

[HIGH COURT OF AUSTRALIA.]

SLOAN AND OTHERS PLAINTIFFS ;

AND

POLLARD AND OTHERS DEFENDANTS.

Constitutional Law (Cth.)—Defence—National security—Food control—Order made after cessation of hostilities—Purpose—Supply of necessary foodstuffs to United Kingdom—Agreement made during war-time—Validity of order—Defence (Transitional Provisions) Act 1946 (No. 77 of 1946), s. 6—National Security (Food Control) Regulations (S.R. 1943 No. 165), reg. 9.

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Nov. 11-13 ;
Dec. 12.Latham C.J.,
Rich, Starke,
Dixon,
McTiernan and
Williams JJ.

In 1944, during the war, the Commonwealth Government agreed to supply to the Government of the United Kingdom for four years from 1st July 1944 all butter and cheese in excess of the needs of the Commonwealth, the military forces of the Commonwealth and U.S.A. and U.N.R.R.A., the agreement showing that it was intended that the Commonwealth would endeavour to make available as much butter as possible. In August 1947, two years after the cessation of hostilities, the Minister of State for Commerce and Agriculture, under the *National Security (Food Control) Regulations*, as continued in force by s. 6 of the *Defence (Transitional Provisions) Act 1946*, made the Cream (Disposal and Use) Order which, *inter alia*, forbade, except under permit, the sale or use of cream for any purpose other than the production of butter or cheese.

Held that the order was valid under the defence power as carrying out an agreement which, when made, was reasonably incidental to the conduct of the war.

ACTION.

In an action commenced in the High Court by John Henry Sloan, John Ronald Anderson, William Anderson, Thomas William Seddon Sloan, Eileen Jane Alice Anderson and Charles Richard Stevens trading as Regal Cream Products against Richard Thomas Pollard, Walter Leslie Smallhorn and the Commonwealth of Australia, the statement of claim was substantially as follows :—

1. The plaintiffs are registered under the provisions of the *Business Names Act 1928* (Vict.) as the proprietors of a business

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carried on under the name of "Regal Cream Products" at 27 Arden Street, North Melbourne, Victoria, the nature of such business being the purchase, processing and sale of cream.

2. The defendant Reginald Thomas Pollard is the Minister of State for Commerce and Agriculture of the defendant Commonwealth of Australia.

3. The defendant Walter Leslie Smallhorn is an officer of the defendant Commonwealth of Australia.

4. The plaintiffs have for many years carried on this business and have built up a large and extensive trade therein, in the course of which they sell large quantities of cream to, *inter alios*, pastry-cooks and retail vendors of cream.

5. (1) By an Act of the Parliament of the Commonwealth of Australia entitled the *Defence (Transitional Provisions) Act 1946* which came into operation on 1st January 1947, it was enacted, *inter alia*, that the regulations the titles of which were specified in the first column of the first schedule thereto should, subject to such Act, be in force until midnight on 31st December 1947.

(2) Included in the regulations the titles of which were specified in the first column of the said schedule were regulations entitled the *National Security (Food Control) Regulations*.

6. (1) On 22nd August 1947 the defendant Reginald Thomas Pollard as Minister of State for Commerce and Agriculture purporting to act pursuant to reg. 9 of the *National Security (Food Control) Regulations* made an Order entitled Cream (Disposal and Use) Order which provided *inter alia*, that :—

"4. A person shall not without the consent of the Controller-General of Food sell, exchange, give away or otherwise dispose of cream except—

(a) to a person who is registered or licensed in respect of premises which are required to be registered or licensed under the law of any State or Territory of the Commonwealth providing for the registration of butter factories or cheese factories or

(b) under the authority of and in accordance with the terms and conditions of a permit."

(2) The order purported to come into operation on 1st September 1947.

7. (1) The cream which the plaintiffs purchase, process and sell in the course of their business is produced from cows' milk in the State of Victoria.

(2) On 1st September 1947, and at all other material times, the quantity of cows' milk produced in the State of Victoria and in

other parts of the Commonwealth of Australia was more than sufficient to supply the demand therefor and for cream and any other product derived therefrom by persons desiring to purchase the same for use or consumption in the Commonwealth and/or for use or consumption by the armed forces of the Commonwealth, and the sole purpose of the order is to increase the exportable surplus of products derived or manufactured from milk or cream.

8. By letter dated 23rd September 1947 the defendant Walter Leslie Smallhorn acting for and on behalf of the Controller-General of Food and at the direction of the defendant Reginald Thomas Pollard as Minister of State for Commerce and Agriculture informed the plaintiffs that it would be necessary for them to apply immediately for a permit under the order to purchase cream from producers or butter factories for re-sale by them to manufacturers of ice cream or other approved products, hospitals and retail vendors holding permits in respect of medical cases.

9. (1) By notice in writing dated 30th September 1947 the defendant Walter Leslie Smallhorn required the plaintiffs to supply him in writing not later than 7th October 1947 certain information to wit—

(i) Names and addresses of persons or companies supplied with cream by the plaintiffs since 1st September 1947 to 30th September 1947, inclusive, and

(ii) Quantities of cream supplied to each of the said persons or companies within the period specified.

(2) In so requiring the plaintiffs to supply to him that information, Walter Leslie Smallhorn purported to act in pursuance of par. 9 of the Order and of the powers conferred thereunder.

10. By letter dated 6th October 1947 to Walter Leslie Smallhorn the plaintiffs refused to supply the said information on the ground that the Order was not within the power of the Commonwealth of Australia to make and was bad in law.

11. On 10th October 1947 Walter Leslie Smallhorn laid an information against certain of the plaintiffs under the provisions of the *Judiciary Act* 1903-1936, the *Defence (Transitional Provisions) Act* 1946, both of the Commonwealth of Australia and the *Justices Act* 1928 (Vict.), alleging that they the said plaintiffs did contrary to the *Defence (Transitional Provisions) Act* fail to comply with a provision of the Order in that they, being persons who had been required under par. 9 of the Order to supply information did fail to supply the information on or before the date specified in the notice to the person making the requirement.

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12. By reason of the Order, persons from whom the plaintiffs have hitherto in the course of their business obtained supplies of cream are reluctant to supply the plaintiffs therewith unless a permit is obtained by the plaintiffs pursuant to the Order and the plaintiffs cannot supply to persons desirous of purchasing cream from them in the course of their business (other than persons who hold a permit pursuant to the Order) save under the threat of prosecution for an offence against the provisions of the *Defence (Transitional Provisions) Act 1946*.

13. The defendants and each of them threaten and intend to require the plaintiffs to cease the acquisition or sale of cream, otherwise than in accordance with the provisions of the Order, and to require the plaintiffs to supply such information as from time to time may be required under the Order and to institute prosecutions against the plaintiffs for failure to comply with the provisions of the Order.

The plaintiffs claimed :—

1. Against all the defendants :—

(a) A declaration that the Cream (Disposal and Use) Order is not authorized by the provisions of the *Defence (Transitional Provisions) Act 1946* or the *National Security (Food Control) Regulations* and is void.

(b) Alternatively with (a), a declaration that in so far as the *National Security (Food Control) Regulations* and/or the *Defence (Transitional Provisions) Act 1946* purport to authorize the making of the Cream (Disposal and Use) Order, the *National Security (Food Control) Regulations* and the *Defence (Transitional Provisions) Act 1946* are beyond the powers of the Parliament of the Commonwealth of Australia, contrary to the provisions of the Constitution of the Commonwealth and are void.

2. Against the defendants Reginald Thomas Pollard and Walter Leslie Smallhorn :—

An injunction restraining the defendants and either of them and any person acting under their direction or the direction of either of them from taking any action against or in relation to the plaintiffs or any of them in pursuance or purported pursuance of the provisions of the Order.

The president of the Cream Products Manufacturers Association deposed in an affidavit that on 15th October 1947 he was informed by the secretary of the Australian Dairy Produce Board, constituted under the provisions of the *Dairy Produce Export Control Act 1924-1942*, that the ban on the sale of cream contained in the Cream

(Disposal and Use) Order was not necessary in order to maintain the present butter ration scale in Australia; that the production in Australia of cream and of cream derivatives such as butter and cheese, both before the coming into operation of the order and at the present time, was more than sufficient for all domestic needs (including the demand for table cream) in Australia and for the supply of the armed forces of Australia; that the only purpose of the order was to stimulate exports to Great Britain; that from one-half to two-thirds of the total production of cream in Australia was exported as butter; that the enforcement of the order would mean that 10,000 tons of extra butter per annum would be available for export; and that the information so given by him, the secretary, was based upon his knowledge of the official statistics prepared by the officers of the said Board.

An affidavit by Archibald Spencer, sworn 23rd October 1947, was, so far as material, as follows:—

2. That the first order for the restriction of the use of cream in the Commonwealth was made in May 1943. This order was made for the purposes of meeting heavy demands for butter from the armed services of the Commonwealth and from the United Kingdom and by reason of the decline in the production of dairy products it was found necessary to restrict the use of cream except for high priority dairy products and the sale of cream as sweet or table cream except on approved medical grounds was prohibited.

3. That in February 1944 the form of the order was slightly changed but continued in operation for substantially the same reasons. This order of February 1944 continued in force until 11th November 1946.

4. That although reliable statistics of sweet or table cream consumption before May 1943 were not available, it was estimated that it was the equivalent of at least 5,000 tons of commercial butter per annum.

5. That during September-October 1946 a survey of butter production prospects was made. It was anticipated that improvement in the manpower position, brought about by releases from the Services, would result in increased production which, together with some 12,000 tons annually, no longer required for the Allied Services based on Australia, would assure the export annually of 60,000 tons to Great Britain without relying on any savings from the cream ban. The annual export of 60,000 tons of butter to the United Kingdom was promised by the Commonwealth to sustain the ration of butter decided on by the British Ministry of Food.

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It was proved that in August 1947 the food position in the United Kingdom was rapidly deteriorating and advice was communicated on behalf of His Majesty's Government of the United Kingdom to the Commonwealth Government of the probability of serious shortage of essential foodstuffs; further that the Commonwealth Government recognized that the food situation in the United Kingdom was extremely serious and formed the opinion that the provision of sufficient fats in the 1947-1948 winter would be a matter of vital importance for the maintenance of the life and health of very many inhabitants of the United Kingdom.

The evidence also showed that in the year 1944 the Government of the United Kingdom and the Government of the Commonwealth of Australia agreed that the Government of the Commonwealth of Australia would make available for sale to the Government of the United Kingdom for the period commencing 1st July 1944 and ending 30th June 1948 all butter and cheese in excess of that required to satisfy the needs of Australia including those of the Australian Forces, the requirements of the United States of America as should be agreed in consultation with the Government of the United Kingdom, supplies to U.N.R.R.A. and the sale to other markets after consultation and agreement with the Government of the United Kingdom. It was further agreed that the Government of the Commonwealth of Australia in determining quantities to be made available for the milk production of each season would consult with the Government of the United Kingdom and would, within the limits of the productive capacity of Australia, take all necessary steps to ensure that supplies of butter and cheese were made available for sale in such proportions as might be required by the Government of the United Kingdom. Negotiations were then being conducted between the Government of the United Kingdom and the Government of the Commonwealth of Australia for an extension of the agreement already entered into beyond the period ending 30th June 1948.

It was estimated that the total butter production in the Commonwealth for the year 1947-1948 would be approximately 160,000 tons of which 100,000 tons would be available under the existing rationing system for consumption in Australia. The balance of 60,000 tons would be exported primarily to the United Kingdom. The estimate of the total production and of the export balance was based upon the assumption of a continuance of the modified ban on the use of sweet or table cream as it existed at present. The termination of the limitation upon the use of cream abovementioned would reduce the export balance by 6,000 tons, constituting ten per cent of the total amount available for export.

A motion by the plaintiffs for an interlocutory injunction was by consent, on 30th October 1947, ordered by *McTiernan J.* to be turned into a motion for decree and, also by consent, was directed to be argued before the Full Court.

The two Governments having regard to the conditions then prevailing were to enter into discussions before 31st December 1947 regarding the arrangements which were to apply after 30th June 1948. If it were then decided that a further agreement should not be made between the two Governments for the sale and purchase of butter and cheese, the Government of the Commonwealth would, during the month of July 1948, transmit to the Government of the United Kingdom, details including the descriptions and quantities of butter and cheese unshipped at 30th June 1948 due to be lifted in accordance with the agreement and the Government of the United Kingdom would buy such butter and cheese at the prices operating at the termination of this agreement.

Provision relating to butter and cheese was made in a schedule to the document in respect of the following matters:—prices, evidence of date of production, advances, weights and packages, salt, preservative, adulteration and moisture, quantity, storage, shipping documents, and loss prior to ocean shipment.

A defence to the action was filed by the defendants during the hearing before the Full Court and the motion then proceeded as the trial of the action.

Further facts and the relevant statutory provisions and regulations are sufficiently set forth in judgments hereunder.

Tait K.C. (with him *Nelson*), for the plaintiffs. The Cream (Disposal and Use) Order, made in August 1947, was not authorized by the *Defence (Transitional Provisions) Act 1946* or the *National Security (Food Control) Regulations* and is void. The only purpose of the order was to stimulate the export of butter, not cream, to the United Kingdom. The order does not come within the scope of the defence power. It was not made in aid of the Commonwealth in aid of the United Kingdom. In those circumstances the order is not supported by the defence power in the Constitution or at all. The effect of the order is to deprive the plaintiffs of their business and without any compensation therefor.

[*Dixon J.* The question is whether the defence power enables the Commonwealth to take measures to ensure the performance of an agreement or the carrying out of an undertaking made in war-time with the prospect of the war continuing for an indefinite period.]

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On the facts the prohibition was not imposed for the purpose of defence. It had nothing to do with the armed forces, nor had it any connection with the defence economy of the Commonwealth, and it is clear that the ban has nothing to do with the rehabilitation of the Commonwealth service personnel or the people of the Commonwealth after the war. The defence power does not operate to enable the doing of matters that fall outside one or other of those classifications. The thing done or proposed to be done under the defence power must have a real connection with the defence of the Commonwealth and not a mere remote possibility of connection. The rehabilitation of other countries does not come within the defence power. Upon the passing of the *Defence (Transitional Provisions) Act* 1946 the *Food Control Regulations* became statutory. The power given by reg. 9 (d) of those regulations was for the purpose of making orders for defence purposes only. The object of the power appears from a perusal of the Act to be limited to rehabilitation. Recital (a) in the preamble to the Act seems to be a limitation upon the objects for which orders can be made ; it is directed to the time during which they shall operate as well as the purpose for which they shall be made, the purpose being the transition from war conditions to peace. The fact that the Act deals with the defence of the Commonwealth generally is not only apparent from the preambles and appears also from the nature and scope of the Act itself. The matters provided for are directed to the maintenance of the defence of the Commonwealth. The preamble limits the power of the Minister to make orders that are or can be said to be for rehabilitation matters. A power given under an Act can be validly exercised only for the purpose or purposes for which the Act was enacted (*R. v. Bromhead* ; *Ex parte Miss Daveney Pty. Ltd.* (1) ; *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (2) ; *Australian Textiles Pty. Ltd. v. The Commonwealth* (3)). An order made under the regulations can be made only for a purpose that is limited to the objects set out in the preamble. The object of the order was the increase of food supplies to the United Kingdom and was outside the power that was given through the defence power by the *Defence (Transitional Provisions) Act*. The order, which purports to deal with the use of cream in the Commonwealth, was made with a view to increasing the quantity of butter available for export from the Commonwealth to the United Kingdom and not with a view to the rehabilitation and restoration from war to peace in

(1) (1946) 73 C.L.R. 237, at p. 243.

(2) (1945) 72 C.L.R. 37, at pp. 67, 68, 79.

(3) (1945) 71 C.L.R. 161, at p. 179.

the Commonwealth. There is no real and substantial connection between the fixing of conditions as to the sale and disposal and use of cream in the Commonwealth and the defence of the Commonwealth. How far there must be a real specific connection is shown in *The Commonwealth v. Australian Commonwealth Shipping Board* (1); *Attorney-General (Vict.) v. The Commonwealth* (2) and *Victorian Chamber of Manufactures v. The Commonwealth* (3). The Minister has made an order for the distribution of cream, not for the purposes of defence, therefore the order is invalid. The test is: has the matter any real and substantial connection with the defence of the Commonwealth. The rehabilitation aspect was dealt with in *Dawson v. The Commonwealth* (4); *Miller v. The Commonwealth* (5); *Real Estate Institute of New South Wales v. Blair* (6) and *Australian Textiles Pty. Ltd. v. The Commonwealth* (7). It does not follow that because there was an existing valid agreement made under the defence power in 1944 that an order made in 1947 with a view to implementing the carrying out of that agreement can also derive its validity from the defence power. A law for the purpose of implementing the agreement cannot be made under the defence power.

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Phillips K.C. (with him *Fazio*), for the defendants. The power of the Minister under the *National Security (Food Control) Regulations* is a power to be exercised within the defence power or for the purpose of the defence power. The power conferred by reg. 9 is within the defence power. The power of the Minister is not limited to the exercise of the defence power but extends to the exercise of any constitutional power available to the Parliament. The order could be justified under, e.g. the power with respect to trade and commerce with other countries and the power with respect to external affairs. The preamble to the Act does not limit in any way the powers to be exercised under the Act. The preamble states that it is necessary to make provision for the security and defence of the Commonwealth and other purposes. Any constitutional power which the Parliament has may be called in aid by it for those purposes. The powers of the Minister under reg. 9 can only be limited by the relevant powers in the Constitution and, ultimately, the only way those powers can be limited is by stating what exercise would be beyond power. Those powers

(1) (1926) 39 C.L.R. 1, at p. 9.

(2) (1935) 52 C.L.R. 533.

(3) (1943) 67 C.L.R. 413, at pp. 417, 418.

(4) (1946) 73 C.L.R. 157, at p. 173.

(5) (1946) 73 C.L.R. 187.

(6) (1946) 73 C.L.R. 213.

(7) (1945) 71 C.L.R. 161.

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should not be read down any further than is required by the Constitution. Assuming, however, that the justification for the Minister's exercise of power must be found within the defence power, it is supported by three separate reasons, namely: (i) the order is a valid exercise of the defence power in view of the existence of the agreement; (ii) the power required to deal with the matters which have been dealt with during the war and cannot be brought to an immediate conclusion upon the cessation of hostilities is a continuation or winding-up power; and (iii) powers connected with the defence of the Commonwealth, past, present and future, not necessarily either rehabilitation or winding-up. The agreement made in 1944 for a term of four years was a reasonable step incidental to the prosecution of the war by the Commonwealth. The agreement having been so made it was implemented up to the cessation of hostilities as part of a war policy. It does not follow that upon the termination of war all that was left in the defence power was rehabilitation. Rehabilitation represents only one facet of the defence power. As regards (i) mentioned above it is undeniable that at the termination of a war power must be exercised to restore to a serviceable and just position in the community those persons who suffered disturbance during the war. As to (ii), *Dawson v. The Commonwealth* (1); *Miller v. The Commonwealth* (2) and *Real Estate Institute of New South Wales v. Blair* (3) fall outside the subject of restoration or rehabilitation. The problems dealt with fell within the defence power because the actual economic measures and defence do not cease when hostilities cease, therefore the power must continue in some form, subject to limitations and modifications as fixed by this Court. Neither of those two subdivisions exhaust the power and there still is a general power to make laws for the defence of the Commonwealth. It is within the defence power to provide vital foodstuffs for a community so closely associated with the Commonwealth in war and peace as was and is the United Kingdom. Further, just as the proper sharing of a vital foodstuff in short supply amongst individuals as the result of the war would be within the defence power if the individuals were within the Commonwealth so, it is submitted, would a proper sharing of a vital foodstuff amongst individuals who are the King's subjects, whether within the Commonwealth or elsewhere, be within the defence power. This allocation amongst individual consumers of vital foodstuffs, is in the circumstances of this case, a problem arising out of the war and is a proper exercise of the

(1) (1946) 73 C.L.R. 157.

(2) (1946) 73 C.L.R. 187.

(3) (1946) 73 C.L.R. 213.

defence power. It cannot be laid down dogmatically as to time or circumstance what will determine whether particular matters or conditions come under the defence power (*Chastleton Corporation v. Sinclair* (1)). The question of whether defence powers continued after the cessation of hostilities was discussed in *Fleming v. Mohawk Wrecking & Lumber Co.* (2); *In re Yamashita* (3); *Chastleton Corporation v. Sinclair* (1) and *Fort Frances Pulp and Paper Co. Ltd. v. Manitoba Free Press Co. Ltd.* (4).

[WILLIAMS J. referred to *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* (5).]

The causes of the present shortage of vital foodstuffs, are the shortage of manpower, materials and equipment, and fertilizers. These causes are directly traceable to the war and war-time conditions and circumstances. The Court will not examine every administrative or executive decision, and it is sufficient if an exercise of power may reasonably be seen to be for defence. The Court would not say that butter rationing is on the threshold of invalidity because although there is a constitutional justification for doing it some exercise of the power outside the constitutional limits might be made (*Dawson v. The Commonwealth* (6)). Regulation 9 is to be read subject to some implied limitations to be gauged from the Act, not the Constitution. In the preambles the Parliament was describing the situation and difficulties calling for legislation. It did not intend to limit its powers in dealing with those difficulties. Recourse cannot be had to the preambles to read down a grant of power such as that in the *Food Control Regulations*. The *Defence (Transitional Provisions) Act* is a valid statute within the defence power. The commerce power extends far enough to enable the Parliament to make a regulation which would direct the exportation of a commodity and would extend to a law which directly increased the available supply of an exportable commodity. Taking into account the existing rationing law which limits the consumption of butter in the Commonwealth, and assuming that to be valid, then it is submitted that a law which is directly related to increasing the amount to be exported in international commerce is a law within s. 51 (i) of the Constitution. A law directed to nothing except the increasing of the exportable surplus is a law within the trade and commerce power. In the circumstances, the Court would be justified in treating the subject

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(1) (1924) 264 U.S. 543 [68 Law. Ed. 841].

(2) (1947) 331 U.S. 111 [91 Law. Ed. 1375].

(3) (1946) 327 U.S. 1 [90 Law. Ed. 499].

(4) (1923) A.C. 695, at pp. 706-708.

(5) (1947) A.C. 87.

(6) (1946) 73 C.L.R., at p. 181.

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order as an exercise of the power with respect to trade and commerce with other countries (*National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1); *Mulford v. Smith* (2) and *Wickard v. Filburn* (3)). The regulations are general in their character. They authorize the making of any order which might as a law be made by the Commonwealth under any one of its constitutional powers. Although the order clearly comes within the defence power, in the circumstances of this case it promotes the flow of foreign commerce and therefore also comes within the trade and commerce power. Consequently, it also comes within the external affairs power.

Tait K.C., in reply. The order is directed to the acquisition, disposal and use of cream in the Commonwealth and it is outside the power with respect to trade and commerce with other countries. That power does not extend to enable the Parliament to deal with matters that are concerned with what happens before that trade and commerce commences at all. The order cannot be validated under the trade and commerce power because it was made under reg. 9 of the *Food Control Regulations*, and those regulations were made under an Act which on its face appears to have been made for the purposes of defence. The exercise of a sub-power under the Act, as by a Minister or a delegate of a Minister, must be limited to purposes of the Act as found. Parliament gave the Minister power to do these things for the purpose of defence and for no other purpose. The purpose for which the power is exercised by the Minister must be a purpose that is the aim and object of the power so exercised (*Shrimpton v. The Commonwealth* (4)). The validity of the order depends upon the power of the Parliament under s. 51 (vi.) of the Constitution as in August 1947 and not as in 1944. The agreement is simply an agreement for whatever may be the excess over the domestic needs of the Commonwealth and there is no suggestion in it that the Government of the United Kingdom expects or requires that any step shall be taken to reduce the quantity of butter and cheese that the people of the Commonwealth may desire to consume. On its face the agreement relates only to the production of butter and cheese and has nothing to do with war. It is not denied that in 1943-1944 there was a necessity for food production for the purposes of the war in the Commonwealth and for all its allies, but the question is: what was the position in August 1947 as regards the defence of the Commonwealth. A law,

(1) (1937) 301 U.S. 1 [81 Law. Ed. 893].

(2) (1939) 307 U.S. 38 [83 Law. Ed. 1092.]

(3) (1942) 317 U.S. 111 [87 Law. Ed. 122].

(4) (1945) 69 C.L.R. 613, at p. 619.

the aim and object of which is to provide assistance to rehabilitate or restore or help economic conditions in the United Kingdom, is not a law for the "peace, order and good government of the Commonwealth" (s. 51), with respect to "the naval and military defence of the Commonwealth" (s. 51 (vi.)). It cannot be said that the conditions prevailing in the United Kingdom in August 1947, and which were sought to be remedied, were altogether, or even substantially, the result of the war. Although it is not denied that the defence of the Commonwealth may be conducted in other parts of the world, it is denied that the power of rehabilitation is exercisable in respect of those other parts of the world.

Cur. adv. vult.

The following written judgments were delivered:—

LATHAM C.J. This is a motion by the plaintiffs for an interlocutory injunction which by consent has been ordered to be treated as a motion for a decree and has been referred to the Full Court.

The plaintiffs, John Henry Sloan and others, carry on business under the name of "Regal Cream Products" in the purchase, processing and sale of cream.

The *Defence (Transitional Provisions) Act* 1946 provides in s. 6 that the regulations the titles of which are specified in the First Schedule, being regulations in force under the *National Security Act* immediately prior to the commencement of the *Defence (Transitional Provisions) Act*, shall, subject to the Act, be in force until midnight on 31st December, 1947, with the amendments specified in the schedule.

The regulations which were thus enacted by the statute include the *National Security (Food Control) Regulations*. Regulation 9 (1) of those regulations provides that the Minister shall have power to control, regulate and direct the distribution, disposal, use and consumption of food . . . and in particular shall have power—
(a) to require that any food . . . shall be distributed or disposed of . . . (d) to prohibit, regulate or restrict the distribution, disposal, use or consumption of food.

Regulation 9 (2) provides that the Minister may make such orders as appear to him to be necessary or expedient for the purposes of the regulations.

Under these provisions the Minister made an order on 22nd August 1947, entitled Cream (Disposal and Use) Order. Paragraph 4 of the order provides that a person shall not without the consent of the Controller-General of Food sell, exchange, give away or

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otherwise dispose of cream except—(a) to a butter or cheese factory, or (b) under the authority of and in accordance with the terms and conditions of a permit.

Paragraph 5 provides that, except with the consent of the Controller-General of Food or under the authority of and in accordance with the terms and conditions of a permit, a person shall not purchase, receive or otherwise acquire any cream unless he is registered or licensed under the law relating to butter factories or cheese factories.

Paragraph 6 provides that a person shall not without the consent of the Controller-General of Food use any cream except—(a) for the manufacture of butter or cheese at registered butter factories or cheese factories or at the farm where the cream is produced ; or (b) under the authority of and in accordance with the terms and conditions of a permit.

Paragraph 8 provides for the granting of permits.

Paragraph 9 provides that the Controller-General of Food or an authorized officer may, by notice in writing, require a person to furnish returns relating to food.

The evidence shows that an officer acting on behalf of the Controller-General of Food has informed the plaintiffs that they must apply for a permit in order to purchase cream from producers or butter factories and that it would be a condition of the permit that the cream should be resold by the plaintiffs to specified classes of purchasers, viz., manufacturers of ice cream or other approved products, hospitals and retail vendors holding permits in respect of certain medical cases.

A demand has also been made that the plaintiffs should furnish returns in accordance with par. 9 of the order. The plaintiffs have declined to supply such returns and a prosecution of the plaintiffs for breach of the order is pending. If the order applies to the plaintiffs they will be unable to sell cream for table use or for use in the making of cakes and pastry, and will (if they obtain a permit) be able to supply cream only to persons who are approved as purchasers by the Controller-General of Food.

The order made under the regulations is an administrative order, and, it is submitted, can be valid only if the power to make the order is exercised bona fide for the purpose for which the power is conferred (*Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (1)). That purpose is shown by the preamble to the *Defence (Transitional Provisions) Act 1946* to be a purpose connected with defence. The preamble to the Act, which was assented to on 14th

(1) (1945) 72 C.L.R. 37.

December 1946, recites that a state of war still exists between His Majesty and Germany, Japan and other countries and that legislative provision is required in order to bring a gradual and orderly return to conditions of peace and that it is necessary for the peace, order and good government of the Commonwealth—(a) to make certain provisions to operate during a time of transition from war conditions to conditions of peace; (b) to make provision for the carrying on or completion, of certain arrangements &c. entered upon or subsisting in pursuance of regulations made under the *National Security Act*; (c) to provide for matters incidental to the termination of that Act and of the regulations made thereunder and/or the orders, &c. made under those regulations.

This preamble, it is contended, operates in relation to all the regulations to which it is sought to give continued effect by s. 6.

The plaintiffs contend that there are no circumstances associated with defence which can be relied upon to support the order.

In the affidavit filed on behalf of the plaintiffs the following statement appears, and it is not contradicted or qualified by any of the evidence adduced on behalf of the defendants:—"The cream which the Plaintiffs purchase process or sell in the course of their said business is produced from cows' milk in the State of Victoria. On the said 1st day of September 1947" (the date of the Minister's order) "and at all other material times the quantity of cows' milk produced in the State of Victoria and in other parts of the Commonwealth of Australia was more than sufficient to supply the demand therefor and for cream and any other product derived therefrom by persons desiring to purchase the same for use or consumption in the said Commonwealth and/or for use or consumption by the armed forces of the Commonwealth, and the sole purpose of the said Order is to increase the exportable surplus of products derived or manufactured from milk or cream."

In a further affidavit by A. D. Roker, it is stated that the secretary of the Australian Dairy Produce Board constituted under the provisions of the *Dairy Produce Export Control Act* 1924-1942 of the Commonwealth informed the plaintiffs that the prohibition of the sale of cream contained in the Minister's order "was not necessary in order to maintain the present butter ration scale in Australia; that the production in Australia of cream and of cream derivatives such as butter and cheese, both immediately before the coming into operation of the Order and at the present time, was more than sufficient for all domestic needs (including the demand for table cream) in Australia and for the supply of the Armed Forces of Australia; that the only purpose of the order was to stimulate

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exports to Great Britain.” The said officer also informed Mr. Roker that the enforcement of the order would mean that 10,000 tons of extra butter per annum would be available for export. This statement is not contradicted or qualified by any of the evidence submitted on behalf of the defendants.

The defendants, while not disputing these allegations made on behalf of the plaintiffs, contend that there are further facts consideration of which shows that the Minister’s order can be justified under the defence power.

An order restricting the use of cream was made in May 1943, in order to meet the demands for the armed services and the United Kingdom. That order continued in force until 11th November 1946.

In the year 1944, i.e. during the war, an agreement was made between the Government of the United Kingdom and the Government of the Commonwealth with respect to the disposition of butter and cheese produced in Australia. This agreement is contained in a document entitled “ Heads of Agreement for the purchase by the Government of the United Kingdom of supplies of butter and cheese in Australia from the production period 1st July 1944 to 30th June 1948.” It bears the date of 1st July 1944. The agreement is prefaced by the following words : “ The Government of the United Kingdom and the Government of the Commonwealth of Australia, recognizing the necessity of maintaining and, if possible, increasing the production in Australia of butter and cheese, agree as follows.”

Clause 1 of the agreement provides that the Commonwealth of Australia will make available for sale to the Government of the United Kingdom, in the period commencing 1st July 1944 and ending 30th June 1948, all butter and cheese in excess of that required— (a) to satisfy the needs of Australia including those of the Australian forces ; (b) to provide the requirements of the forces of the United States of America ; (c) to provide supplies to U.N.R.R.A. ; (d) for sale to other markets.

In the case of (b), (c) and (d), it is provided in each case that the requirements, supplies or sales shall be made following or subject to consultation with the Government of the United Kingdom.

Clause 3 provides that the Government of the United Kingdom will buy butter and cheese from Australia.

Clause 5 provides for the prices to be paid.

The defendants have also adduced evidence that since November 1943, allocation of world foodstuffs has been made by a Combined Food Board and later by an International Emergency Food Council in Washington. The agreement between the Governments of the United Kingdom and the Commonwealth was taken into account

by the Council as part of the general scheme of distribution of world supplies. H. C. OF A.

In August 1947, i.e. more than two years after the end of the war in Europe, the food position in the United Kingdom was rapidly deteriorating and the Commonwealth Government formed the opinion that the provision of sufficient fats in the 1947-1948 winter would be a matter of vital importance for the maintenance of the life and health of very many inhabitants in the United Kingdom.

It is admitted for the plaintiffs that there is Commonwealth power in time of war to control the disposition of foodstuffs: see *Farey v. Burvett* (1); *Stenhouse v. Coleman* (2). It is argued for the defendants that the power to make laws with respect to the defence of the Commonwealth and the several States conferred upon the Commonwealth Parliament by s. 51 (vi.) of the Constitution extends also to the enactment of measures for the economic assistance of other parts of the British Commonwealth which have assisted Australia in the recent war and upon whose support Australia would probably depend in any future war. It is suggested that economic assistance to Great Britain (whether or not there is war or imminence of war at the time) is assistance to a country which has been and can be expected to be a powerful ally in time of war and that therefore such assistance is authorized as an exercise of the power to make laws with respect to the defence of the Commonwealth.

Upon the view which I take of the effect of the agreement made between the Governments, it is not necessary to decide upon this contention. As at present advised I am of opinion that the contention goes too far. Even in relation to matters within Australia the defence power does not enable the Commonwealth Parliament to make laws upon the basis that they promote the welfare and strength of Australia and are therefore connected with defence—cf. *Victorian Chamber of Manufactures v. The Commonwealth (Industrial Lighting Regulations)* (3). If this be so, the strengthening of the economic position, not of Australia, but of another country, even though it be part of the British Commonwealth, could not be held to come within the subject of the defence of Australia.

The defendants, however, rely also upon a special argument based upon the existence of the agreement with the United Kingdom. The conduct of war involves many arrangements between allies and, within the British Commonwealth, between the various parts of the Commonwealth. These arrangements must necessarily be

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(1) (1916) 21 C.L.R. 433.

(2) (1944) 69 C.L.R. 457.

(3) (1943) 67 C.L.R. 413.

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made at a time when it is not known how long the war will last or what the result of the war will be. In some cases such arrangements can be effective only if they can be relied upon for a period. In 1944 the date of the termination of the war was quite uncertain. As a war measure the provision of fats—butter and cheese—to Great Britain clearly might be a matter of great importance not only to Great Britain but also to Australia. It cannot be said that it was unreasonable to take the view that the war and consequential necessity for such provision might continue to the year 1948. Further, the agreement made must be viewed in relation to the whole war set-up which involves a complexus of reciprocal arrangements as to supply of shipping, munitions, food and other commodities. Butter may be given or sold in exchange for guns. It is a matter of common knowledge that a far-reaching system of mutual assistance between countries engaged on the same side in a war may be necessary during a war in order to secure co-operation and the efficient utilization of national resources in the common interest.

Thus in my opinion the making of the agreement as to the sale of Australian butter and cheese to England during the period 1944-1948 was a step which may reasonably be regarded as incidental to the conduct of the war and therefore the making and the carrying out of the agreement is a justifiable exercise of the defence power.

It is argued for the plaintiffs that the arrangement between the Governments of the United Kingdom and the Commonwealth was not a contract to supply any definable quantity of butter and cheese. In my opinion that is quite true. The agreement was not a contract for the breach of which an action for damages could be brought. It was an arrangement between governments and was essentially the kind of arrangement upon which governments are entitled to rely as between themselves. It is true that the Commonwealth Government does not agree to restrict the consumption of cream in Australia so as to increase the amount of exportable butter and cheese, but the terms of the arrangement show that it was expected that the Commonwealth, though not legally bound to do so, would endeavour to make as much butter and cheese as possible available for export to the United Kingdom.

Accordingly in my opinion the existence of the agreement in the special circumstances of this case gives legislative power to the Commonwealth Parliament to act so as to increase the exportable surplus of butter and cheese to the United Kingdom during the period for which the agreement operates. One obvious method of securing this result is to take steps to secure the conversion of cream

into butter and cheese and to limit the use of cream for other purposes.

It is objected, however, that the order of the Minister contains no reference to the arrangement between the two governments and that therefore it ought to be considered apart from any such arrangement. Many orders made under National Security Regulations have contained no reference in terms to the purpose for which the orders were made. It has not hitherto been suggested that such orders were invalid because they did not declare their purpose upon their face. In my opinion there is no reason why the facts in relation to which an administrative order is applicable should not be shown by evidence. If, for example, there is power to give a certain direction to a class of persons such as, e.g., wheat farmers, and a direction is given to someone described as "William Smith" without any mention of his occupation, the person who gives the direction would, if his authority be challenged, be entitled to show that William Smith was in fact a wheat farmer. In the same way, in the case of the present order, the defendants are, in my opinion, entitled to show that the operation of the order is to increase the exportable surplus of butter and cheese and that such increase is in accordance with the true object of the arrangement between the Governments. The Court may properly assume that the arrangement will be carried out by exporting as much butter and cheese as possible to the United Kingdom.

These conclusions make it unnecessary for me to consider arguments for the defendants which were based upon the power of the Commonwealth Parliament to make laws with respect to trade and commerce with other countries.

For the reasons stated, the order made by the Minister is, in my opinion, a valid order and the action of the plaintiffs should be dismissed.

RICH J. This case presents some difficulties, but in my opinion they are to be solved by an application of the defence power to the precise facts of the case. I have said before "that although the meaning of the defence power is static its application varies with the circumstances to which the legislation in question is directed" (*Victorian Chamber of Manufactures v. The Commonwealth* (1)). This observation was made in reference to an exercise of the power during the progress of the war. At that time it was necessary to consider the ambit of the defence power in relation to what was incidental or conducive to the prosecution of the war. We have

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now reached a state of affairs when our attention must be directed rather to what is incidental or ancillary to the liquidation of the national organization for war. The basal principle, however, by which the operation of the power is to be determined is the same although the manner in which the principle works in its application to the facts is necessarily governed by a somewhat different line of reasoning. What is incidental to the process of winding up the organization, arrangements or order called into being for the prosecution of the war necessarily includes the implementing, execution or adjustment of agreements whether with other countries or between the Commonwealth and its subjects made in the course of the prosecution of the war. In the present case the situation which makes the defence power applicable depends in some measure upon the outcome of an agreement made between the Commonwealth and the United Kingdom during the war. That agreement which seems to have been made in 1944 is expressed in a document exchanged in May 1945 between the representatives of the two countries. If the Cream (Disposal and Use) Order made in August 1947 can be regarded as a means of fulfilling the obligations of the Commonwealth to the United Kingdom arising under this agreement I think it is justified by the defence power. I have come to the conclusion that it can be so regarded and for two reasons. In the first place, the natural tendency of the order is to produce a greater surplus for export of butter and cheese. In the second place, though the document does not stipulate for any definite quantity of butter and cheese as the exportable surplus, the plain sense of the agreement is that Australia should supply as much butter and cheese as she reasonably can after supplying her own needs, and the assurance subsequently given by the Commonwealth to the Ministry of Food is sufficient as between two countries to quantify the obligation in an amount making it incumbent on the Commonwealth to take some measures to secure a commensurate exportable surplus. I need hardly say that I am not using the word "obligation" in any technical or juristic sense. I refer only to the need for the fulfilment of expectations raised between two countries by any express understanding arrived at between them. In short, I use the word "obligation" to express the consequence of the Latin phrase *pacta sunt servanda*.

I am therefore of opinion that the order is a valid exercise of power and that the action should be dismissed.

STARKE J. A declaration is sought in this action that the Cream (Disposal and Use) Order dated 22nd August 1947 is void and that in so far as the *National Security (Food Control) Regulations* and the

Defence (Transitional Provisions) Act 1946 purport to authorize the order the same are beyond the constitutional powers of the Commonwealth and void.

Shortly, the order provides that a person shall not without the consent of the Controller-General of Food sell, exchange, give away or otherwise dispose of cream except to registered butter or cheese factories or under the authority of a permit and also that a person shall not, except with the consent of the Controller-General of Food, purchase, receive or otherwise acquire cream unless his premises are registered or licensed as a butter or cheese factory. Further, the order provides that a person shall not without the consent of the Controller-General of Food use any cream except for the manufacture of butter or cheese at registered or licensed butter or cheese factories, or at a farm where the cream is produced or under a permit. But a person is not prohibited from using cream obtained from milk held by him for his own ordinary consumption. The order also gives very general powers concerning the issue of permits and the terms and conditions thereof and also authority to require persons to furnish returns or supply information relating to food or foodstuffs specified by notice.

This order purports to have been made under and in pursuance of the *National Security (Food Control) Regulations* which were made effective by the *Defence (Transitional Provisions) Act* 1946. And although some reliance was placed upon the trade and commerce and the external affairs powers in the Constitution it is plain, I think, that the constitutional basis of the *Defence (Transitional Provisions) Act*, the *National Security (Food Control) Regulations* and the order itself depend upon the defence power in the Constitution.

Every legislative Act, regulation or order of the Commonwealth must, as I have said before, find some warrant in the Constitution. Some reasonable and substantial basis must exist for the conclusion that the Act, regulation or order is one with respect to defence. The Court however has already held that the cessation of hostilities does not necessarily exhaust the defence power which includes power to remedy conditions arising out of and by reason of war.

Orders restricting the use of cream were first made under the *National Security Act* in 1943 and were continued until November 1946.

In August 1947 the present order was made, operating from 1st September 1947, renewing restrictions as already set forth.

At the time of the making of this order hostilities between the belligerents in the recent war had ceased.

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Apart from the recitals in the *Defence (Transitional Provisions) Act 1946* there is nothing on the face of the order itself that discloses any connection with defence. And it does not require that the owners or manufacturers of butter or cheese should apply the same for defence or any other purpose. So far as the order is concerned the owners and the manufacturers of butter or cheese are free to deal with and market it as they choose.

But, I take it that we may look at the circumstances surrounding the order. It is conceded that the real purpose of the order is to increase the exportable surplus of products derived or manufactured from milk or cream. And it appears that in August the food position in the United Kingdom was rapidly deteriorating and that the provision of sufficient fats in the winter of 1947-1948 was of vital importance for the maintenance of the life and health of the inhabitants of the United Kingdom.

Further, it appears that in 1945 an arrangement was made between the governments of the United Kingdom and Australia whereby Australia was to make available for sale to the government of the United Kingdom in the period commencing on 1st July 1944 and ending 30th June 1948 all butter and cheese in excess of what I may shortly describe as Australian requirements and the United Kingdom agreed to buy the excess. In a covering letter it was intimated that the United Kingdom regarded the purchase as on behalf of the United Nations but expected the supplies under the arrangement to be allocated to the United Kingdom.

And the *National Security (Dairy Produce Acquisition) Regulations* made effective by the *Defence (Transitional Provisions) Act 1946* conferred upon the government of Australia ample powers to implement this arrangement.

It was suggested, however, that the defence power of the Commonwealth must be confined to the needs of Australia—the peace, order and good government of the Commonwealth and that the shortage of foodstuffs and other materials in England in the post-war period in consequence of and by reason of conditions arising from the war were not matters in respect of which the Commonwealth could exercise the defence power. The argument cannot be sustained. The defence power is being exercised in the present order to implement a war arrangement with the British Government involving food supplies in short supply arising in consequence of and by reason of conditions arising out of the war in which both the United Kingdom and Australia together engaged with other allies, and in operation the order results in an increase of the

exportable surplus of butter and cheese available for the purposes of that arrangement.

In my opinion, that is a reasonable and substantial basis for concluding that the order is made with respect to defence. It may be that the order can be justified, as was argued, upon a wider basis but it is unnecessary to discuss that contention in this case. It can stand over for another day.

The action should be dismissed.

DIXON J. The question in this suit is whether an order called the Cream (Disposal and Use) Order is valid. It is expressed to come into force on 1st September 1947 and was made a week before that date by the Minister for Commerce and Agriculture purporting to act under the *National Security (Food Control) Regulations*, the operation of which is continued by the *Defence (Transitional Provisions) Act 1946*.

The chief provisions of the order forbid the sale or disposal of cream, except under permit, to anybody who is not registered or licensed in respect of a butter or cheese factory and forbid the use of cream, except under permit, for any purpose but the manufacture of butter or cheese.

A law imposing such a prohibition upon the disposal and use of an ordinary commodity is prima facie a regulation of domestic industry, internal trade and home consumption which falls within the legislative powers of the States and beyond those of the Commonwealth.

It is upon this broad ground that the validity of the order is attacked. The order, if good, is plainly calculated to increase the production of butter and cheese and its provisions evidence that purpose. To increase production is to increase the exportable surplus of butter and cheese.

The Commonwealth claims that, because of the circumstances that obtain, the purpose of securing a greater export of these foods from Australia is one which, for the time being at all events, falls within the scope of Federal legislative power. The purpose, it is said, draws under Commonwealth power what otherwise would be an excursion into the legislative field of the States. Three powers are invoked. Stout reliance was placed on defence; *a Iove incipendum*. Then trade and commerce with other countries was referred to as a second power that might support the provisions of the order. The reference was brief and seemed less like an argument than a caveat against any supposition on the part of the Court that it was impossible, even with a full use of the more recent decisions

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of the Supreme Court of the United States, to extend the power over inter-state and foreign commerce back to the production of commodities that might be required for such commerce.

In the third place, the power with respect to external affairs was faintly mentioned.

The order itself depends upon the power conferred by the *National Security (Food Control) Regulations* upon the Minister to control, regulate and direct the production, disposal and use of foodstuffs, and it may seem strange that any power but that of defence could be used to justify an order made under a power deriving from the *National Security Act*.

The explanation lies in the fact that the Food Control Regulations had by the time the order was made, come to depend upon s. 6 of the *Defence (Transitional Provisions) Act 1946*. Section 6 of that Act provides that a list of regulations contained in a schedule, including the Food Control Regulations, shall be in force until 31st December 1947. It may be true that, if any of the legislative powers of the Parliament will authorize so much of this provision as relates to any of the scheduled regulations or any divisible part thereof, it is enough for the validity of that regulation or that part.

Little need be said about the Commonwealth's reliance upon the legislative powers with respect to overseas commerce and external affairs.

The order cannot, in my opinion, be justified under either of these powers for the simple reason that neither the order nor the statutory authority under which the order was made is shown to amount to a law *with respect to* trade and commerce with other countries or *with respect to* external affairs.

The statutory authority under which the order was made consists in s. 6 (1) of the *Defence (Transitional Provisions) Act* in its application to so much of the first schedule as refers to the *National Security (Food Control) Regulations*. On the face of those regulations there is nothing to connect them with trade and commerce with other countries nor with external affairs. In picking up the regulations and providing that they shall be in force until 31st December 1947, s. 6 (1) does not therefore touch ostensibly either of these two subjects of legislative power. That, perhaps, is not conclusive. Circumstances existing when the *Defence (Transitional Provisions) Act* was passed might put a different complexion on that part of the operation of s. 6 (1). For instance, the preamble to the Act speaks of "arrangements activities actions and proceedings entered upon or subsisting in pursuance of certain of the regulations made under the *National Security Act*." If it had been made to appear that

some "arrangement or activity" so subsisted and was of such a kind as to fall within either of the two legislative powers in hand, conceivably that might have been enough to make the section *pro tanto* a law with respect to the subject.

But a singular and unfortunate circumstance of this case is that there has not been laid before us a complete account of what must be an interconnected, if complicated, set of arrangements, transactions, events and facts with reference to the war-time and post-war production, allocation and distribution of food, which I should imagine must have a bearing upon the questions for our decision. If it were before us, it might not affect either the result or the steps by which we reach it, but that we cannot know. As it is, I think that it is clear that we must put aside the commerce power and the external affairs power at all events.

I have reached a different conclusion with reference to the defence power. Enough, in my opinion, has been made to appear to establish that, in present circumstances, to increase the exportable surplus of butter and cheese is an object falling within the defence power. And I agree in the contention that the order can be justified because it is addressed to that object and comes within the words of the authority conferred upon the Minister by the regulations.

Of the facts disclosed by the evidence before us, those upon which I rest this opinion can be briefly stated. During the war, in 1944, an agreement was arranged between the United Kingdom and Australia for the supply of the exportable surplus of butter and cheese. The heads of the agreement were settled and exchanged between the Governments in March 1945. The Commonwealth undertook to make available to the United Kingdom for four years, commencing on 1st July 1944, all butter and cheese in excess of that required to satisfy the needs of Australia, including those of the Australian forces, and to supply certain other requirements.

The other requirements were, in effect, the supply of American forces, the supply of U.N.R.R.A. and sale in other markets. It was left for Australia to agree how much of these requirements she would supply, but always following prior consultation with the United Kingdom Government, and in the last case, namely, sale in other markets, subject to the prior agreement of that Government. The heads of agreement recited the recognition by the two Governments of the necessity of maintaining and, if possible, increasing the production in Australia of butter and cheese.

The transaction formed part of the Allied arrangements for the supply of food in the conduct of the war. The Minister of Food

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for the United Kingdom, in forwarding the heads of agreement to the Australian High Commissioner, wrote :—" While we expect that the supplies we shall buy under the Agreement will be allocated to the United Kingdom, we regard them as purchased on behalf of the United Nations and subject to allocation by the Combined Food Board " (a body established under the Combined Chiefs of Staff) " so long as that body continues to allocate food supplies among the United Nations."

The agreement does not provide for any limitation upon Australia's prior needs, it being sufficiently obvious that such a matter would be left to the good faith of the Commonwealth. But afterwards, that is to say, as I understand it about October 1946, the Commonwealth gave an assurance or promise to the United Kingdom Government of an annual export of 60,000 tons of butter to sustain the ration of butter decided on by the British Ministry of Food. The giving of this promise appears to me to be a thing done in pursuance of, although not required by, the agreement, something incidental to its reasonable execution or fulfilment.

There had been an order restricting the use in Australia of cream, an order like that now in question. But, because of a mistaken expectation that the production of butter would increase, the order was revoked on 11th November 1946. The present order was made nine or ten months afterwards as part of the measures adopted to obtain a production of 160,000 tons of butter in 1947-1948. Of such a production 100,000 tons would be available for Australian consumption and 60,000 tons for export to Great Britain.

If the surplus were 60,000 tons, the Commonwealth would thus be able to make good its promise to the Ministry of Food in the United Kingdom. How much would be contributed to the surplus by the diversion of cream to butter as a result of the order is necessarily a matter of estimate. According to the information obtained by plaintiffs' inquiries, if the order were enforced completely it would mean that annually 10,000 tons more butter would be available for export. The estimate by the Commonwealth officials of the increase to be expected from the operation of the order is not specifically given, but it appears to be considerably lower than this figure. It is plain, however, that the order involves a very substantial contribution to making up the 60,000 tons needed to fulfil the assurance given to Great Britain in 1946 as to the quantitative working out of the agreement made in 1944 and 1945.

The foregoing are special facts which, in my opinion, bring the purpose of the Cream (Disposal and Use) Order, namely the purpose

of increasing the exportable surplus of butter and cheese, within the defence power.

The two Governments made the agreement for a term of years which, it may be surmised, was regarded in 1944 as covering not only the concluding stages of the war but also an ensuing period of expected food shortage and of difficulty of supply of the same character as during actual hostilities and proceeding from the same causes. That such a period should ensue was an inevitable consequence of the diversion of effort, the reshaping for war of the whole Allied economy, the absorption of manpower, the displacement of people and the physical destruction of war.

The agreement by Australia for the supply of butter and cheese for four years was thus a measure taken in the prosecution of the war by the Allies. The subsequent fixing of 60,000 tons of butter per annum as the quantity which Britain in making her arrangements could rely upon Australia's supplying under the agreement ought not perhaps to be considered in itself as incident to the state of war. Hostilities were then over and the state of war was manifested in the occupation and administration of enemy territory and the like. But it was a step in dealing with a situation in contemplation of which the agreement had been made, a situation contemplated as a necessary result of the manner in which the war was being carried on when the agreement was made.

In these circumstances I think that the finding by Australia at this time of at least 60,000 tons of butter per annum for export under the agreement is a matter fairly falling under the defence power.

It is a legislative power the application of which after the final cessation of hostilities in a war must be very different from its application while resistance to the enemy or his overthrow still forms the central purpose of its exercise. But its operation and the ascertainment of the practical measures which it authorizes must continue to depend upon the facts as they exist from time to time. Speaking generally, the fulfilment of agreements with other countries made as an incident in the prosecution of a war or the completion or winding up of arrangements made in the course of a war and designed to further its prosecution, whether by this country, other British countries or their Allies, will constitute a purpose for which the power may be exercised. It is an end relevant to the power. When an end is relevant to a power, the only inquiry that remains is whether the means adopted are appropriate to the end.

The most immediate step for achieving the end in this instance is the production of a greater surplus of butter or cheese, as the case

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For the reasons I have given I think that such facts do exist. In reaching that conclusion I have confined myself to the specific circumstances I have mentioned. I have done so notwithstanding larger claims on the part of counsel for the Commonwealth and notwithstanding his reliance upon additional circumstances, sometimes vague, sometimes more or less precise. These, in my opinion, are matters deserving, as indeed counsel scarcely denied, a much more detailed statement and examination than the materials laid before us contain or admit before their real effect upon the constitutional power is determined, and upon those materials I am not at present prepared to pronounce in favour of the validity of the order, except upon the very special and limited grounds I have assigned.

But upon those grounds I think the suit should be dismissed with costs.

MCTIERNAN J. The question upon which the result of this case depends is whether the Cream (Disposal and Use) Order is ultra vires. It was made on 22nd August 1947 by the Minister of State for Commerce and Agriculture. He declared in the order that he made it in pursuance of reg. 9 of the *National Security (Food Control) Regulations*. This regulation derives its force as a law from s. 6 of the *Defence (Transitional Provisions) Act* 1946. By this section Parliament intended to authorize the Minister to exercise the powers contained in reg. 9 until the end of 1947. In passing this Act the Parliament has, plainly, exerted its power to make laws with respect to "Defence." After hostilities began, this power extended to a wider range of subjects than those which could have come within it before the outbreak of the war. But upon the cessation of hostilities the power did not *ipso facto* become limited to the latter range of subjects. Thereafter it extends to the making of a law on any subject, if the law is an appropriate means of coping with a national emergency attributable to the war.

The existence of emergencies of this nature characterize the period described in the preamble of the Act as "a time of transition from war conditions to conditions of peace."

The present order is in terms which are authorized by the provisions of reg. 9. It is necessary that the order should be within the legislative powers with respect to defence and within the purposes of the *Defence (Transitional Provisions) Act* 1946. It satisfies both these conditions if it is an appropriate means of coping with a national emergency attributable to the war. The reasons which the Minister had for making the order are not stated upon its face. The evidence shows that they are founded upon the agreement which was made in 1944 between the Government of the United Kingdom and the Government of the Commonwealth relating to the supply of butter and cheese from Australia to Great Britain. In that agreement the two Governments declared that they recognized the necessity of maintaining and if possible increasing the production of butter and cheese in Australia and the Government of the Commonwealth therein promised that it would make available for purchase by the Government of the United Kingdom all butter and cheese produced in Australia from 1st July 1944 to 30th June 1948, in excess of certain specified requirements. The present order is calculated to increase the production of butter and cheese in Australia and consequently the amount of these foods which will be available for purchase by Great Britain, because local consumption is or may be controlled under the Commonwealth Rationing Regulations. The agreement is not legally enforceable.

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McTiernan J. It calls for action on the political level to implement it. The working of the agreement depends upon the adoption in Australia of government policies appropriate to foster the production of butter and cheese in sufficient quantities to provide a surplus for export to Great Britain. The agreement was made under the necessity of war. The commitments of the Commonwealth Government under the agreement are in the nature of emergencies attributable to the war. The evidence proves that the Minister made the order with the sole object of providing a surplus of butter and cheese for export to the United Kingdom. The order is in my opinion an appropriate means of honouring such commitments.

I am of opinion that the Cream (Disposal and Use) Order is not ultra vires and that the action should be dismissed with costs.

WILLIAMS J. The question that arises for decision in this action is whether the Cream (Disposal and Use) Order is valid. This order was made on 22nd August 1947 and came into force on 1st September 1947. It was made by the Minister of State for Commerce and Agriculture in pursuance of reg. 9 of the *National Security (Food Control) Regulations*. The order provides in par. 4 that without the consent of the Controller-General of Food a person shall not sell exchange or give away or otherwise dispose of cream except (a) to a person who is registered or licensed in respect of premises which are required to be registered or licensed under the law of any State or Territory of the Commonwealth providing for the registration of butter factories or cheese factories, or (b) under the authority of or in accordance with the terms and conditions of a permit: par. 5; except with such consent or authority a person shall not purchase receive or otherwise acquire cream unless he is so registered or licensed: par. 6 (1); a person shall not without such consent use any cream except (a) for the manufacture of butter or cheese at such premises or at the farm where the cream is produced or (b) under the authority of and in accordance with the terms and conditions of a permit.

The effect of the order is therefore to prohibit the use of cream, except for manufacture into butter or cheese, without the consent of the Controller-General of Food or a permit. Regulation 9 (1) of the Food Control Regulations provides, so far as material, that the Minister of State for Commerce and Agriculture shall have power to control regulate and direct the distribution disposal use and consumption of food (then follow a number of specific powers). Regulation 9 (2) provides that the Minister may make such orders, give such directions, enter into such contracts on behalf of the

Commonwealth, and do all such other things as appear to him to be necessary or expedient for the purposes of the regulations. The Food Control Regulations first came into force on 28th June 1943. They then contained reg. 3, which provided that the object of the regulations was to secure for the purposes of the defence of the Commonwealth and the effectual prosecution of the war, that adequate provision of food . . . was made and maintained . . . and these regulations should be administered accordingly. The regulations were continued in force by the *Defence (Transitional Provisions) Act* 1946 until 31st December 1947 with the omission, however, of reg. 3. The *Defence (Transitional Provisions) Act* contains a preamble which recites, *inter alia*, that legislative provision is required in order to bring a gradual and orderly return to conditions of peace, and that it is necessary for the peace, order and good government of the Commonwealth to make certain provisions to operate during a time of transition from war conditions to conditions of peace. There had been two previous orders restricting the use of cream. The first order prohibited the use of cream except for high priority dairy products and the sale of cream as sweet or table cream except on approved medical grounds. In February 1944 this order was superseded by a new order in a slightly changed form which remained in force until 11th November 1946. The restriction of the use of cream during these periods was rendered necessary by the decline of milk production in Australia occasioned by conditions due to hostilities and the heavy demands for butter from the armed forces of the Commonwealth and the United Kingdom.

When the restriction was removed in November 1946 it was anticipated that there would be an improvement in the manpower position in the dairying industry brought about by releases from the services which would result in an increased production of butter, and that this increase, together with some 12,000 tons of butter per annum no longer required for the allied services based on Australia, would assure an annual surplus of 60,000 tons of butter which the Commonwealth had promised the Government of the United Kingdom would be available for export to that country. But on account of a continued shortage of manpower, materials, and farm equipment in the industry, and of pastures becoming more impoverished owing to the continued shortage of supply of fertilizers, this anticipation proved incorrect, and it was found necessary in August 1947 to reimpose restrictions on the use of cream except for manufacture into butter and cheese to create the promised surplus.

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In July 1944 an arrangement embodied in a document entitled Heads of Agreement was made between the Government of the United Kingdom and the Government of the Commonwealth of Australia for the purchase by the Government of the United Kingdom of supplies of butter and cheese in Australia between 1st July 1944 and 30th June 1948. This document, after reciting that these Governments recognized the necessity of maintaining and if possible of increasing the production in Australia of butter and cheese, provided that in this period the Government of the Commonwealth of Australia would make available for sale to the Government of the United Kingdom and the latter Government would purchase all butter and cheese in excess of that required to satisfy the needs of Australia including those of the Australian forces and certain other purposes. The document also provided that the Government of the Commonwealth of Australia in determining the quantities to be made available from the milk production of each season would consult with the Government of the United Kingdom and would, within the limits of the productive capacity of Australia, take all necessary steps to ensure that supplies of butter and cheese were made available for sale in such proportions as might be required by the Government of the United Kingdom.

It appears that conferences of representatives of the United Nations were held in the United States of America at Hot Springs in May 1943 and at Atlantic City in November 1943, and that in accordance with the principles there agreed upon allocations of world supplies of food were made first by the Combined Food Board and later by the International Emergency Food Council in Washington. Mention of these conferences was made in a covering letter to the Heads of Agreement dated 23rd March 1945 written by the British Minister for Food to the Australian High Commissioner in England. The writer, after referring to the desire of the Governments of the United Kingdom and the Commonwealth of Australia to facilitate the allocation of supplies by the Combined Food Board in accordance with the principles there agreed upon, stated that he expected that the supplies to be purchased by the United Kingdom under the arrangement would be allocated to the United Kingdom, but that he regarded them as purchased on behalf of the United Nations and subject to allocation by the Combined Food Board so long as that body continued to allocate food supplies among the United Nations.

There is evidence that in accordance with these expectations the fact that the arrangement between the Government of the United Kingdom and the Government of the Commonwealth of Australia

provided for the anticipated Australian surplus of butter and cheese to be allocated to the United Kingdom was taken into account by the International Emergency Food Council as part of the general scheme of distribution of world supplies.

The defence power, that is s. 51 (vi.) of the Constitution, provides that the Commonwealth Parliament may make laws with respect to the naval and military defence of the Commonwealth and of the several States. It was not disputed that legislation having as its object the supply of essential foodstuffs such as butter and cheese to the United Kingdom to assist in sustaining the people of Britain and enable them to take a predominant part in the common war effort was entirely within the ambit of this power during hostilities. But it was contended that upon the termination of hostilities the legislation of an economic character authorized by this power relating to the period of transition from hostilities to peace was confined to legislation for the restoration of the people of Australia to conditions of peace, and did not extend to the restoration of any people outside Australia, even those of the United Kingdom. It was urged that the Cream (Disposal and Use) Order was independent legislation of an economic character enacted two years after the termination of hostilities, that its purpose was the restoration of the economy of the people of the United Kingdom and not of Australia, and that it was not therefore authorized by the power. If, two years after the termination of hostilities, the United Kingdom had become for the first time largely dependent on Australia for its supplies of butter and cheese, it might be open to argument that there was no sufficient connection between the order and the defence of Australia. But the order is not in any sense a piece of independent legislation. It is part of a connected series of steps taken to meet an emergency which arose during hostilities, and which did not cease to exist upon their termination. If there had been no arrangement like that embodied in the Heads of Agreement, but the Commonwealth had in fact been supplying the United Kingdom with butter and cheese for the purpose stated, I should have thought that the decisions of this Court in *Dawson's Case* (1) and *Miller's Case* (2) show that the defence power would have continued to be wide enough after the termination of hostilities to support legislation having as its object the maintenance of such supplies during a reasonable period of readjustment after the fighting had ceased.

It is not disputed that it was competent for the Commonwealth Parliament and those to whom it delegated its powers to pass legislation under the defence power during hostilities conferring

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upon the Minister of State for Commerce and Agriculture authority to control, regulate and direct the distribution, disposal, use and consumption of foodstuffs. In my opinion it was also competent for the Commonwealth Parliament to pass legislation to continue that authority for a reasonable period thereafter, so that commitments entered into during hostilities could be gradually liquidated. In *Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd.* (1) and recently in *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* (2) the Privy Council has made it plain that the Executive "must be . . . left with considerable freedom to judge" what legislation is still required to cope with the transition from hostilities to peace. In the latter case Lord Wright said (3): "But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament . . . that exceptional measures were required or were still required."

In the present case the position is clarified by the existence of the arrangement. The period for which this arrangement is to operate was agreed upon during hostilities; it is a reasonable period, and it is still current. The main purpose of the arrangement was to meet to the fullest possible extent the requirements of the United Kingdom in butter and cheese after satisfying the needs of Australia. It was contended that the expression "the needs of Australia" in the Heads of Agreement referred to the actual Australian consumption. I cannot accept this contention. In my opinion the expression refers to the reasonable dietary needs of Australia, and the determination of the amount of butter and cheese required for this purpose is a matter for the Government of the Commonwealth. Australian consumption of butter is controlled by the system of butter rationing instituted under the *National Security (Rationing) Regulations*. The purchase of the butter and cheese required to give effect to the arrangement is made by the Dairy Produce Control Committee constituted under the *National Security (Dairy Produce Acquisition) Regulations*. Both of these sets of regulations have been continued in force by the *Defence (Transitional Provisions) Act*. The interaction of the Cream (Disposal and Use) Order with the system of Australian butter rationing and the purchase of the surplus Australian butter and cheese by the Dairy Produce Control Committee is plain and clear. It was suggested that the required exportable surplus of butter for

(1) (1923) A.C. 695.

(2) (1947) A.C. 87.

(3) (1947) A.C., at pp. 101-102.

the United Kingdom could be obtained by reducing the Australian butter ration. This may be true. But once it is decided, as in my opinion it should be decided, that in all the circumstances it was competent for the Parliament of the Commonwealth and its authorized delegates to legislate under the defence power to maintain the supplies of essential foods promised to the Government of the United Kingdom during hostilities for a reasonable period thereafter, the determination of the policy to be followed to give effect to this object is a matter for the Government of the Commonwealth.

For these reasons I would dismiss the action.

Action dismissed with costs.

Solicitor for the plaintiffs, *F. A. Ladbury*, Melbourne.

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

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