to prevent purchasers being overcharged by a particular trader. The Regulations expressly contemplate differentiation between traders. Such differentiation can be made only if the commercial results of the trading of individual traders are separately considered in relation to the results of their trading, that is in relation to their profits. It is therefore no objection to the exercise of the power of fixing prices that the prices were fixed for the purpose of affecting the profits of a particular trader. On any other view it is difficult to understand upon what basis of community interest of an economic or commercial character the power to differentiate between traders could be exercised.

In my opinion, the convictions were rightly made and the appeals should be dismissed.

RICH J. These are appeals by the above-named company against convictions on charges of selling by wholesale certain declared goods (confectionery) at a price greater than the maximum price fixed with respect to such goods under the *National Security (Prices) Regulations*. The charges were based on alleged breaches of a notification in writing given to the company on 8th February 1946 fixing the maximum prices at which the confectionery manufactured by the company might be sold.

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It was argued on behalf of the company that the power had not been exercised for the legitimate purpose of price fixing but for an illegitimate purpose—that of reducing the profits of the company to an amount considered by the Commissioner to be adequate. The question thus raised is a question of fact and it was necessary for the company to prove that the Commissioner though professing to exercise the power conferred upon him by the Order was in fact employing it in furtherance of some ulterior object: Cf. *Municipal Council of Sydney v. Campbell* (1); *Werribee Council v. Kerr* (2). The power expressly conferred on the Commissioner by par. 8 of Prices Regulation Order No. 2182 is to fix the maximum price at which the confectionery specified in the notice in pursuance of this paragraph may be sold. But the evidence, consisting of letters which passed between the Prices Branch and the company and of interviews between the investigating officer of the Branch and the secretary of the company, proves, in my opinion, that the power was exercised for a purpose beyond the scope of the Order, namely profit-control pure and simple. There is no doubt, as was pointed out by the Supreme Court of New South Wales in *Ex parte Byrne; Re King* (3), that the element of profit is one that cannot be left out of account in any system of price fixing, and may give rise to great difficulties in fixing prices which will be fair as between different types of traders dealing with the same classes of goods. It is no necessary objection to the validity of a price-fixing order, whether general or special, that gross or net profit has obviously been the dominating factor in the fixation. But the evidence in the present case makes it quite clear that the price-fixing authority has departed from the field of price fixing altogether, and, under a colourable disguise of price fixing, made an order which has no other purpose than that of decreasing the company's profits by twenty per cent. This is shown by uncontradicted evidence that, price-fixing officers having failed in a suggestion that the company should reduce its output by twenty per cent, the price-fixing authority issued an order, clearly designed to achieve the same (and no other) purpose, and framed to reduce its profits by twenty per cent. Such an abuse of power should not be allowed to stand (cf. *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.* (4), per *Evatt J.*).

In my opinion, the appeals should be allowed with costs, the orders nisi made absolute and the convictions set aside.

(1) (1925) A.C. 338, at p. 343.

(2) (1928) 42 C.L.R. 1.

(3) (1944) 45 S.R. (N.S.W.), at p. 126;
62 W.N., at p. 106.

(4) (1939) 61 C.L.R. 735, at p. 794.

STARKE J. Rule nisi for a prohibition issued pursuant to the Constitution, s. 73, and the Appellate Rules of this Court, s. IV. and the *Justices Act* 1902-1940 of New South Wales.

The object of the prohibition is to restrain the parties respondent to this appeal from further proceeding on or in connection with a conviction of the appellant, Miss Daveney Pty. Ltd., for selling by wholesale certain confectionery at greater prices than the maximum prices fixed by a prices notification or order made pursuant to the *National Security (Prices) Regulations*.

The contention on the part of the appellant is that the notification or order of the Commissioner was unauthorized by law. The notification or order relied upon by the Commissioner, issued in February 1946, notified the appellant that the maximum prices at which confectionery manufactured by it might be sold wholesale were fixed at various prices indicated in the schedule.

Regulation 23 (1) (b) (i) of the *National Security (Prices) Regulations* enables the Commissioner to declare that the maximum price at which any declared goods (as were the goods in the present case) might be sold by any person should be such price as was fixed by the Commissioner by notice in writing to that person. And the Commissioner's powers enable him to fix maximum prices so that such prices might vary with profits as determined by the Commissioner. On its face the notification or order issued by the Commissioner is within the authority conferred upon him.

But the appellant contends that the Commissioner exercised his authority in the form in which the notification or order appears for the purpose of controlling and reducing the gross profit percentage of the appellant to a percentage approximate to that earned by it in the year which ended on 31st July 1939.

This fact is established by the evidence.

It appears that the appellant by its own efforts and economies had substantially increased its turnover so that its overhead expenses bore a much lower ratio to gross earnings than in the year 1939 though in its trading the appellant had complied with all prices regulations. The Commissioner's officers suggested that the appellant should reduce its profit margin by voluntarily reducing its turnover by twenty per cent. But the appellant was not content to do so and the Commissioner then issued his notification or order which reduced the maximum prices at which various lines of confectionery might be sold wholesale by it. The reduction in price was in the neighbourhood of twenty per cent and the appellant estimates that its gross profit margin will be reduced by about the same percentage.

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Starke J.

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It is true as was said by *Jordan C.J.* in *Ex parte Byrne; Re King* (1) "that the element of profit is one that cannot be left out of account in any system of price-fixing." But it is still maximum prices at which goods may be sold that the Commissioner is authorized to fix though they may vary with profits; and he is not authorized to fix profits or profit margins. If the Commissioner had notified and ordered that the gross profit percentage of the appellant should be reduced by twenty per cent or to the gross profit percentage earned by it in the year which ended on 31st July 1939, then there is no provision in the Regulations that expressly authorizes him so to act or that can be spelled out of the authority given to him.

And that which he cannot do directly he cannot do indirectly. The Commissioner has no authority to use power, confided in him for the purpose of fixing prices at which goods might be sold, for the purpose of fixing and controlling profit margins. In my opinion, so to do would be an abuse of and beyond his power and authority. Yet that is what the Commissioner claims to do and has attempted to do, by indirect means, in the present case.

Consequently, in my opinion, the notification or order challenged is bad and prohibition should go.

DIXON J. These are appeals from four convictions before a Court of Petty Sessions exercising Federal jurisdiction upon informations alleging offences against reg. 29 of the *National Security (Prices) Regulations*. The offences consist in selling by wholesale declared goods to wit confectionery at a greater price than the maximum price fixed in relation to the goods under the Regulations. The question upon which the appeals depend is whether the maximum prices were validly fixed.

It is not disputed that the goods in question are declared goods, declared by the Minister under reg. 22. Under reg. 23 (1) (b) (i) the Prices Commissioner is empowered with respect to declared goods to declare that the maximum price at which any such goods may be sold by any person shall be such price as is fixed by the Commissioner by notice in writing to that person. It is under this power that the Commissioner purported to fix the maximum prices. He did so by a notice to the appellant, dated 8th February 1946. The appellant says that the notice is ineffective because it was not given bona fide for the purposes for which the power is conferred upon the Commissioner. The allegation is that the notice was designed solely to control the profits earned by the appellant without regard

(1) (1944) 45 S.R. (N.S.W.), at p. 126; 62 W.N., at p. 106.

to the circumstances to be taken into account by the Prices Commissioner in exercising the power according to the Regulations.

Two general Prices Orders govern the sales of confectionery in New South Wales. There is, first, the Order No. 1015, affecting all goods, which takes as ceiling prices the traders' selling prices for the like goods on or before 12th April 1943. Then there is a general order for confectionery, No. 2182, made on 3rd August 1945. After fixing maximum prices for confectionery sold by retail, the latter Order declares the maximum price at which any other confectionery may be sold to be the price fixed by the former Order, viz., No. 1015. But both Orders contain clauses reserving, so to speak, the power conferred by reg. 23 (1) (b) (i) to declare prices for the individual trader. The reservation contained in Order No. 2,182 is expressed as a declaration by the Commissioner that, notwithstanding the earlier provisions of the Order, the maximum price at which confectionery specified in a notice in pursuance of the clause may be sold by any person to whom such notice is given is such price as is fixed by the Commissioner by notice in writing to that person.

The notice given to the appellant, if valid, therefore operated to take the appellant out of the operation of the general orders and to require it to conform to the maximum prices named specially for its case in the notice.

The appellant is a company that has made confectionery for some years. The prices at which it sold its products in 1946 were the same as those it charged in 1938. They were unchanged. But the sales had almost trebled and that had led to a considerable increase in the amount and rate of profit. The growth in the volume of its business had been progressive in the years 1942 to 1945. For the year ended 31st July 1939 the sales had been £12,270, the gross profit £1,559 or 14.55 per cent on cost and the net profit £605. For the year ended 31st July 1945 the sales amounted to £33,504, the gross profit to £10,354 or 44.73 per cent on cost and the net profit to £3,606.

The business had developed, the fixed charges had not increased and the increase in the volume of sales meant a much higher rate of profit. According to the calculations made in the Prices Commissioner's Branch, the percentage upon funds employed in the business multiplied many times between 1939 and 1945. These circumstances having been ascertained by the officers of the Commissioner from information obtained from the appellant company, they decided that measures must be taken to reduce the rate of profit. An investigating officer having reported to the leader of his group in the Prices Branch on 29th August 1945, they discussed the position with the secretary of the appellant company. According to the evidence,

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the group leader said that, in their opinion, the gross profit percentage should be reduced to a percentage approximating to that which the company would have earned in the year ended 31st July 1939, which he called the base year. He suggested that the appellant company might consider reducing its turnover by about 20 per cent with the object of reducing the gross profit margin to 15 per cent. The secretary of the company said that his directors would consider the question and, on 18th September 1945, wrote to the Prices Branch saying that, as requested, he had placed the representations of the Branch before his board of directors. The letter contained a recapitulation of the interview and asked whether, in the light of the facts the letter proceeded to state, compliance with the requirement to reduce turnover was insisted on.

The facts relied upon in the letter were briefly that the selling prices were the same as those charged as at 31st August 1939, that the increase in profit was the result in part of restricting production under war-time controls to fewer varieties of confectionery, and those the more profitable, and in part to more efficient and improved methods of production and that to reduce turnover meant a reduction of output and, therefore, of employees. None of the statements in this letter appears ever to have been controverted by the Prices Branch, but, on 11th January 1946, the Branch wrote a letter which, after referring to the letter of the secretary of the appellant company, advised him that approval had been given to maximum selling prices for confectionery manufactured by the company. A list of the maximum prices was attached and they were in fact about twenty per cent below those which the company had charged. To the more formal notice already mentioned of 8th February 1946 the same list was annexed.

Counsel for the informant did not go into evidence in the Court of Petty Sessions upon the question of the purpose with which this notice was given, contenting himself with objecting to the relevance of the evidence upon that subject tendered on the part of the defendant company. We are, therefore, restricted upon the question of fact to the materials I have summarized.

On the facts they disclose I think the inference is inevitable that the sole purpose with which the notice fixing reduced maximum prices was given was to bring about a reduction in the profits of the appellant company. We must take it that consideration was given to no other question than the increase in the gross profit of the company and the consequent increase in the net profits and in the percentage of profit on turnover and upon funds employed in the business. We must take it that the reduced maximum prices were

fixed in order to give effect to an opinion, presumably reflecting a general principle or policy of the Prices Commissioner, that an increase of profit of such a kind should be restrained by price fixing.

The question for decision is whether it is within the power conferred by the *Prices Regulations* to fix maximum prices for a specified manufacturer or trade wholly for the purpose of effecting such an end. It is a difficult question but it is one that to my mind depends altogether upon the Regulations. For I do not think that at the time they were adopted it was beyond the power conferred by s. 5 of the *National Security Act* 1939-1946 to confide to the Prices Commissioner a discretion to fix prices for the purpose in question alone, if he thought fit. For the reasons given in *Dawson v. The Commonwealth* (1), I do not think that the operation of Regulations of such a kind lapsed as a result of the close of hostilities and I think that they are continued in force until 31st December 1946 by the *National Security Act* 1946. The matter, therefore, depends upon the scope of the power given by reg. 23 (1) (b) (i).

The scope of the power must be ascertained from an examination of the *Prices Regulations* as a whole and from any further considerations that may be disclosed by other economic measures taken during the war or found in any accepted understanding of the purpose of price fixing or supplied by the principles of interpretation. For there is no definition of the purposes of the power, no statement of the factors which the Prices Commissioner is to take into account in fixing prices and no recital of the objects of the *Prices Regulations*.

When a discretionary power of an administrative nature is given without any other indication of the ambit of the discretion or of the grounds upon which it is to be exercised than may be implied in the general description of the power itself, the criteria for deciding whether some challenged use of the power does or does not go outside or beyond the purposes the power was meant to effect must necessarily be indefinite and even uncertain. With no explicit guidance, the courts must decide as best they can whether any specific use that has been made of the discretionary power is or is not outside its scope. Not much help is given in the present case by the principles of interpretation. They tell us that an authority restrictive of individual liberty must not be loosely construed. But they also warn us against importing an unexpressed restriction into a general power expressly given, if the restriction is not necessarily implied.

I should hesitate to say whether or not there is any accepted understanding of the purposes of price fixing which includes among the purposes the restriction of the profits of a particular trader by a

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specific reduction of his prices, though otherwise his prices would not be considered excessive. But I presume that it may be safely said that, as well as being aimed at protecting the standard of living, price fixing finds its paramount purpose in the contribution it makes to the prevention of inflation. The growth of surplus profits is commonly regarded as a factor tending to increase inflation and the restriction of manufacturing and trading profits is one consequence of price fixing. It does not, of course, necessarily follow that it is commonly conceived to be a function of price fixing to regulate the profit of businesses piece meal by examining the returns of each or any trader separately and fixing distinct maximum prices to be charged by the individual undertaking. But there are obvious difficulties in restricting profits by fixing uniform prices or rates without making it impossible for some manufacturers to carry on whose plants or methods are less efficient than those for whom the prices were set. Whether for that reason or to meet the many other difficulties which must often arise in fixing uniform prices without regard to individual cases, the Regulations specifically provide for the separate fixing of maximum prices for individual traders. Indeed the power, contained in reg. 22, enabling the Minister to declare goods, expressly authorizes the Minister to declare goods in respect of any person. With respect to any declared goods the Prices Commissioner is empowered by reg. 23 in his absolute discretion to fix and declare maximum prices. That power may be exercised as to any person by notice to him: reg. 23 (1) (b) (i). It may, therefore, be reasonably asked, why, since the trader may be dealt with individually and since to restrain profits is a function of price fixing, the power to fix a given trader's prices should not be exercised simply in order to restrict his profits.

In reg. 23 (1A) (h) the Commissioner is given specific authority, in the exercise of his powers, to fix maximum prices so that prices shall vary with profits. The "exercise of his powers" is an expression which must cover all the power given by reg. 23 (1) and, therefore by reference, it draws in the power given by reg. 23 (1) (b) (i) to fix prices for a particular trader separately. Since this can be done so that the prices shall vary with the profits, does it not follow that a purpose of the power is to limit profits and to limit them with respect to the particular person? It is not easy to see any reason in varying maximum prices with profits except to ensure, on the one hand, that the profits shall be reduced if they are greater than a rate considered reasonable by the Commissioner and, on the other hand, that the prices shall go up if they do not allow the trader to

earn what the Commissioner considers an adequate rate. The purpose of ensuring the former implies that the limitation of profits is a specific object of the power.

On the whole, I have come to the conclusion, though not without some hesitation, that the considerations I have mentioned show that to fix maximum prices for a manufacturer or trader in order to reduce his amount or rate of profit is not outside the scope of the power, even although that is the sole reason for notifying him of a distinct list of maximum prices for his business. I do not think that the contrast expressed in the contention that the power is to fix prices, not to limit profits, is one which the Regulations really contemplate or actually institute or maintain. The power is, I think, wide enough to permit the fixing of prices in order to reduce profits. It is true that in the *War-time (Company) Tax Assessment Act* 1940-1944 the legislature, in effect, dealt directly with excess profits; but from that fact no inference can be drawn that profits were not otherwise to be controlled or affected by subordinate legislation. It is also true that by reg. 5 of the *National Security (Economic Organization) Regulations* (S.R. 1942 No. 76) made on 19th February 1942, a provision that was amended on 9th March 1942 (by S.R. 1942 No. 110) but repealed on 2nd October 1942 (by S.R. 1942 No. 425), a person deriving profits from the carrying on of a business was required not to part with assets to such an extent as to disable him from paying to the Commissioner of Taxation so much of the profits as exceeded four per cent of the capital employed in the business, should the Parliament enact legislation exacting such a payment. But again no inference can be drawn from this provision adverse to the conclusion that the *Prices Regulations* contemplate a use of the power to fix maximum prices for the purpose of restraining or restricting profits. Indeed it might be said, on the contrary, that it shows how much economic importance was attached by the regulation-making authority to the limitation of profits. These seem to me to be the only economic measures taken during the war that are in any way relevant, on the question in hand, to the interpretation of reg. 23 (1) of the *Prices Regulations*. Neither appears to me to disclose any consideration that affects the matter.

Upon an examination of the *Prices Regulations*, I think that they cover the purpose with which the notice of 8th February 1946 was given and I am, therefore, unable to accede to the contention on which the appeal depends that the notice did not validly fix maximum prices for sales of confectionery by the appellant company.

I think that the appeals should be dismissed with costs.

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 { and do not think that it is necessary to add anything.

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WILLIAMS J. These are applications to make absolute four rules nisi for writs of prohibition to restrain further proceedings upon four convictions of the prosecutor Miss Daveney Pty. Ltd. for breaches of a notification in writing given to the company on 8th February 1946 fixing the maximum prices at which confectionery manufactured by the company might be sold by wholesale. Prior to this notification, which was made pursuant to par. 8 of Prices Regulation Order No. 2182, the maximum prices for the company were fixed and declared by par. 6 of that Order which fixed a general maximum price for the sale of confectionery at the maximum prices fixed by the provisions of Prices Regulation Order No. 1015. This order, as appears from *Fraser Henleins Pty. Ltd. v. Cody* (1), fixed the maximum prices for such sale at those at which goods sold on substantially identical terms and conditions were being sold on 12th April 1943. The notification of 8th February 1946 was given pursuant to par. 8 of Prices Regulation Order No. 2182 which authorized the Prices Commissioner to vary the maximum prices fixed generally by par. 6 by a notice fixing particular maximum prices for an individual trader.

I have already expressed the opinion in *Vardon v. The Commonwealth* (2) and in *Arnold v. Hunt* (3), to which I adhere, that Prices Regulation Orders are executive orders and that opinion applies *a fortiori* to a notification fixing maximum prices for an individual. Such an order is open to attack on the ground that it is not authorized by the legislation under which it is purported to be made (in this case the *Prices Regulations*) and also on the ground that, although in form it complies with the legislation, it is not a bona-fide exercise of the power for the purpose for which it was conferred. The magistrate appears to have thought that, in order that the exercise of the power should be void on the latter ground, it was necessary that the exercise should have been dishonest. No question of dishonesty arises in this case but where a power is exercised not for the purpose for which it was conferred but for some ulterior purpose the exercise is not a bona-fide exercise of the power and is void.

The company contends that the purpose of the notification of 8th February 1946 was not to fix a price that was fair and reasonable in the public interest but solely to limit the gross profits of the company. The company has not increased its prices since before

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

(2) (1943) 67 C.L.R. 434.

(3) (1943) 67 C.L.R. 429.

the war. Prior to its prices being fixed under par. 6 of Prices Regulation Order No. 2,182, the company had supplied the Commissioner with full particulars of its business so that the Commissioner must then have been satisfied that these prices were fair and reasonable in the public interest. On 29th August 1945 a discussion took place between Mr. Miller, the secretary of the company, and Mr. East, representing the Commissioner, at which Mr. East pointed out that the company's percentage of gross profits had considerably increased in recent years due to increased turnover and that this percentage should be reduced to a percentage approximating that which the company had earned in what he called "the base year" meaning thereby the year ended 31st July 1939. He suggested that for this purpose the company should reduce its sales by twenty per cent. Mr. Miller said that this suggestion would have to be referred to the directors of the company.

On 18th September 1945 the company wrote a letter to the Commissioner referring to this conversation and asking whether, in the light of certain facts therein mentioned, including the fact that its selling prices were those obtaining as at 31st August 1939, the Commissioner still insisted that the company should reduce its percentage of profit by reducing its turnover by twenty per cent.

On 11th January 1946 the company received from the Commissioner a letter referring to, but not answering, the letter of 18th September 1945 and attaching a schedule of maximum prices at which the company was authorized to sell its confectionery, the prices in the schedule being the prices at which the company was then selling its confectionery reduced by twenty per cent. This letter was superseded by the notification of 8th February 1946 which did not refer to the letter of 18th September 1945 but contained the same schedule of prices.

The Commissioner's own file indicates that the company's existing prices were reduced not because they were excessive but because since 1942 the company had been earning what the Commissioner considered to be too high a percentage of profit on the funds employed by the business.

The only finding open on these facts is, in my opinion, that the sole purpose of the Commissioner in fixing special prices for the company was to limit its profits. It is not disputed that an investigation of a trader's profits and a consideration of what is a fair margin of profit in any particular trade are relevant matters for the Commissioner to take into account in determining what is a fair and reasonable price in the public interest. The *Prices Regulations* do not contain an express statement of the purpose for which the Commissioner is authorized to fix prices. But the purpose is clearly

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implied from the contents of the Regulations and the circumstances under which they were made. These circumstances have already been stated in *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1) and I shall not repeat them. The purpose is to enable the Commissioner to fix prices which will protect the public against profiteering and inflation during the war or, in other words, against traders taking advantage of the shortage of goods and abundance of purchasing power due to the war to charge excessive prices. The cases would, I think, be rare in which a price charged before the war, which was then fair and reasonable, would become unreasonable during the war. The Court is not a court of appeal against prices fixed by the Commissioner. It cannot set aside a prices order on the ground that the prices thereby fixed are unreasonable. But the Regulations do not authorize the Commissioner to fix a maximum price for the sole purpose of limiting profits. This is an exercise of the power for an ulterior purpose and is therefore void.

For these reasons, I would make the rules nisi absolute.

Appeals dismissed with costs. Orders nisi discharged.

Solicitors for the prosecutor, *Minter, Simpson & Co.*

Solicitor for the respondents, *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

J. B.

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