[HIGH COURT OF AUSTRALIA.]

MORGAN . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND THE RATIONING COMMISSION . . . . . DEFENDANTS.

MORGAN . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

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SYDNEY, *March* 25-28; *April* 14.

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

Constitutional Law (Cth.)—National Security Regulations—Validity of—Substance of regulations—Indirect effect—Defence—Trade and commerce—Rationing of goods—Sale of Goods—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*i*), 98, 99, 100, 101, 102—*National Security Act* 1939-1946 (*No.* 15 *of* 1939—*No.* 15 *of* 1946)—*National Security* (*Rationing*) *Regulations* (*S.R.* 1942 *No.* 228—1945 *No.* 132) *regs.* 24, 25, 26—*National Security* (*Prices*) *Regulations* (*S.R.* 1940 *No.* 176—1946 *No.* 198)—*Rationing Order No.* 37—*Prices Regulation Orders Nos.* 1817, 2106.

Sections 98 to 102 inclusive of the Constitution should be read as applying only to laws which can be made under the power conferred by s. 51 (i).

The *National Security* (*Rationing*) *Regulations*, *National Security* (*Prices*) *Regulations* and Orders made thereunder are provisions with respect to defence and, although they produce effects in relation to trade and commerce, they are not laws or regulations of trade or commerce within the meaning of the words in s. 99 of the Constitution because they could not have been made by virtue of the legislative power conferred by s. 51 (i).

The Rationing Commission is empowered by regs. 24, 25 and 26 of the *National Security* (*Rationing*) *Regulations* to make an Order relating to the rationing of goods which is not applicable generally throughout Australia.

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REFERENCE to the Full Court and CASE STATED by *Dixon* J.

In November 1946 the Attorney-General for the Commonwealth filed indictments in the High Court against Arthur Edward Morgan—who carried on business at North Richmond, Victoria, as a wholesale and retail butcher and small goods manufacturer—and certain of his employees for (*a*) conspiracy to effect an unlawful purpose, namely the supply of coupon-meat to other persons otherwise than in accordance with the provisions of Rationing Order No. 37, as amended; and (*b*) offences of black marketing under the *Black Marketing Act* 1942 the alleged offences consisting in selling porterhouse and rump steak and veal and beef at prices greater than the maximum prices fixed by Prices Regulation Order No. 1817 as amended by Prices Regulation Orders up to and including Prices Regulation Order No. 2106.

By writs of summons issued out of the High Court on 14th February 1947, Morgan commenced actions against (*a*) the Commonwealth of Australia and the Rationing Commission wherein he claimed that Rationing Order No. 37, as amended, was invalid as contravening s. 99 of the Constitution; and (*b*) the Commonwealth of Australia and Mortimer Eugene McCarthy wherein he claimed that Prices Regulation Order No. 1817, as amended, was contrary to s. 99 of the Constitution and void.

These Orders were applicable only to the State of Victoria.

The statement of claim in respect of the rationing order was substantially as follows:—

1. During the years 1944 and 1945 until about the month of April 1946 the plaintiff carried on business at North Richmond in the State of Victoria as a wholesale and retail butcher and small goods manufacturer in partnership with his wife under the name of William Say & Co.

2. The defendant the Rationing Commission is a body corporate duly incorporated under the provisions of the *National Security* (*Rationing*) *Regulations*.

3. On 20th November 1946 the Attorney-General for the Commonwealth of Australia filed an indictment in the High Court of Australia against the plaintiff and certain of his employees in his business whereby he charged that the plaintiff and his said employees did between 1st March 1945 and 31st March 1946 conspire together amongst themselves and with each other and with divers other persons to effect a purpose which was unlawful under the law of the Commonwealth namely the supply of coupon-meat to other persons otherwise than in accordance with the provisions of Rationing Order No. 37 as subsequently amended made in pursuance of the *Natio a*

Security (*Rationing*) *Regulations* made under the *National Security Act* 1939 as subsequently amended.

4. By an Order published in the Commonwealth Government *Gazette* on 1st November 1943 the Minister of State for Trade and Customs, acting pursuant to reg. 24 of the *National Security* (*Rationing*) *Regulations* declared " meat " as defined in that Order to be " rationed goods " for the purposes of the Regulations.

5. By an Order published in the Commonwealth Government *Gazette* on 14th January 1944 and described therein as Rationing Order No. 37 the defendant the Rationing Commission purported to control or regulate the supply and disposal of meat by providing *inter alia* that a person should not supply coupon-meat to another person otherwise than upon the surrender to him of the appropriate number of coupons and in accordance with the provisions of that Order.

6. That Order has been amended from time to time, in particular by Rationing Order No. 40, published in the Commonwealth Government *Gazette* on 5th April 1944, by Rationing Order No. 47 published in the Commonwealth Government *Gazette* on 5th June 1944, and by Rationing Order No. 74 published in the Commonwealth Government *Gazette* dated 26th February 1945. Rationing Order No. 37, as so amended, was in force between 1st March 1945 and 31st March 1946.

7. (*a*) Rationing Order No. 37, as so amended, by clause 4 thereof provided that the provisions thereof including those relating to the surrender of coupons should not apply in any " special meat area."

(*b*) " Special meat area " is by that Order defined as any part of the Commonwealth included in any of the areas specified in the fourth schedule. The areas specified in the schedule are portions of the States of New South Wales, South Australia, Queensland, Western Australia, and the whole of the Northern Territory.

(*c*) Rationing Order No. 37 by par. 8 (2) thereof prohibited the supply by wholesale of coupon-meat in a cut or form which did not correspond with any of the descriptions contained in the second schedule thereto.

(*d*) Rationing Order No. 74 revoked the second schedule to Rationing Order No. 37 and inserted a new schedule in its stead setting out a new scale of coupons required to be surrendered in respect of the purchase of beef by wholesale. The schedule provided for different numbers of coupons per 100 lbs. of beef for various cuts of beef in all States including Queensland and all States other than Queensland, and in Queensland only.

8. The defendant Rationing Commission was not authorized or empowered by the regulations to make an Order relating to the

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rationing of meat which was not applicable generally throughout Australia and was not entitled to exclude from the application of the Order the areas specified in the fourth schedule to Rationing Order No. 37 as amended.

9. Rationing Order No. 37 as amended is a law or regulation of trade or commerce within s. 99 of the Constitution of the Commonwealth, and

(*a*) by reason of the exclusion from its operation of certain parts of the States of New South Wales, South Australia, Queensland and Western Australia ; and

(*b*) by reason of the provision of a different scale of coupons in the State of Queensland from the scale provided for the rest of the Commonwealth ; and

(*c*) by reason of the fact that it enables the supply in the State of Queensland of cuts or forms of meat the supply of which is prohibited in the other States of the Commonwealth by par. 8 (2) of the said Order ; Rationing Order No. 37 as amended gives preference to a State or part thereof over other States or parts thereof contrary to s. 99 and is void.

10. Rationing Order No. 37 as amended provides by par. 6 (2) thereof that a person shall not without the consent in writing of the Commission or of the Controller of Meat Supplies appointed under the *National Security* (*Meat Industry Control*) *Regulations* convey, or cause to be conveyed, coupon-meat from a special meat area to a meat ration area. By reason of that paragraph, the said Rationing Order is contrary to s. 92 of the Constitution and is void.

11. By reason of the matters aforesaid :—

(*a*) Rationing Order No. 37 as amended was not authorized by the *National Security* (*Rationing*) *Regulations* ;

(*b*) if the said Orders were so authorized the said Regulations so far as those Orders were thereby authorized were not authorized by the *National Security Act* 1939-1946 and are void ;

(*c*) if the said Regulations were so authorized the *National Security Act* 1939-1946 so far as those Regulations were thereby authorized was not authorized by the Constitution of the Commonwealth and is void.

Morgan claimed declarations : (*a*) that the *National Security Act* 1939-1946 if and so far as it authorized the making of the *National Security* (*Rationing*) *Regulations* was not authorized by the Constitution of the Commonwealth and was void, or, alternatively, (*b*) that the *National Security* (*Rationing*) *Regulations*, if and so far as they authorized the making of Rationing Order No. 37, as amended,

were not authorized by the said Act and were void, or, alternatively, (*c*) that Rationing Order No. 37, as amended, was not authorized by the said Regulations and was void.

In the defence filed by them the defendants : (*a*) admitted each and all of the allegations contained in pars. 1 to 4 inclusive of the statement of claim, and, subject to the production of Rationing Orders Nos. 37, 40 and 47, admitted each and all of the allegations contained in pars. 5 to 7 inclusive of the statement of claim ; (*b*) denied each and all of the allegations contained in pars. 8, 9, 10 and 11 of the statement of claim ; and (*c*) alleged substantially as follows :—

5. The *National Security* (*Rationing*) *Regulations* and the Rationing Orders made thereunder and in particular Rationing Orders Nos. 37, 40 and 47 were promulgated under the provisions of the *National Security Act* 1939-1946 for the more effectual prosecution of the war in which His Majesty was then engaged and for securing the public safety and the defence of the Commonwealth, and in particular the said Rationing Orders were made for the purpose of maintaining and controlling during the continuance of the war in which His Majesty was engaged the supply and distribution of a staple foodstuff to wit, meat.

6. The *National Security Act* 1939-1946, the *National Security* (*Rationing*) *Regulations*, the Rationing Orders made thereunder and each of them is a law with respect to the naval and military defence of the Commonwealth and none of them is a law or regulation of trade, commerce or revenue within the meaning of the Commonwealth *Constitution Act*, s. 99, upon its true construction.

7. If Rationing Orders Nos. 37, 40 and 47 or any of them is a law or regulation of trade or commerce, each of which allegations is specifically denied, then none of those Orders give a preference to any State or any part thereof over any other State or part thereof.

8. Prior to the promulgation of Rationing Order No. 37 the trade, customs and usages in the meat trade in the State of Queensland differed from those existing in other States of the Commonwealth and in particular in the manner of breaking up beef carcasses and adopting certain cuts such as the crop.

9. After making exhaustive tests to establish the true relation between the quantity of meat in a carcass and the quantity of meat from such a carcass which was sold by the retailer to consumers, the Rationing Commission promulgated first and second schedules in Rationing Order No. 37 to ensure equality between the coupons to be received by the retailer from consumers with those to be

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delivered up by the retailer to the wholesaler on a wholesale sale of a carcass of meat so sold.

10. Such schedules were based upon the trade usages and customs in Victoria and New South Wales with respect to breaking up and general cuts of meat, and were made applicable to the whole of Australia.

11. Because in their incidence the first and second schedules of Rationing Order No. 37 interfered with the established usages and customs in the meat trade in Queensland the Rationing Commission by Rationing Order No. 47 amended the second schedule to accord with the established usages and customs prevailing in the various States, at the same time retaining in the schedules as amended the equality in coupons based upon the relation between the quantity of meat in a carcass and the quantity of meat from such carcass which was sold by retailers against coupons to the consumers.

12. Insofar as certain areas in Australia were exempted from the application of certain paragraphs of Rationing Order No. 37 as alleged in the statement of claim such areas were exempted by reason of conditions and circumstances existent throughout the whole of the areas so exempted and such exemptions were made without reference to States or parts of States of the Commonwealth and solely by reference to conditions or circumstances of a continent-wide character.

. . .

15. The defendants further say they will rely upon the provisions of s. 5 of the *National Security Act* 1939-1946 and s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941.

The plaintiff joined issue, save as to the admissions contained in the defence, and contended : (i) as to pars. 5, 6 and 7 of the defence—(*a*) that the Rationing Orders therein referred to amounted to a law or regulation of trade or commerce ; (*b*) that they severally gave preference to one State or States or part or parts thereof over another State or States or part thereof ; (*c*) that they severally restricted trade, commerce and intercourse among the States or that essential provisions thereof did so ; and (*d*) that the said Orders were invalid ; and (ii) as to pars. 8 to 12 inclusive of the defence—that the matters therein alleged were not proper to be considered in relation to the validity of the said Rationing Orders, and, alternatively, that they were not matters of pleading and of proof.

DIXON J. referred the matter to the Full Court of the High Court for the consideration of certain questions. In the reference it was stated, *inter alia*, that the pleadings were closed and were annexed to the case and that " it was made to appear to me (*Dixon* J.) that

there were certain questions namely, those raised by the questions set out at the foot of this case stated and that it would be convenient to have the same decided before any evidence is given or any questions of issue or fact is tried. It further appeared to me that such questions are raised by the pleadings. The parties desire that the questions should be disposed of before trial and that they should be decided before any evidence is given or any question or issue of fact tried and the parties applied to me for an order accordingly. I concurred in the view of the parties that it is highly desirable that the said questions should be decided at once by the Full Court and with their consent made an order as under Order XXXII rule 2 as well as under Order XVII rule 26 and also under s. 18 of the *Judiciary Act* 1903-1946 with a view to obtaining a decision thereof. The effect of the Order, . . . was to direct that the questions should be raised by a case stated and should be reserved for the consideration of and argued before the Full Court."

The questions for the consideration of the Full Court were :—

1. Is each of the said Rationing Orders No. 37, No. 40 and No. 47 a law or regulation of trade or commerce within s. 99 of the Constitution ?

2 (*a*) Are the facts alleged in pars. 8, 9, 10 and 11 of the defence herein or any and which of them proper as a matter of law to be considered by the Court in the determination of the question whether the said Rationing Orders are contrary to the provisions of s. 99 of the Constitution ?

(*b*) If so, may evidence be received relating to any of the said facts ?

3 (*a*) Are any of the facts alleged in par. 12 of the defence herein proper as a matter of law to be considered by the Court in the determination of the question whether the said Rationing Orders are contrary to the provisions of s. 99 of the Constitution ?

(*b*) If so, may evidence be received relating to any of the said facts ?

4. If questions 2 (*a*) and 3 (*a*) or questions 2 (*b*) and 3 (*b*) are answered in the negative do the said Orders or any of them give a preference contrary to s. 99 of the Constitution and are they therefore invalid ?

5 (*a*) Are the said Orders or any of them invalid by reason of s. 92 of the Constitution or is any part of such Orders invalid ?

(*b*) If any part of any such Order is invalid by reason of s. 92 is the remainder of the Order nevertheless valid and effectual ?

During argument before the Full Court another question was added as follows :—

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6. Was the defendant Rationing Commission authorized or empowered by the *National Security* (*Rationing*) *Regulations* to make an Order relating to rationing of meat which was not applicable generally throughout Australia ?

The statement of claim in respect of the Prices Regulation Orders was substantially as follows :—

1. The plaintiff during the years 1944 and 1945 and until April 1946 carried on business at North Richmond in the State of Victoria as a wholesale and retail butcher and smallgoods manufacturer in partnership with his wife under the name of William Say & Co.

2. The defendant Mortimer Eugene McCarthy is the Commonwealth Prices Commissioner appointed under and for the purposes of the *National Security* (*Prices*) *Regulations*.

3. On 28th November 1946 the Attorney-General for the Commonwealth filed an indictment in the High Court against the plaintiff and certain of his employees in the said business whereby he charged that the plaintiff and his employees and each of them did on various dates between 9th and 19th February 1946 (both dates inclusive) acts each of which constituted black marketing as defined in the *Black Marketing Act* 1942. The said acts as alleged in the various counts of the indictment included sales of porterhouse and rump steak at greater prices than the maximum prices fixed for the sale thereof under the *National Security* (*Prices*) *Regulations* by Prices Regulation Order No. 1817 as amended by subsequent Prices Regulation Orders up to and including Prices Regulation Order No. 2106 made pursuant to the Regulations.

4. On 28th November 1946 the Attorney-General for the Commonwealth filed an indictment in the High Court against the plaintiff and certain of his employees in the said business whereby he charged that the plaintiff and certain of his employees in the business did and each of them did on various dates between 23rd August 1945 and 11th September 1945 (both dates inclusive) acts each of which constituted black marketing as defined in the *Black Marketing Act* 1942. The said acts as alleged in the various counts of the indictment were sales of veal and beef at greater prices than the maximum prices fixed for the sale thereof under the *National Security* (*Prices*) *Regulations* by the Prices Regulation Orders as in par. 3 hereof mentioned.

5. By notice published in the Government *Gazette* dated 15th April 1942 the Minister of State for Trade and Customs acting pursuant to reg. 22 of the *National Security* (*Prices*) *Regulations* declared all goods in the possession or under the control of any person

in Australia (with certain exceptions not material to these proceedings) to be declared goods for the purposes of the regulations.

The following paragraphs 6-64A referred in detail to the provisions of various Prices Regulation Orders fixing the price of meat by retail and wholesale in various States and parts of States and showed that the Orders fixed prices by reference to specific cuts of meat, or by a margin on gross profit, or by prevailing price with or without a margin of profit. The prices so fixed for the same cuts or carcases differed in many instances as between States and as between parts of the same State and as between parts of different States. The Prices Regulation Orders referred to were Nos. 1817, 1602, 965, 1565, 1723, 1472, 2026, 1873, 2166, 2155, 2263.

65. The said Prices Regulation Order No. 1817 is a law or regulation of trade or commerce within s. 99 of the Constitution of the Commonwealth and by reason of its fixing and declaring maximum prices for cuts or forms of meat of various types and for meat of various types as hereinbefore set out in various parts of the State of Victoria which on 20th November 1944 (the date of the making of Prices Regulation Order No. 1817) differed from the maximum prices fixed and declared for the same cuts or forms and types of meat in other States of the Commonwealth and parts thereof the said Prices Regulation Order gives a preference to a State or part thereof over other States or parts thereof contrary to the said s. 99 and is void.

66. Alternatively to par. 65 hereof the said Prices Regulation Order No. 1817 and the various Prices Regulation Orders up to and including the said Prices Regulation Order No. 2106 are and each of them is a law or regulation of trade or commerce within s. 99 of the Constitution and by reason of its fixing and declaring maximum prices for cuts or forms of meat of various types and for meat of various types as hereinbefore set out in various parts of the State of Victoria which on 30th May 1945 (the date of the making of Prices Regulation Order No. 2106) differed from the maximum prices fixed and declared for the same cuts or forms and types of meat in other States of the Commonwealth and parts thereof the said Prices Regulation Orders give a preference to a State or part thereof over other States or parts thereof contrary to s. 99 and are and each of them is void.

67. In the further alternative, by reason of the said Prices Regulation Orders mentioned in pars. 65 and 66 hereof fixing and declaring maximum prices for cuts or forms of various types and for various types of meat as hereinbefore set out in various parts of the State of Victoria which—(*a*) so far as sales by retail are concerned between 9th and 19th February 1946, both days inclusive (being the dates

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of the offences alleged in par. 3 thereof); (*b*) so far as sales by wholesale are concerned between 23rd August 1945 and 11th September 1945, both days inclusive (being the dates of the offences alleged in par. 4 hereof); differed from the maximum prices fixed and declared for the same cuts or forms and types of meat in other States of the Commonwealth and parts thereof the said Prices Regulation Orders give a preference to a State or part thereof over other States or parts thereof contrary to s. 99 and are and each of them is void.

Morgan claimed declarations: (*a*) that Prices Regulation Order No. 1817 at the date of the making thereof was not authorized by the *National Security* (*Prices*) *Regulations*, or alternatively, was contrary to s. 99 of the Constitution and void; (*b*) that Prices Regulation Order No. 1817 as amended by Prices Regulation Orders down to and including Prices Regulation Order No. 2106 was at the date of the making of Prices Regulation Order No. 2106 not authorized by the *National Security* (*Prices*) *Regulations*, or, alternatively, was contrary to s. 99 of the Constitution and void; (*c*) that Prices Regulation Order No. 1817 as amended down to Prices Regulation Order No. 2106 was during the period from 9th to 19th February 1946 (both inclusive) not authorized by the *National Security* (*Prices*) *Regulations*, or, alternatively, was contrary to s. 99 of the Constitution and void; and (*d*) that Prices Regulation Order No. 1817 as amended down to Prices Regulation Order No. 2106 was during the period from 23rd August 1945 to 11th September 1945 (both inclusive) not authorized by the *National Security* (*Prices*) *Regulations*, or, alternatively, was contrary to s. 99 of the Constitution and void.

The defence filed by the defendants was substantially as follows:—

1. Subject to the production of the Prices Regulation Orders referred to they (the defendants and each of them) admit each and all of the allegations contained in pars. 1 to 64A inclusive of the statement of claim, but they will contend that the said Prices Regulation Orders constitute an arbitrarily selected portion only out of a complete series of Prices Regulation Orders relating to the fixation of the prices of meat, the operation and effect of which can be ascertained only by consideration of the whole series and not by the consideration of such an arbitrarily selected portion.

2. They deny each and all of the allegations contained in pars. 65 to 67 inclusive of the statement of claim.

3. The said *National Security* (*Prices*) *Regulations* and each of the Prices Regulation Orders made thereunder were promulgated under the provision of the *National Security Act* 1939-1946, for the more effectual prosecution of the war in which His Majesty was then engaged and for securing the public safety and the defence of the

Commonwealth, and in particular the Prices Regulation Orders hereinafter referred to including the Prices Regulation Orders referred to in the statement of claim herein were made for the purpose of maintaining and controlling, during the continuance of a war in which His Majesty was engaged the supply and prices of a staple foodstuff to wit, meat, both to the civilian population and military forces of the Commonwealth and other military forces of His Majesty and of States allied with His Majesty and the civilian subjects of His Majesty in the United Kingdom.

4. The *National Security Act* 1939-1946, the *National Security* (*Prices*) *Regulations*, the Prices Regulation Orders made thereunder and each of them is a law with respect to the naval and military defence of the Commonwealth and none of them is a law or regulation of trade, commerce or revenue within the meaning of the *Commonwealth Constitution Act*, s. 99, upon its true construction.

5. If the *National Security Act* 1939-1946 or the *National Security* (*Prices*) *Regulations* or any of the said Prices Regulation Orders is a law or regulation of trade, commerce or revenue (each of which allegations is specifically denied) then neither the *National Security Act* 1939-1946, the *National Security* (*Prices*) *Regulations* nor any of the said Prices Regulation Orders give or gave a preference to any State or any part thereof over any other State or part thereof.

6. Prior to 1st March 1943, meat was sold by wholesale in each of the States of the Commonwealth other than the State of Tasmania. The wholesale prices of meat throughout each State in the Commonwealth other than the State of Tasmania prior to 1st March 1943, were determined and controlled by the prices ruling at the Metropolitan Livestock and Wholesale Meat Market in each of the States as aforesaid, which said markets are referred to hereafter as the "controlling markets."

7. Prior to 1st March 1943, the wholesale prices for meat of comparable descriptions, quality and quantity, differed in each of the said controlling markets in each of the States of the Commonwealth.

8. The wholesale prices of meat in the controlling market in any one State or the differences in wholesale prices in those markets in the various States did not remain constant, and both the levels and differences of the prices as aforesaid fluctuated from time to time in the various States by reason of—(*a*) Changes in conditions arising from normal recurring seasonal changes which affected different States in different ways and at different times, whereby the supply of and demand for livestock in the controlling markets varied from State to State, and from time to time; (*b*) Regional and local variations additional to normal recurring seasonal changes due to

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abnormal climatic and other physical disturbances such as bushfires, abnormally heavy rainfall, floods, droughts, luxuriant growths and other physical abnormalities, occurring in one or more States, whereby the supply of and demand for livestock in the controlling markets varied from State to State and time to time ; (*c*) The differing effects of seasonal and abnormal climatic conditions upon the production areas of livestock in the various States due to the differing topographies and physical features of such areas, thereby causing the supply of and demand for livestock in the controlling market to vary from State to State and time to time ; (*d*) Variations in costs of and availability of transport from different areas of production to the controlling markets in each of the States ; (*e*) The demand for export of beef from Queensland and the relation of the export price thereof to overseas and local prices ; (*f*) The demand for export of frozen lamb and mutton from the States of Victoria, New South Wales and South Australia and the relation of export prices thereof to overseas and local prices ; (*g*) The variation in prices of the produce other than meat obtainable from livestock ; (*h*) Other factors which from time to time and from State to State affected the supply of and/or demand for livestock and/or meat in the controlling markets in the various States.

9. On 1st March 1943, by Prices Regulation Order No. 965 the then Commonwealth Prices Commissioner fixed and declared prices for the sale of meat in all the States of the Commonwealth at the prices prevailing on 26th February 1943.

10. From and after 1st March 1943, aforesaid the factors referred to in par. 8 above which had theretofore caused the fluctuations in the levels of and differences between the wholesale prices of meat in the various States of the Commonwealth continued to operate and to affect the supply of and demand for meat and livestock and to necessitate the adjustment from time to time of the prices for the same.

11. During the continuance of hostilities in the said war and particularly during the period after 1st March 1943, very substantial demands for beef meat for consumption in or exportation from the Commonwealth of Australia and in particular from the State of Queensland were made to provide in whole or in part the requirements of the military forces of the Commonwealth, other military forces of His Majesty and of allied governments, and in consequence of the satisfaction in whole or in part of such demands the supply of beef meat in the Commonwealth and particularly from the State of Queensland to the controlling markets in the States of Queensland,

New South Wales and Victoria was considerably affected thereby from time to time.

12. During the continuance of hostilities in the said war and particularly during the period after 1st March 1943, very substantial demands for lamb and mutton for consumption in or exportation from the Commonwealth and in particular from the States of New South Wales, Victoria and South Australia were made to provide in whole or in part the requirements of the military forces of the Commonwealth, other military forces of His Majesty and of allied governments, and for export to the United Kingdom and in consequence of the satisfaction in whole or in part of such demands the supply of lamb and mutton in the Commonwealth and particularly from the States aforesaid to the controlling markets in each of such States was considerably affected thereby from time to time.

13. During the period referred to in par. 10 above the frozen lamb exported to the United Kingdom as therein mentioned was exported at a price fixed by agreement between His Majesty's Government in the Commonwealth and His Majesty's Government in the United Kingdom in pursuance of policies of the said Governments directed to the more effectual prosecution of the war in which His Majesty was engaged and in the absence of the fixation of prices by the Commonwealth Prices Commissioner hereinafter mentioned, the said frozen lamb exported as aforesaid would not have been supplied or supplied at the price so agreed upon or supplied without grave disturbances to and dislocation of the livestock and wholesale controlling markets for sheep, lamb and mutton in the three States above-mentioned.

14. Subsequent to 1st March 1943, under and by virtue of the powers conferred upon him, the Commonwealth Prices Commissioner fixed and declared specific maximum prices at which meat might be sold by wholesale in the States of the Commonwealth which said prices were stated in a series of Prices Regulation Orders issued from time to time.

15. From time to time alterations were made in the specific maximum prices referred to in par. 14 by the Commonwealth Prices Commissioner fixing and declaring other maximum prices by Prices Regulation Orders which amended the Orders referred to in par. 14 or Orders amending the same.

16. From time to time after 1st March 1943, the Commonwealth Prices Commissioner by Prices Regulation Orders made as aforesaid fixed and declared specific maximum prices for the sale of meat by retail in each of the States of the Commonwealth.

The specific retail prices aforesaid were calculated and thereafter fixed and declared after taking into consideration the prevailing

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wholesale prices as fixed and declared and the costs of conducting retail business in meat in particular areas and the retail margins appropriate to such retail trade carried on in the circumstances and conditions of each part of the Commonwealth for which a specific retail price was fixed and declared.

17. The Prices Regulation Orders referred to in pars. 9, 14 and 15 hereof and the wholesale prices for meat fixed and declared thereby were made under the circumstances of varying supply and demand for livestock and meat in the controlling markets in the States of the Commonwealth caused by the factors and variations thereof referred to in pars. 8, 11, 12 and 13 above.

18. Further and in the alternative to par. 17 above, the Prices Regulation Orders referred to in pars. 9, 14 and 15 hereof and the wholesale prices for meat fixed and declared hereof and the wholesale prices for meat fixed and declared thereby maintained an equitable and necessary adjustment to the factors referred to in par. 17 hereof and to variations in the supply and demand for livestock and meat in the controlling markets in the States of the Commonwealth, due to the factors and variations thereof referred to in pars. 8, 11, 12, and 13 above. Such adjustments varying from State to State and from time to time in accordance with the relative force of the factors abovementioned operative in each State at each relevant time.

19. In fixing and declaring the maximum wholesale and retail prices for meat in the various States of the Commonwealth, the Commonwealth Prices Commissioner did not in fact or in law give a preference to any State or part of a State over any other State, but on the contrary directed the economic resources and activities of the Commonwealth so far as the same related to the production and consumption of meat for the more effectual prosecution of the war and for securing the public safety and the defence of the Commonwealth.

The plaintiff joined issue, save as to the admissions contained in the defence, and contended : (i) as to pars. 3, 4 and 5 of the defence—(*a*) that the Prices Regulation Orders referred to in par. 66 of the statement of claim amounted to a law or regulation of trade or commerce ; (*b*) that they severally gave preference to one State or States or parts thereof over another State or other States or part thereof ; (*c*) that they severally restricted trade, commerce and intercourse among the States or that essential provisions thereof did so ; and (*d*) that each of the said Orders was invalid ; and (ii) as to pars. 6 to 19 of the statement of claim, that the matters alleged were not proper to be considered in relation to the validity of the said

Orders and, alternatively, that they were not matters of pleading and of proof.

This matter also was referred by *Dixon* J. to the Full Court for consideration of certain questions. The reference was in its terms similar to the reference in respect of the Rationing Order as set forth above.

The questions for the consideration of the Full Court were :—

1. Is Prices Regulation Order No. 1817 as amended by Prices Regulation Orders down to and including Prices Regulation Order No. 2106 a law or regulation of trade or commerce within s. 99 of the Constitution ?

2 (*a*) Are the facts alleged in pars. 6 to 19 inclusive of the defence herein or any and which of them proper as a matter of law to be considered by the Court in the determination of the question whether the said Prices Regulation Orders are contrary to the provisions of s. 99 of the Constitution ?

(*b*) If so, may evidence be received relating to any of the said facts ?

3. If question 2 (*a*) or question 2 (*b*) is answered in the negative, do the said Orders or any of them give a preference contrary to s. 99 of the Constitution and are they therefore invalid ?

Dean K.C. (with him *Norris*), for the plaintiff. The Orders upon which the plaintiff is being prosecuted on indictment are invalid in that for the most part, they are contrary to s. 99 of the Constitution. To control rationing by reference to parts of States is a contravention of s. 99. Persons who carry on business as butchers in some parts of States are not obliged to limit their purchases by coupons and are entitled to sell meat to the public without requiring the surrender of coupons whereas persons so carrying on business in other States are obliged to limit their purchases by coupons and to require the surrender of coupons by the public. The effect of that Order is to give preference to retailers in some States, the retailers who so receive preference being those who are free from any control. As regards prices, the differentiation between the States is based on prices so that wholesalers and retailers in some States can sell precisely the same kind and quality of goods for a different price from that at which wholesalers and retailers in other States can sell such goods. The facts pleaded are of such a character that, even if they were proved, they would not prevent the differentiation which exists from being a preference. The facts themselves are irrelevant, in the sense that they are not matters proper for the Court to consider in determining the validity of a constitutional provision of the kind now under

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review. Under the Rationing Orders parts of the States have been excluded from the operation of the law which operates in other States and parts of States. That amounts to a preference given to the excluded parts. Prices and rationing should be uniform throughout the Commonwealth. The Rationing Orders go beyond the power given by reg. 25 of the *National Security (Rationing) Regulations*. The geographical operation of rationing and other Orders relating to the control or supply of goods is reserved to the Minister and upon the Minister defining what are geographical areas upon which the Commission may operate its powers, the Commission must then exercise its powers uniformly on the areas so declared. It is no part of the Commission's function to limit geographically the operation of any Order made by it. The Commission has no power to make a declaration having partial operation. The Rationing Orders contravene s. 92 of the Constitution because they prevent a transfer of meat across the border into New South Wales without the consent in writing of the Commission or the controller of meat supplies. The Orders provide that a different rule shall apply in each State or part of a State. Section 99 of the Constitution restricts all powers and is not merely applicable to the commerce power. The Orders are related to trade and commerce because they regulate the sale of commodities. The words "trade" and "commerce" in s. 99 do not refer only to s. 51 (i) but apply to any law of the Commonwealth which affects trade or commerce in such a way that it may properly be described as a law or regulation of trade or commerce, e.g. laws made under s. 51 placita (i), (iii), (v), (vi), (xii), (xvii), (xviii) and (xx), and s. 52 of the Constitution. This wider interpretation is supported by s. 100. A law under or by which a preference is given in the way of trade or commerce is a law in relation to trade and commerce. The law itself must be one which is a law or regulation of trade or commerce. It may be a law upon an entirely different subject which in some indirect way may affect trade or commerce. If it had been intended that s. 99 was to be a mere limitation of s. 51 (i) one would have supposed that as in placita (ii) and (iii) there would have been a proviso to placitum (i) to show that the prohibition in s. 99 was directed to s. 51 (i) and to that section only. It is not without significance that the provisions contained in s. 99 were not inserted in that Part of the Constitution relating to the powers of the Parliament but were inserted in that Part of the Constitution which contains what has been referred to as the "constitutional guarantees." Section 99 is an overriding guarantee. A law does not cease to be a law or regulation of trade or commerce because it was made under a power other than s. 51 (i).

A law relating to the fixation of the prices of goods and a law relating to the rationing of goods is each a law relating to trade or commerce and comes within the operation of s. 99. The introduction of the word " law " in that section shows that the reference is to the law of the Commonwealth Parliament. The word " State " should be read as meaning some class of persons within a State.

[DIXON J. referred to *Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1).

LATHAM C.J. referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (2).]

The laws particularly under consideration in those cases were not laws or regulations relating to trade or commerce but were laws fixing industrial relations. There is nothing in the first-mentioned case (3) which throws any light on the question. The question of whether or not the *Dried Fruits Acts* and the regulations made thereunder under consideration in *James* v. *The Commonwealth* (4) were laws or regulations of trade or commerce, was not dealt with in that case.

[LATHAM C.J. referred to *R.* v. *Barger* (5).]

That case does not assist the Court on this point. The trade and commerce provisions of s. 99 were discussed in *Elliott* v. *The Commonwealth* (6). The observations on s. 99 (7) indicate that placita (i) and (ii) of s. 51 were not then being considered as the sole source of laws under s. 99, and (8) suggest that a law of trade and commerce would be something other than a law under placitum (i); it might be a law under placitum (iii). The first question in each case stated should be answered in the affirmative, that is to say that the Prices Regulation Orders and the Rationing Orders there referred to are laws or regulations of trade or commerce within s. 99 of the Constitution.

LATHAM C.J. The Court suggests that counsel should deal first with the interpretation of s. 99 of the Constitution and Question 6 as added to the case stated in respect of the Rationing Orders.

Phillips K.C. (with him *Gillard* and *Else Mitchell*), for the defendants. Although argument confined to this point does not include a consideration of whether or not the Orders now under review

(1) (1909) 8 C.L.R. 465, at pp. 496, 539, 544, 546.
(2) (1910) 11 C.L.R. 1.
(3) (1909) 8 C.L.R. 465.
(4) (1928) 41 C.L.R. 442.
(5) (1908) 6 C.L.R. 41.
(6) (1936) 54 C.L.R. 657, at pp. 666-668, 676.
(7) (1936) 54 C.L.R., at pp. 666-668.
(8) (1936) 54 C.L.R., at p. 668.

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do grant preferences, it is submitted that they do not grant preferences. That, however, does not arise unless they are held to be laws in respect of trade, commerce, or revenue. They are not preferences because (*a*) s. 99 in referring to laws or regulations of trade, commerce and revenue means laws or regulations of inter-State trade or commerce; and (*b*) even if that were not so, these laws are not, upon their true analysis, laws of trade or commerce, either because (i) their real nature, or pith or substance, is that they are laws of defence, or (ii) if in their real nature they are not laws of defence, though they were made under that power, but are laws dealing with something else then the convenient category is property and civil rights and not trade or commerce. The real nature, or pith and substance, for this purpose can be ascertained only upon an examination of the provisions of the *Prices Regulations* or the *Rationing Regulations*. These regulations are laws of defence, or, alternatively, they are laws but are not laws of trade or commerce. The true interpretation of s. 99 is that that section is directed to limiting the power of the Commonwealth with respect to inter-State and foreign trade. Section 99, occurring where it does in the Constitution, is part of the Constitution concerned with inter-State trade and commerce power. It is not possible to find laws made by the Parliament under the other legislative heads which are, at one and the same time, a valid exercise of the legislative powers under the other heads and laws of trade and commerce. A law made, for example, under placitum (v) of s. 51 is really a postal law and not a law of trade or commerce. In *R.* v. *Barger* (1) it was held, by majority, that the statute there under consideration was not a proper exercise of the taxation power and that if otherwise valid, it was invalid on the ground that it authorized discrimination and therefore discrimination between States or parts of States within the meaning of s. 51 (ii). Laws regulating trade and commerce are laws which deal with trade and commerce as such, as complete concepts, not laws which affect some trade or commercial aspect (*Citizens Insurance Co. of Canada* v. *Parsons* (2)). Whether it is a regulation of trade and commerce is to be ascertained by looking at the pith and substance of the legislation (*Attorney-General for Canada* v. *Attorney-General for Alberta* (3); *Attorney-General for Ontario* v. *Reciprocal Insurers* (4); *In re Board of Commerce Act*, 1919, and *Combines and Fair Prices Act*, 1919 (5); *Toronto Electric Commissioners* v. *Snider* (6)). Section 99 presupposes a law made under

(1) (1908) 6 C.L.R. 41.
(2) (1881) 7 App. Cas. 96, at pp. 111 et seq.
(3) (1916) 1 A.C. 588.
(4) (1924) A.C. 328, at pp. 327 et seq.
(5) (1922) 1 A.C. 191.
(6) (1925) A.C. 396, at pp. 414, 415.

some power of the Commonwealth and provides that if it be a law which falls within a particular class and is preferential it is prohibited. Assuming, however, that s. 99 is not limited to laws made under s. 51 (i), the laws under consideration in this case, applying the test elaborated by the Privy Council, are not laws of trade and commerce. Rationing is not a law of trade and commerce (*Toronto Electric Commissioners* v. *Snider* (1)). Although the *National Security* (*Rationing*) *Regulations* affect trade and commerce the pith and substance of these regulations is the regulation of the obtaining and consumption of goods and services and whether the obtaining was in commercial transactions or otherwise, because, in point of fact, the rationing coupon system extended beyond mere ordinary commercial transactions : see regs. 3, 25. If the wider meaning be given to trade and commerce then there would not be a limitation to laws made under s. 51 (i), but the position would arise that the framers of the Constitution must be taken to have conceded that there were two placita under which the trade and commerce laws could be made and it was not intended to put this shackle on trade and commerce. With regard to the suggestion that the test of the majority in *R.* v. *Barger* (2) is not good doctrine, it is a conspicuous fact that one of the dissentients, *Higgins* J., shortly afterwards, in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3), approved the method of approach by the majority in *R.* v. *Barger* (2). The expression " law . . . of trade, commerce, or . . . " in s. 99 and the expression " with respect to trade or commerce " in s. 102 are synonymous ; they do not involve any change. It may be necessary to have regard to the nature and purpose of the Act in order to determine what is the subject matter.

[DIXON J. referred to *Ex parte Walsh and Johnson* : *Re Yates* (4).]

The *Rationing Regulations*, as a whole, constitute an administrative body with very wide powers, some of which are not necessarily matters of trade and commerce. The real nature of the *National Security* (*Prices*) *Regulations* is that they constitute a law with respect to, or of, or concerning, money or the value of money and not trading. The right to control prices extends to all classes, including those outside the sphere of trade and commerce.

[LATHAM C.J. referred to *W. & A. McArthur Ltd.* v. *Queensland* (5).]

It seems to have been assumed in that case that the price-fixing provisions there under examination were laws with respect to trade and commerce. Section 99 is referential and not descriptive. It refers

(1) (1925) A.C. 396.
(2) (1908) 6 C.L.R. 41.
(3) (1908) 8 C.L.R. 330, at pp. 408, 410.
(4) (1925) 37 C.L.R. 36, at p. 115.
(5) (1920) 28 C.L.R. 530.

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to the inter-State commerce power. If, however, it be the true view that s. 99 refers to laws of trade and commerce referred to in s. 51 (i), the legislation now under consideration are not such laws. The *Rationing Regulations*, if enacted as a statute of the Commonwealth Parliament, could not be defended as valid on the ground that they were an exercise of the powers given by s. 51 (i). The true view, in all the surrounding circumstances, is that these regulations are laws of defence. The words " trade " and " commerce " in s. 99 are used with referential import to s. 51 (i). Question 6 added to the case stated in respect of the Rationing Orders, refers to regs. 24, 25 and 26 of the *Rationing Regulations*. The powers given to the Commission by reg. 25 are given in the widest terms and are large enough to permit rationing by localities and the exclusion of other localities. These powers are independent powers—the Minister's power to ration can be for all or part. The same kind of problem arose in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1). The regulations now under consideration were cast in the same mould as the regulations there under consideration.

LATHAM C.J. We are not prepared, on the amount of consideration which we have been able to devote to the case so far, to determine the matter upon the part of the case which has hitherto been argued and we therefore require to hear argument upon the other questions in the case and upon the other points which arise.

Dean K.C. On their face the Orders under consideration give a preference. The facts pleaded in the defence are, as pleaded, irrelevant facts, even if true. It is quite irrelevant for the present case what were the established usages and customs of the meat trade in Queensland. These usages and customs are not alleged to be universal. The effect of the Order is that such traders in Queensland who may not or do not now observe the alleged established usages and customs would be compelled to use a different method. The Orders in question are laws or regulations of trade or commerce which give preference to one State or part of a State over another State or any part thereof contrary to s. 99. A preference is something which provides a tangible advantage in the course of trade or some material or substantial benefit of a trading character (*Crowe* v. *The Commonwealth* (2), *Elliott* v. *The Commonwealth* (3). Under the Rationing Orders, in one State sellers are free to sell all that the

(1) (1943) 67 C.L.R. 335.
(2) (1935) 54 C.L.R. 69, at pp. 83, 86, 91, 92.
(3) (1936) 54 C.L.R., at pp. 668, 670, 678.

public will buy ; in another State they are restricted to the amount which the coupons will produce. That constitutes a preference to one State. Section 99 does not specify any section of inhabitants. The words are "to one State or any part thereof." Those words do not mean any geographical unit, nor do they mean the State of government, they must therefore mean the residents of a State or some part of the residents of a State ; some portion of the community in a State. By the Rationing Orders an impediment or burden is imposed upon traders in some States which is not imposed on traders in other States (*Cameron* v. *Deputy Federal Commissioner of Taxation (Tas.)* (1) ; *Crowe* v. *The Commonwealth* (2)). The nature of a provision which may amount to a preference is indicated in *James* v. *The Commonwealth* (3). The fixing of varying prices for different States or parts of States constitutes a preference. If the prices fixed for a State be different from the prices fixed for another State and amount to a preference then, whatever the economic consequences may be, there is a preference (*Cameron* v. *Deputy Federal Commissioner of Taxation (Tas.)* (4) ; *James* v. *The Commonwealth* (5) ; *Elliott* v. *The Commonwealth* (6)). The Court is concerned not with the purpose of an enactment but with whether or not it does in fact constitute a preference between one State and another in its effect (*Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (7)). Though each Order taken by itself may not contain any reference to inter-State, or kindred matters, the mere fact that it makes a difference renders it invalid. If it is not uniform it is preferential : this is recognized by s. 96 of the Constitution (*Deputy Federal Commissioner of Taxation* (N.S.W.) v. *W. R. Moran Pty. Ltd.* (8)). The general rule in respect of s. 99 is shown in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (9) in which it was held that the legislation there under consideration was a uniform law and that the law was applied differently in different States because the amount varied and it was not, therefore, a violation of the Constitution. The laws now under consideration are not uniform and there is no requirement that they should be uniform. The restriction imposed by the Rationing Orders upon some traders in some localities is an impediment upon them which gives traders in other localities a preference over them. It is a direct tangible trading advantage equally as direct and tangible as in *James* v. *The Commonwealth* (10).

(1) (1923) 32 C.L.R. 68, at p. 73.
(2) (1935) 54 C.L.R. 69.
(3) (1928) 41 C.L.R., at pp. 455, 456, 461, 462.
(4) (1923) 32 C.L.R. 68.
(5) (1928) 41 C.L.R., at p. 464.
(6) (1936) 54 C.L.R., at p. 684.
(7) (1939) 61 C.L.R. 735, at p. 760.
(8) (1939) 61 C.L.R., at pp. 763, 764.
(9) (1906) A.C. 360, at p. 367.
(10) (1928) 41 C.L.R. 442.

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The motive of the legislation is irrelevant. Even if the allegations in the defence are true, these facts would not prevent the differences amounting to preferences for the purpose of s. 99. The facts pleaded in the defence cannot be established, and even if they were established they would not amount to an answer. Any area in a State is necessarily part of a State for the purposes of s. 99. Even if the majority view in *R.* v. *Barger* (1) and of the Chief Justice in *Elliott* v. *The Commonwealth* (2) be preferred, in this case at least what has been done has been to treat the areas differently affected as parts of States, and not as localities within the State. The use of the words " undue and unreasonable, or unjust " in s. 102 lead to the conclusion that if, in fact, preference is created by any law which answers to the description of prohibition in s. 99, no question of the dueness and reasonableness or justness arises if in fact it is a preference. Section 99 is subject to no such qualification. The Court will reject the idea that discrimination according to the locality may be made because it is reasonable so to discriminate, and therefore impliedly rejects the idea that variations may be made because of, for example, economic factors, therefore it follows that it would be wrong for the Court to consider any questions of evidence in relation to such facts (*R.* v. *Barger* (3)).

[*Phillips* K.C. I am prepared to state that certainly in the case relating to prices, if it be held that the dissimilar legislative provisions are preferential in their effect, I would not contend that they are outside s. 99 because they are preferential in respect of localities referred to in s. 99. No question of the true definition of localities under s. 99 arises. With regard to the case relating to rationing, insofar as there is alleged to be an unconstitutional preference by reason of certain cuts of meat being prescribed for Queensland, and other cuts of meat prescribed for other States, if again that is a dissimilarity of legislative regulation preferential in its effect within the meaning of s. 99, it clearly refers to States. If it is a preference, it will be condemned, as to the exempt areas, by s. 99. In the prices case argument will not be based upon the question arising under States or parts of States under s. 99, and in the rationing case argument will not be based on those words in relation to the question of the cuts of meat in Queensland. But it will be argued that the description of special areas does not come under s. 99, because it is one large area of Australia and has no reference to States or parts of States within the meaning of s. 99.]

(1) (1908) 6 C.L.R. 41.
(2) (1936) 54 C.L.R. 657.
(3) (1908) 6 C.L.R., at p. 80.

Dean K.C. So far as the rationing case is concerned, even if it be correct that it is one area, the less populated parts of Australia, there is nevertheless an infringement of s. 99 because the special areas are parts of States. They do not cease to be parts of States merely because in the aggregate they form one area. If there is in fact a preference given to an area which is in fact a part of a State, it does not matter that it is not described as such. Section 99 prohibits any locality discrimination. The prohibition under s. 99 was intended to operate only where the localities were in different States. If in fact a preference is given to a territory or area—to an area which is part of one State—over another State or area or areas in another State s. 99 is satisfied, and that consequence cannot be avoided and the section given a more restricted meaning on any basis on limiting parts of States to localities within a State when in fact they are situated in different States (*R.* v. *Barger* (1)). Parts of States are referred to in ss. 122 and 124 of the Constitution. The remarks made in *Elliott* v. *The Commonwealth* (2), so far as they purport to be based upon observations by *Isaacs* J. in *R.* v. *Barger* (3), are not well founded. In those observations *Isaacs* J. was not using the words in the widest sense in relation to discrimination. On both grounds, that is to say the interpretation of s. 99 and the interpretation of the Orders themselves, those Orders do relate to parts of States for the purpose of s. 99 and if they give preferences then the Rationing Orders are rendered invalid under s. 99 because they do operate to give preferences. The facts pleaded insofar as they are proper matters for judicial notice are not proper matters for evidence. If those facts be looked at as matters of evidence proper for judicial notice they do not establish the facts they are alleged to support.

[STARKE J. referred to *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (4).]

Only the official notice is admissible as evidence. Even if the facts pleaded be proved they would not make the Orders valid if those Orders were otherwise invalid. They are irrelevant and insufficient to establish the pleas in support of which they are alleged. Evidence on disputed facts should not be admitted in constitutional cases.

Phillips K.C. The defendants' contentions fall into three classes —each relatively independent. (A) The " laws " involved in these cases are not laws or regulations of trade, commerce or revenue. Alternatively, (B) If the " laws " are within s. 99 the particular

(1) (1908) 6 C.L.R., at pp. 78, 79.
(2) (1936) 54 C.L.R., at pp. 672-674.
(3) (1908) 6 C.L.R., at pp. 107, 110.
(4) (1939) 61 C.L.R. 735.

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benefits and detriments arising from their operation are not within the class of " preferences " hit at by s. 99. Alternatively, (C) If the " benefits and detriments " are capable of constituting preferences within s. 99, then in these cases preferences within the section are not so constituted either in fact or as a matter of mixed fact and law. The " law or regulation " in s. 99 is a law made by the Commonwealth and must therefore be limited to a law with respect to inter-State or overseas trade and commerce. The laws in question in these cases are laws in respect of defence. The law, that is to say either the *Rationing Regulations* or the *Prices Regulations*, in each case is in its nature, or because of its pith and substance, not a law of commerce or of trade. The law of rationing, for example, is a law concerning the consuming or use of goods or services. There is a presumption in favour of constitutionality which applies to raise an inference that there is a dissimilarity of the attendant circumstances appropriate to the dissimilar provisions of the law in the States so that laws do not give preferences, but on the contrary prevent them from arising. The plaintiff must rebut this inference by allegation and proof. If there be no such presumption, then upon dissimilar legislative treatment being shown it is not for the plaintiff to eliminate appropriate dissimilar facts, it must be open to the defendants to show that the circumstances were themselves such as to make the dissimilar legislative treatment appropriate and justifiable. If once these facts are proper to be considered then evidence should be admitted as to these facts. Laws coming within s. 99 may either introduce a completely new factual situation between the States or may provide a legal regulation of a factual situation which would have existed apart from the law in *Elliott* v. *The Commonwealth* (1). The fixing of prices for meat did not create a situation which had not existed before. What may be adequate to determine a preference, or what may reveal the nature of a preference in one of these cases may be a misleading test in the other. There must be two aspects of this matter, a distortion of the pattern and a distortion which confers, simultaneously, benefits and detriments co-relatively ; the policy must give a preference to one State as against another State. If that be the true view of preference it is clear that it is impossible to ascertain whether there is a preference without recourse to the attendant circumstances. Where the pattern is a moving one, then a law which does not distort the pattern as a moving one will not give a preference, but the law which does disregard the changing elements in the pattern and does distort it will, prima facie, give a preference. A " repulsive " alternative is

(1) (1936) 54 C.L.R. 657.

that any law which fixes standards differing in the States, however entirely appropriate to them, is a law giving preference. In this context " preference " clearly means something which promotes the trade and commerce of one State at the expense of the trade and commerce of another State (*Crowe* v. *The Commonwealth* (1) : see also *Oxford English Dictionary*, vol. 8, " preference.") The Prices Orders were not designed to give, and do not give, a preference. They do not promote or favour the trade of one area and demote or prejudice, correspondingly, the trade of another area. It cannot be determined whether the choice is to promote or to prejudice unless the facts are known, that is to say the whole situation in which the choice of action, the decision to act, is made. Preference of one State over another is only tenable as a conception in the realm of inter-State trade. The word " give " in s. 99 means " produce the effect of " or " create " or " make." These observations as to the nature of a preference involve the rejection of the idea that every discrimination or dissimilarity is a preference. There is something super-added to a discrimination before it becomes a preference. The rights and duties arising from the laws do not confer preferences because if there is an advantage *to* one State *against* another State there is concurrently and co-relatively a detriment to the same State against another State and therefore there is no preference such as is referred to in s. 99 (see *Elliott* v. *The Commonwealth* (2)). Laws which affect separate intra-State transactions unrelated to each other and which do not affect inter-State transactions as such cannot confer the simultaneous benefits and detriments prohibited by s. 99. The Rationing Orders affect a transaction in one State only ; each Order affects a transaction in a State or a smaller area. Unless the trade and commerce of one State be promoted at the expense of the trade and commerce of another State it is not a preference. Whatever the criteria, whether it be the place where the property passes or the place where the contract was made, the operation of the respective Prices Orders under consideration is exclusively in one State. If the laws in question are capable of giving invalid preferences their dissimilarity of legislative treatment does not constitute an invalid preference if there is not a similarity of attendant circumstances in which the laws will operate. The minority view in *R.* v. *Barger* (3) was adopted by the majority of this Court in *Elliott* v. *The Commonwealth* (4). The very idea of a preference, on the true interpretation of s. 99, involves a consideration of the attendant circumstances in which the legislation operates

(1) (1935) 54 C.L.R. 69.
(2) (1936) 54 C.L.R., at pp. 665-676.
(3) (1908) 6 C.L.R. 41.
(4) (1936) 54 C.L.R. 657.

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and that a preference cannot be ascertained merely by looking at the legislation unrelated to the circumstances. Mere dissimilarity of legislative treatment, preferential in its appearance, is not obnoxious to s. 99. If in one State the conditions may be such as to require regulation there, and in the other States regulation may be wholly unnecessary, then a law which provides for regulation in that one State but not in the other States is not a preference (*Elliott* v. *The Commonwealth* (1)). If the legislation appears to arise out of the necessity of maintaining order and regularity, where those conditions are imperilled, and does not contain any legislative provision where those conditions are not imperilled, such legislation does not give a preference. It may be that the Rationing Orders constitute a discrimination or a dissimilarity of legislative treatment but they do not constitute a preference or benefit for the trade of one State over the trade of other States. When the discrimination is one which operates irrespective of State boundaries altogether across a line which has nothing to do with State boundaries, the mere incidental result that some of the discrimination may cross State boundaries does not make it obnoxious to s. 99. What matters are relevant for the purposes of ascertaining a preference, namely differences of local situation, are shown in *Elliott* v. *The Commonwealth* (2). There can be no logical reason for stopping at facts which are capable of being judicially noticed if once the stage be reached of observing the conditions upon which the legislation operates. The Prices Orders are executive orders (*Arnold* v. *Hunt* (3) ; *The Commonwealth* v. *Grunseit* (4) ; *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (5) ; *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (6) ; *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (7)). *Elliott* v. *The Commonwealth* (2) clearly contemplates that the tribunal will direct its mind to some factual situation. The Court should not confine its scrutiny of the facts to those which are the subject of judicial notice (*Borden's Farm Products Co. Inc.* v. *Baldwin* (8)). As to whether the Court may examine the operation or the background of legislation in determining its validity see *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (9) ; *Stenhouse* v. *Coleman* (10) ; *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable*

(1) (1936) 54 C.L.R., at pp. 678-680.
(2) (1936) 54 C.L.R., at p. 680.
(3) (1943) 67 C.L.R. 429, at p. 433.
(4) (1943) 67 C.L.R 58, at pp. 65, 66, 82, 83, 93.
(5) (1943) 67 C.L.R. 347, at pp. 377, 378, 410-412.
(6) (1945) 71 C.L.R. 184, at p. 195.
(7) (1945) 72 C.L.R. 37.
(8) (1934) 293 U.S. 194 [79 Law. Ed. 281].
(9) (1939) 61 C.L.R., at p. 795.
(10) (1944) 69 C.L.R. 457, at pp. 468-472.

Seeds Committee (1); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (2); *James* v. *The Commonwealth* (3); *James* v. *Cowan* (4); *Peanut Board* v. *Rockhampton Harbour Board* (5); *R.* v. *Vizzard*; *Ex parte Hill* (6); *Elliott* v. *The Commonwealth* (7); *Attorney-General for New South Wales* v. *Homebush Flour Mills Ltd.* (8); *Attorney-General for Alberta* v. *Attorney-General for Canada* (9); *Muller* v. *Oregon* (10), and *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (11)).

[LATHAM C.J. referred to *Chastleton Corporation* v. *Sinclair* (12).]

Proof of facts in constitutional cases is dealt with in a useful summary in 49 *Harvard Law Review*, p. 631: see also 59 *Harvard Law Review*, pp. 645, 883. Evidence is admissible as regards the Prices Orders on the ground that the conditions were different.

Dean K.C. in reply.

Cur. adv. vult.

April 14.

The following written judgments were delivered:—

LATHAM C.J., DIXON, MCTIERNAN and WILLIAMS JJ. These are two cases stated in actions by Arthur Edward Morgan against the Commonwealth of Australia and, in one case, the Rationing Commission and, in the other case, the Commonwealth Prices Commissioner. The Rationing Commission operates under the *National Security* (*Rationing*) *Regulations*, and the Prices Commissioner under the *National Security* (*Prices*) *Regulations*, both sets of regulations being made under the *National Security Act* 1939-1946. In the actions the plaintiff claims declarations that certain meat Rationing Orders and certain meat price fixing Orders which apply in Victoria are invalid because they infringe the prohibition contained in s. 99 of the Constitution of the Commonwealth. Section 99 is in the following terms:—"The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

The plaintiff and other persons are being prosecuted upon indictments in the High Court, in the first place for conspiracy to effect an unlawful purpose, namely the supply of coupon-meat to other

(1) (1945) 72 C.L.R. 37.
(2) (1945) 71 C.L.R. 161, at pp. 172, 173.
(3) (1928) 41 C.L.R., at p. 461.
(4) (1930) 43 C.L.R. 386, at pp. 409-411.
(5) (1933) 48 C.L.R. 266, at pp. 296, 297, 304.
(6) (1933) 50 C.L.R. 30, at p. 93.
(7) (1936) 54 C.L.R., at pp. 681, 684.
(8) (1937) 56 C.L.R. 390, at pp. 401, 418.
(9) (1939) A.C. 117, at p. 130.
(10) (1908) 208 U.S. 412 [52 Law. Ed. 551].
(11) (1935) 294 U.S. 405, at p. 414 [79 Law. Ed. 949, at p. 955].
(12) (1924) 264 U.S. 543 [68 Law. Ed. 841].

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persons otherwise than in accordance with the provisions of Rationing Order No. 37 as amended, and in the second place for offences of black marketing under the *Black Marketing Act* 1942, the alleged offences consisting in selling porterhouse and rump steak and veal and beef at greater prices than the maximum prices fixed by Prices Regulation Order No. 1817 as amended by Prices Regulation Orders up to and including Prices Regulation Order No. 2106. The plaintiff in these actions claims that Rationing Order No. 37 and Prices Order No. 1817 and the amendments of them are invalid as contravening s. 99 of the Constitution. The Orders which are challenged are applicable only to Victoria. They contain provisions which, at all relevant times, have differed from provisions in other Orders dealing with the same subject matter which have been applicable in other States than Victoria or in parts of such other States.

Rationing Order No. 37 provides that a person shall not supply certain meat declared to be coupon-meat to another person otherwise than upon the surrender to him of the appropriate number of coupons in accordance with the Order. Three points are taken in respect of this Order.

First, the Order provides that the provisions relating to the surrender of coupons shall not apply in any "special meat area." The Order (par. 2) defines "special meat area" as meaning any part of the Commonwealth included in any of the areas specified in the fourth schedule. The areas specified in the schedule are portions of the States of New South Wales, South Australia, Queensland, Western Australia, and the whole of the Northern Territory. Thus in the special meat areas no coupons are required. Those special meat areas are parts of States. In the areas which are not special meat areas coupons are required and those areas are the whole of the States of Victoria and Tasmania and parts of the other States of the Commonwealth.

Secondly, the Rationing Order prohibits the supply by wholesale of coupon-meat in cuts or forms not corresponding with descriptions contained in the Second Schedule. The cuts or forms prescribed in Queensland are, in certain cases, different from those prescribed in the case of other States.

Thirdly, the result of this provision is that the scale of coupon requirements in Queensland is different from that which applies in other States.

It is contended that these variations show that the Victorian Order gives preference to a State or part thereof over other States or parts thereof contrary to s. 99 and is therefore void. The Victorian Order applies only to the supply of meat in Victoria. It cannot be said to have

any operation in any other State, and therefore the contention must be either (1) that the Order, considered in relation to the Orders applying in other States, gives preference to Victoria over other States or parts thereof; or (2) that the Order imposes some disadvantage upon Victoria or parts thereof as compared with other States or parts thereof. It was not made very clear in argument whether it was contended that the Order was a preference to Victoria over other States or a preference to other States over Victoria.

The Victorian Prices Order the validity of which is challenged is No. 1817 as amended from time to time down to Order No. 2106. This order fixes and declares the maximum prices at which meat of the cuts or classes specified in the Fifth Schedule may be sold by retail in various parts of Victoria. The operation of the Order as originally made may be illustrated by reference to fillet steak, for which four retail prices were fixed—1s. 10d. a pound in the Melbourne metropolitan area, and 1s. 8d., 1s. 9d. and 1s. 10d. in other areas in Victoria. In New South Wales, on the other hand, by an Order which was in force at the same time as No. 1817, the retail prices for fillet steak were 2s. in the Sydney metropolitan area and 1s. 9d. elsewhere. The retail prices fixed for the same meat in other States also varied, running down to 1s. 3d. in certain parts of Tasmania. The retail prices were varied by amending Orders, but at all times different prices were fixed for the same meat in different States and parts of different States.

Order No. 1817 also fixed wholesale prices of meat in Victoria; for example, ox beef—the maximum price to 650 lbs. was 53s. In other States the price was fixed at varying rates, e.g. 5½d., 5d., 6¾d. per lb. The wholesale prices were altered by amending Orders, but at all times the prices for the same meat varied as between different States and parts of different States.

The contention for the plaintiff was that these variations as between States and parts of States constitute preferences which are prohibited by s. 99 and that therefore the Victorian Order No. 1817 and the various Orders amending it are invalid.

In order to establish these contentions the Orders in question or the regulations under which they were made must be shown to be laws or regulations of trade and commerce within the meaning of s. 99 of the Constitution. Both the *Rationing* and the *Prices Regulations* and the Orders thereunder can be supported as valid legislation only under the legislative power conferred by s. 51 (vi) of the Constitution—the power to legislate with respect to the naval and military defence of the Commonwealth and the several States. The Commonwealth Parliament also has power under s. 51 (i) to make

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laws with respect to "Trade and commerce with other countries, and among the States." It was contended for the plaintiff that the operation of s. 99 is not limited to laws which are authorized by the power conferred in s. 51 (i), but that s. 99 applies to other laws or regulations which are laws or regulations of trade or commerce, whatever the constitutional power may be in pursuance of which or under which they have been enacted by the Commonwealth Parliament. It was contended that preferences to States and parts of States appear on the face of the challenged Orders, that they are laws or regulations of trade or commerce and therefore must be held to be void.

The defendants on the other hand contended that the words of s. 99 and the context in which it appears show that s. 99 is intended to be limited to laws or regulations of trade and commerce which can be enacted by the Federal Parliament under what is called the trade and commerce power, that is, under s. 51 (i), and that s. 99 does not apply to laws or regulations which can be supported only under other powers, even though they have (as some of them in fact have) an effect upon or in relation to trade and commerce. The regulations and Orders under consideration in this case were made under the defence power and though they, or some of them, affect trade and commerce, they are, it was contended, exclusively defence legislation and could not be justified under s. 51 (i) as trade and commerce legislation. The argument for the defendants was that s. 99 has no application to laws made under the defence power or, indeed, under any power other than that contained in s. 51 (i).

Alternatively, it was contended for the defendants that the *Rationing Regulations* are not really laws or regulations of trade or commerce, even if those words are given their widest interpretation as including, not only laws made under s. 51 (i), but any other laws which deal with trade and commerce, under whatever power they are made. The argument was that the regulations are directed towards a fair distribution of commodities during a time of war emergency, and that, although they introduce a limitation upon commercial dealings, their real nature is that of an arrangement for the distribution of necessary or important commodities such as, in the present case, food. An arrangement for the fair distribution of food by a coupon system, though it affects trading in food, is not, it was contended, a law regulating trade and commerce. It was also argued, though not with as much force, that the *Prices Regulations* were directed to the prevention of inflation, and that the object was to prevent money losing its value rather than to fix prices to be observed as maximum prices in commercial dealings.

It was further argued for the defendants that the regulations and the Orders made under them did not give a preference to any State or part of a State over another State or part of a State. It was submitted that it was difficult, if not impossible, to identify the alleged preference, whether to wholesale or retail butchers or to consumers of meat, and that schemes for distribution of meat under a coupon system and for fixing prices which varied as between different States did not produce any clear and identifiable preference to any identifiable State or part of a State over any other identifiable State or part of another State.

It was also contended for the defendants that, even if the Orders appeared to give a preference on their face, the defendants should be allowed to show by evidence that this effect of the Orders was only an apparent effect, and that in fact they operated to bring about, not preferences between States or parts of States, but an equality of treatment in each State, regard being had to varying conditions which existed in the various States and parts of States with respect to the supply of and demand for meat, seasonal and market conditions, trade customs and practices and similar matters which differ from State to State.

It was not argued for the defendants that, if the differences as between States and parts of States were preferences, they were not preferences to a State or part of a State over another State or part of a State—except in the case of the " special meat areas " which it was contended, were a single Australian area and not a part or parts of States.

All the contentions to which we have referred appear in the pleadings in the actions. *Dixon* J., considering it desirable that the questions raised should be determined before the trial of the actions and before the trial of the plaintiff and others upon the indictments mentioned, has stated cases in each action in which he has submitted questions to the Court which inquire, in the first place, whether the Orders in question are laws or regulations of trade or commerce within s. 99 of the Commonwealth Constitution. Other questions inquire whether the facts alleged in the defences upon which the defendants propose to rely and which they wish to establish by evidence so far as judicial notice cannot be taken of them, are facts which can, as a matter of law, be considered by the Court in determining the questions whether the Orders are contrary to the provisions of s. 99.

(1) There is no decision of the Court upon the question whether the words " law or regulation of trade, commerce, or revenue " in s. 99 include, so far as trade and commerce is concerned, laws made

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under a power other than the power conferred by s. 51 (i) to make laws with respect to trade and commerce with other countries and among the States. None of the decisions upon s. 99 have dealt with this point. In *R.* v. *Barger* (1) it was held by the majority of the Court that a law was not in its true nature a law of taxation, but that, if it were a law with respect to taxation, it infringed s. 99: See report (2). It is clear that the words "law" and "revenue" in s. 99 include laws with respect to taxation. In *Crowe* v. *The Commonwealth* (3) the legislation under consideration related to the export and sale and distribution after export of Australian dried fruits, and was obviously a law which was a law with respect to trade and commerce with other countries enacted under s. 51 (i) of the Constitution. In *Elliott* v. *The Commonwealth* (4) the law in question was the *Transport Workers (Seamen) Regulations*, which applied only in inter-State trade and commerce. The validity of a similar law as applied to waterside workers had been upheld in *Huddart Parker Ltd.* v. *The Commonwealth* (5) and in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (6). This law was also a law made under s. 51 (i) of the Constitution. Since the enactment of the *National Security Act* 1939 this Court has on many occasions considered the validity of *Prices Regulations* and in many cases the Orders made under the regulations have prescribed different prices for the same commodities in different States; but until the present case the Court has not been called upon to determine whether or not such variations constituted an infringement of s. 99. It is now, however, necessary to determine this question.

(2) The Constitution, in s. 51 (i), confers an express power upon the Commonwealth Parliament to make laws with respect to trade and commerce with other countries and among the States. This provision confers no power to legislate with respect to intra-State trade. It gives no power to make laws with respect to trade between different parts of the same State. Accordingly it was not necessary to provide against preferences to parts of a State over other parts of the same State, as no law could validly be made under s. 51 (i) with respect to trade between different parts of the same State. Section 99 prohibits preferences to one State or part of a State over another State or part thereof, but does not purport to deal with preferences within a single State. This circumstance shows a connection between s. 99 and s. 51 (i).

(3) There is, however, no such circumstance to show a connection between s. 99 and the other legislative powers referred to in s. 51.

(1) (1908) 6 C.L.R. 41.
(2) (1908) 6 C.L.R., at p. 78.
(3) (1935) 54 C.L.R. 69.
(4) (1936) 54 C.L.R. 657.
(5) (1931) 44 C.L.R. 492.
(6) (1931) 46 C.L.R. 73.

There are many powers of the Commonwealth Parliament besides the defence power under which laws may be passed which affect trade and commerce, not only inter-State but also intra-State. Reference may be made to the powers to make laws with respect to (s. 51 (ii)) taxation—laws might be made under this power prohibiting commercial transactions, whether inter-State or intra-State, which were designed to evade taxation or which would interfere with the application of a system of taxation ; s. 51 (iii)—bounties on the export of goods ; s. 51 (v)— postal, telegraphic, telephonic, and other like services ; s. 51 (ix)—quarantine (under this power there can be control of the movement of goods in the interests of health) ; s. 51 (xii)—currency, coinage, and legal tender ; s. 51 (xv) —weights and measures ; s. 51 (xvi)—bills of exchange and promissory notes ; s. 51 (xvii)—bankruptcy and insolvency ; s. 51 (xviii)— copyrights, patents of inventions and designs, and trade marks. Under all these powers legislation may be enacted which may have an important effect in relation to trade and commerce. A law with respect to patents may prohibit the sale of patented articles without a licence from the person entitled to the patent. Such a law would be effective as a law with respect to patents in relation both to inter-State and intra-State sales. It would be quite irrelevant to consider the law in relation to the power contained in s. 51 (i) with respect to trade and commerce, because the law would obviously be a law with respect to patents, and so considered would (unless it infringed some applicable constitutional prohibition) be valid, being completely unaffected by the limitation of the trade and commerce power to foreign and inter-State trade.

Under these powers, as well as under the defence power, laws may be passed which affect trade and commerce but which if (as might validly be the case) they applied to intra-State trade and commerce could not have been passed under s. 51 (i). The preferences forbidden by s. 99 are plainly preferences in favour of and against States. They are not preferences in intra-State trade. If s. 99 were construed as applying to all laws affecting trade and commerce passed under any of the powers contained in s. 51, including the defence power, there would be an unexplained gap as to intra-State preferences. But if the expression " law or regulation of trade, commerce " in s. 99 is limited to laws which could be enacted under s. 51 (i), there is no such hiatus in the Constitution. It would, indeed, be a remarkable thing for a Constitution to provide that laws for the defence of a country, at a time possibly of the most critical threat to national existence, should be limited by a requirement that they should not have the effect of giving some commercial

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preference (*Crowe* v. *The Commonwealth* (1)) to parts of the country over other parts. It might become necessary to close down all or some trade and commerce in an invaded or threatened area, without any consideration of any result in trading and commercial preference as between States.

Thus the terms of s. 99 show a connection of the section with the legislative power with respect to trade and commerce. The only express power to make laws with respect to trade and commerce as the subject matter of the law is to be found in s. 51 (i). In determining whether a law is such a law it is necessary to consider the substance of the legislation (*Barger's Case* (2)). It is irrelevant to consider the indirect effect of a law for the purpose of determining whether it is proper to refer it to a particular category (*Attorney-General for Ontario* v. *Reciprocal Insurers* (3) and see cases cited in *South Australia* v. *The Commonwealth* (4)).

The regulations and Orders the validity of which is challenged in this case are provisions with respect to defence, but they should not be held to be laws or regulations of trade and commerce within the meaning of the words in s. 99, although they produce effects in relation to trade and commerce because they could not have been made by virtue of the legislative power conferred by s. 51 (i).

(4) This view is reinforced by consideration of the context and setting of s. 99 in the Constitution. It is included in Chapter IV. of the Constitution—Finance and Trade—and is one of a group of sections which deal with trade or commerce. The other associated sections consist of provisions all of which either define, or limit in some way, the exercise of the power of the Commonwealth Parliament in relation to trade and commerce—a power which, as already stated, is derived from s. 51 (i) of the Constitution and is therefore limited to inter-State and foreign trade and commerce. The following phrases are used in this group of sections : s. 98—" laws with respect to trade and commerce " ; s. 99—" any law or regulation of trade, commerce, or revenue " ; s. 100—" any law or regulation of trade or commerce " ; s. 101—" provisions of this Constitution relating to trade and commerce and . . . all laws made thereunder " ; s. 102—" any law with respect to trade or commerce." These phrases vary in some particulars but they are all intended to refer to the same subject matter, namely laws which the Parliament can make under the power conferred upon it by s. 51 (i).

It has been held that this is the case with respect to s. 98, which provides that " The power of the Parliament to make laws with

(1) (1935) 54 C.L.R. 69.
(2) (1908) 6 C.L.R., at p. 65.
(3) (1924) A.C. 328, at p. 337.
(4) (1942) 65 C.L.R. 373, at pp. 424 et seq.

respect to trade and commerce extends to navigation and shipping." In *Newcastle & Hunter River Steamship Co. Ltd.* v. *Attorney-General (Cth.)* (1) it was held that this section did not confer power upon the Federal Parliament to legislate with respect to navigation and shipping generally, but that the section operated within the power conferred by s. 51 (i), so that s. 98 conferred power to deal with navigation and shipping only so far as navigation and shipping was relevant to inter-State and foreign trade or commerce.

Section 100 is in the following terms :—" The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation." This provision raises a question as to the relation between it and the defence power which is not unlike that raised by s. 99. The prohibition contained in the section would, if it were construed as limiting the exercise of the defence power, limit it only in cases where the law of defence was also a law or regulation of trade or commerce and not in other cases. Such a limitation could find no justification in reason in that case and similar considerations apply in the case of s. 99.

In s. 101, which prescribes the powers of the Inter-State Commission, the reference to " the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder " is most obviously a reference to legislation enacted under s. 51 (i).

So also in s. 102 the provision that the Parliament may " by any law with respect to trade or commerce " forbid certain railway discriminations plainly has reference to laws made under the power conferred by s. 51 (i). Section 102 proceeds to impose certain limitations upon the exercise of the power.

This whole group of sections, including s. 99, should be read as applying only to laws which can be made under the power conferred upon the Commonwealth Parliament by s. 51 (i).

The provisions under consideration in these proceedings are not laws which could have been so made. They were made and could be made only under another power, namely the defence power. To such laws s. 99 has no application. Some day the question may arise whether a law which may be supported under s. 51 (i) and independently under some other power, such as external affairs, may fall under s. 99, but it is a question which does not arise in this case.

The first question submitted in the *Rationing Regulations Case* is— " Is each of the said Rationing Orders No. 37, No. 40 and No. 47 referred to in the statement of claim a law or regulation of trade or commerce within s. 99 of the Constitution of the Commonwealth ? "

(1) (1921) 29 C.L.R. 357.

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The first question submitted in the *Prices Regulations Case* is—"Is Prices Regulation Order No. 1817 as amended by Prices Regulation Orders down to and including Prices Regulation Order No. 2106 referred to in the statement of claim a law or regulation of trade or commerce within s. 99 of the Constitution of the Commonwealth?" The result of the considerations mentioned is that each of these questions should be answered in the negative.

These answers produce the result that s. 99 is not applicable to the regulations or Orders. The question whether or not they give a preference prohibited by s. 99 therefore cannot arise. Questions 2, 3 and 4 in the *Rationing Regulations' Case* and questions 2 and 3 in the *Prices Regulations' Case* inquire whether certain facts alleged in the defences to the actions are proper in law to be considered in determining whether the Orders are contrary to s. 99. If s. 99 does not apply to the Orders these questions do not arise. Thus it is unnecessary to answer the questions mentioned.

In the *Prices Regulations' Case* question No. 5 inquires whether the regulations or Orders are invalid as inconsistent with s. 92, but this matter was not argued and it is unnecessary to answer the question.

Question No. 6 in the *Rationing Regulations' Case* is as follows:—"Was the defendant Rationing Commission authorized or empowered by the *National Security* (*Rationing*) *Regulations* to make an order relating to rationing of meat which was not applicable generally throughout Australia?" The answer to this question depends upon the true interpretation of regs. 24, 25 and 26 of the *Rationing Regulations*. It is a question which relates only to the construction of those regulations, and not to any matter of constitutional power.

Regulation 24 (1) provides that "The Minister may, by notice in the *Gazette*, declare any goods or class of goods to be rationed goods for the purposes of these Regulations," and reg. 24 (3) provides that "Any declaration by the Minister in pursuance of this regulation may be made generally or in respect of any part of Australia or any proclaimed area." Regulation 26 provides that the Commission may, from time to time, declare that any area specified shall be a proclaimed area. Thus the Minister is given power to declare goods to be rationed goods either generally or in respect of parts of Australia or any proclaimed area, but the power of proclaiming areas is vested in the Commission. The Minister has proclaimed meat to be rationed goods generally. It is contended that, as the Commission has not proclaimed any area and as the declaration by the Minister was general, the Commission has no power to deal differently with meat in different parts of the Commonwealth.

There are two answers to this contention. In the first place, even where a declaration that goods are rationed goods is made generally, there is no reason for treating such a declaration as prohibiting variations in Orders of the Commission with respect to goods within different parts of Australia. Upon the true construction of the regulations the position is that the general declaration of the Minister gives power to the Commission to make Orders with respect to goods as the Commission thinks proper within the area to which the declaration applies, but does not limit the Commission by preventing any differentiations of treatment within that area.

Further, however, reg. 25 provides that, subject to certain restrictions, including any directions of the Minister, the Commission may, by order published in the *Gazette* " direct, prohibit, restrict, control or regulate in any other manner whatsoever—(*a*) the purchase, acquisition, transfer, possession, use, branding, packing, storage, supply, distribution, advertising, sale and disposal of rationed goods." Under this power the Commission may restrict, control or regulate the purchase, acquisition and sale of rationed goods. There is no prohibition against making the nature of the direction, control, or regulation dependent upon considerations of locality if such considerations are bona fide regarded by the Commission as relevant to the discharge of the functions under the regulations. Question No. 6 should be answered—Yes.

STARKE J. Cases stated in two actions, Numbers 4 and 5 of 1947, pursuant to Order XXXII. rule 2, Order XVII. rule 26 and the *Judiciary Act.*

The statement of claim in each case alleges that during the years 1944 and 1945 until the month of April 1946 the plaintiff Morgan carried on business in Victoria as a wholesale and retail butcher and small goods manufacturer in partnership with his wife under the name of William Say & Co. In action No. 4 of 1947 it was alleged that on 20th November 1946 the Attorney-General for the Commonwealth filed an indictment in this Court against the plaintiff and certain of his employees whereby he charged that the plaintiff and his employees between 1st March 1945 and 31st March 1946 conspired to effect an unlawful purpose, namely, the supply of coupon-meat otherwise than in accordance with the provisions of Rationing Order No. 37, as amended. And in action No. 5 of 1947 that the plaintiff and his employees between 9th and 19th February 1946 did acts each of which constituted black marketing as defined in the *Black Marketing Act* 1942.

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And the claim in action No. 4 of 1947 was, *inter alia*, that Rationing Order No. 37, as amended, was void and in action No. 5 of 1947 that Prices Regulation Order No. 1817, as amended, was void and alternatively contrary to the provisions of s. 99 of the Constitution.

In my opinion, neither of these actions are competent (cf. *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1)). An allegation that the Attorney-General has filed indictments against the plaintiff and others is wholly insufficient to sustain them. The plaintiff does not allege that the regulations prevent or interfere with any business carried on by him. All he alleges is that during the years 1944 and 1945 and until the month of April 1946 he carried on a business and that he stands indicted by the Attorney-General for offences alleged to have been committed by him whilst carrying on business in 1946.

Civil proceedings for the purpose of defence to criminal prosecutions by the Attorney-General or to render those prosecutions abortive are novel and open to great abuse. The present actions will not, I hope, form a precedent for similar actions in the future. In my opinion they ought to have been stayed for all the matters now raised were open by way of defence in the criminal prosecutions. However cases have been stated.

The first question stated in action No. 4 of 1947 is :—Is each of the Rationing Orders No. 37, No. 40 and No. 47 referred to in the statement of claim a law or regulation of trade or commerce within s. 99 of the Constitution of the Commonwealth ?

And in action No. 5 of 1947 :—Is Prices Regulation Order No. 1817, as amended by Prices Regulations Orders down to and including Prices Regulation Order No. 2106, referred to in the statement of claim, a law or regulation of trade or commerce within s. 99 of the Constitution of the Commonwealth ?

Both these questions should be answered in the negative because the law or regulation referred to in s. 99 is a law or regulation made by the Commonwealth with respect to trade and commerce with other countries and among the States. The section should be so construed because the legislative power of the Commonwealth is to make laws with respect to trade and commerce with other countries and among the States and because the preference prohibited is of one State or part of a State over another State or part thereof. But I do not mean that the law must necessarily and upon its face purport to have been made under the power contained in s. 51 (i) for it is possible that a law of trade and commerce with respect to inter-State and foreign trade can be made under other legislative powers. It

(1) (1943) 67 C.L.R., at p. 343.

must, however, be a law or regulation of the character described in s. 51 (i). Thus a law or regulation of revenue which is also referred to in s. 99 need not necessarily be made under the taxing power for the Commonwealth has other sources of revenue but the preference contemplated by s. 99 is in relation to inter-State and foreign trade.

The question whether a law or regulation is or is not a law or regulation of trade or commerce with other countries or among the States can only be determined by examining its character and its legal operation (*Gallagher* v. *Lynn* (1)).

The Rationing Orders which are attacked in these proceedings were made under the *National Security* (*Rationing*) *Regulations* pursuant to the *National Security Act* 1939-1946. The purpose of the regulations (reg. 3) is the defence of the Commonwealth and the more effectual prosecution of the war. And the Rationing Orders were made to the end that meat for consumption by the people of Australia should be rationed (See Rationing Order No. 37). A coupon system was established whereby retail and wholesale sales of meat can only be made upon production of coupons and in quantities specified in tables appropriate to the number of coupons mentioned in those tables. The quantities are not uniform throughout Australia and vary in the different States and also in different parts of the same State. But this is not a law or regulation of inter-State or foreign trade. It does not affect the movement of goods in inter-State or foreign trade but the consumption of goods in the various States and in different parts of the same State. That is a sufficient reason for a negative answer to the questions relating to the Rationing Orders. But I go further and say that the Rationing Orders are not in character or in legal operation laws or regulations of trade and commerce at all but laws or regulations relating to the consumption of goods.

The Prices Orders which are attacked in these proceedings were made under the *National Security* (*Prices*) *Regulations* pursuant to the *National Security Act* 1939-1946. The Orders fix maximum prices, wholesale and retail, at which meat may be sold in the various States and in different parts of those States. The prices are not uniform and vary in the different States and also in different parts of the same State. Again these Orders are not regulations of inter-State or foreign trade. They do not affect the movement of goods in inter-State or foreign trade but the maximum prices at which meat may be sold in the various States or different parts of those States. Their object was the protection of the public against rising prices in time of war. They are war measures and owe their validity

(1) (1937) A.C. 863, at p. 870.

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to the defence power (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1); *Bendixen* v. *Coleman* (2); *Fraser Henleins Pty. Ltd.* v. *Cody* (3)). And they do not, any more than the Rationing Orders, regulate trade and commerce but only the maximum prices at which goods may be sold in different States or parts thereof.

Answers to Questions 2, 3, and 4, in action No. 4 of 1947 relating to the Rationing Orders thus become unnecessary.

Question No. 5 was abandoned during the argument.

A further question was added during argument:—Was the defendant Rationing Commission authorized or empowered by the *National Security* (*Rationing*) *Regulations* to make an Order relating to rationing of meat which was not applicable generally throughout Australia?

This question depends upon the proper construction of regs. 24 and 25 of the *Rationing Regulations*. It was contended that the Minister declares the rationing area and that the Commission's authority must be exercised throughout the area so declared, in this case, throughout Australia. But reg. 25 enables the Commission to regulate prices &c. " in any other manner whatsoever " which enables him to do so in any part of the area declared by the Minister.

This Question should be answered in the affirmative. Answers to questions 2 and 3 in the action No. 5 of 1947 relating to Prices Orders are also unnecessary in view of the answer to Question 1 in that action.

Morgan v. The Commonwealth (*Rationing*).—*Questions in case answered as follows*:—1. *No, as to each of the said orders.* 2 (*a*) (*b*), 3 (*a*) (*b*), 4, 5 (*a*) (*b*), *unnecessary to answer.* 6. *Yes. Case remitted to Dixon J. Plaintiff to pay defendants' costs of case.*

Morgan v. The Commonwealth (*Prices*).—1. *No.* 2 (*a*) (*b*), 3, *unnecessary to answer. Case remitted to Dixon J. Plaintiff to pay defendants' costs of case.*

Solicitors for the plaintiff: *Stewart & Dimelow*, Melbourne.

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

J. B.

(1) (1943) 67 C.L.R. 335.
(2) (1943) 68 C.L.R. 401.
(3) (1945) 70 C.L.R. 100.