[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

DRAKE-BROCKMAN AND OTHERS;

Ex parte NATIONAL OIL PTY. LTD.

H. C. of A. 1943.

Melbourne, *Oct.* 22; *Nov.* 5.

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

National Security—"*Coal mining industry*"—"*Shale mining industry*"—*Regulation of conditions of employment—Employees engaged in mining shale—Other employees of same employer engaged in processing shale to produce oil and in refining oil—Jurisdiction of Central Reference Board—Writ of prohibition—*"*Officer of the Commonwealth*"—*The Constitution* (63 & 64 *Vict. c.* 12), *s.* 75 (*v.*)—*National Security* (*Coal Mining Industry Employment*) *Regulations* (*S.R.* 1941 *No.* 25—1942 *No.* 525), *reg.* 4, *Part II.*

The processes of treating shale for the extraction of crude oil and further processes for the obtaining of standard grade petrol are not embraced within the "shale mining industry" for the purposes of the definition of the "coal mining industry" in reg. 4 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, and it is immaterial that those processes are conducted in the same locality as that in which the shale treated is mined.

So *held* by *Latham* C.J., *Rich* and *Williams* JJ. (*Starke* and *McTiernan* JJ. dissenting).

Held, further, by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ., that, notwithstanding reg. 17 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, prohibition lies under s. 75 (v.) of the Constitution to the Coal Mining Industry Central Reference Board; and, by *Latham* C.J., *Rich* and *Williams* JJ., that the Court thus having jurisdiction in the matter, the order nisi for prohibition should also be made absolute against the trade union which was a party to the proceedings before the Board.

Order Nisi for prohibition.

National Oil Pty. Ltd. (hereinafter called the prosecutor) was, it was stated in the affidavit in support of the application which is the subject of this report, a company duly incorporated in New South

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Wales and having its registered office in Sydney. The works of the company were situated at Glen Davis in New South Wales, where it "carries on the operations of—(*a*) shale mining; and (*b*) the carbonization of shale for the production of crude oil and the cracking, distillation and refining of the crude oil for standard-grade petrol." The affidavit went on to state that the prosecutor's employees engaged in "shale mining" were governed by awards of the Coal Mining Industry Central Reference Board constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*, while those engaged in the "manufacturing section" were governed by other awards (which were not related to mining). On 2nd October 1943 an application was made by the local branch of the Australasian Coal and Shale Employees' Federation to the Central Reference Board with a view to having the award relating to the prosecutor's employees engaged in shale mining extended to its employees engaged on the prosecutor's "retorts and process plant." The affidavit alleged that these men were "not engaged directly or indirectly in the work of mining for shale" but were "engaged in the work of the carbonization of shale which has already been mined for the production of crude oil and the cracking, distillation and refining of such crude oil into standard-grade petrol . . . The manufacturing section of the . . . works was established at Glen Davis to enable the mined shale to be more easily and economically converted into petrol, since the cost of transporting the finished product by pipe line to the railway at Newnes Junction and thereafter by rail to distribution centres is considerably less than would be the cost of transporting the mined shale for treatment in or near the distribution centres. Furthermore the ash residue after the shale has been carbonized is more readily disposed of at Glen Davis than it would be in or near Sydney."

Further details of the matters alleged in the several affidavits filed appear in the judgments hereunder.

The prosecutor obtained from the High Court an order nisi calling upon the members of the Central Reference Board and the Australasian Coal and Shale Employees' Federation to show cause why the Board should not be prohibited from further proceeding with the application to it.

Fullagar K.C. (with him *P. D. Phillips*), for the prosecutor. The Court has jurisdiction under s. 75 (v.) of the Constitution because prohibition is sought against officers of the Commonwealth (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1), per *Griffith* C.J., *Barton* and *O'Connor* JJ.;

(1) (1910) 11 C.L.R. 1, at pp. 21, 33, 41, 42.

R. v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1); *Judiciary Act* 1903-1940, s. 33; *National Security* (*Coal Mining Industry Employment*) *Regulations*, regs. 19, 4 (definitions of "coal mining industry," "industrial dispute"), 5-7). Just as gold mining goes on until you get the gold (*Federal Commissioner of Taxation* v. *Henderson* (2)), so shale mining goes on until you get the shale; but the subsequent treatment of the shale is not shale mining any more than is the making of gold into trinkets gold mining. The same company might have a gas-works close to a coal mine owned by it, but that would not bring the manufacture of gas within the description of coal mining. The fact that the further processes are carried on in the same locality as the shale mining does not make them mining operations. It is merely an accidental circumstance. In this case it is solely a matter of convenience.

Barry K.C. (with him *Adams*), for the Australasian Coal and Shale Employees' Federation. The question what is included within the shale-mining industry is one of fact for the Central Reference Board and should be left to that tribunal. [He referred to *R.* v. *Hibble* (3).] There is no such thing as mining for shale in the same sense as that in which one speaks of mining for gold. When one obtains gold by mining for it, one has a commodity which may be put to many uses, which may well be said not to be mining; but what may in the most limited sense be called mining for shale has only one purpose; that is, to extract oil from the shale, so that the obtaining of the shale is merely a step in the continuous process whereby oil is produced. There is nothing in *Henderson's Case* (4) which is inconsistent with this view; that case rather supports it. [He referred to *Federal Commissioner of Taxation* v. *Henderson* (5), per *Latham* C.J.].

There was no appearance for the other respondents.

Cur. adv. vult.

Nov. 5.

The following written judgments were delivered :—

LATHAM C.J. Motion for a writ of prohibition directed to the chairman, his Honour Judge Drake-Brockman, and the other individual members of the Coal Mining Industry Central Reference Board and to the Australasian Coal and Shale Employees' Federation, prohibiting further proceeding upon an application dated 27th

(1) (1920) 28 C.L.R. 456.
(2) *Ante*, p. 29.
(3) (1920) 29 C.L.R. 290, at p. 297.
(4) *Ante*, p. 29.
(5) *Ante*, at p. 44.

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September 1943 to the Board by the Federation. The Board is constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*, Statutory Rules 1941 No. 25, as subsequently amended. The Board has powers under the Regulations in relation to industrial disputes in the coal-mining industry and matters affecting industrial relations in that industry (regs. 7 and 8). An award or order made by the Board is binding upon the parties and has effect in the same way as if it were an award or order of the Commonwealth Court of Conciliation and Arbitration (reg. 9). The members of the Board are appointed by the Governor-General (reg. 5) and, except in the case of the chairman, are paid for their services (reg. 19). The question which arises upon this application is whether a dispute as to the wages and conditions of employment of certain employees of the applicant company, National Oil Pty. Ltd., is a dispute in the coal-mining industry. The Federation has made an application to the Board in respect of a dispute, and the Board has the matter under consideration.

Reg. 4 provides that "coal mining industry" includes the shale-mining industry. The employees in relation to whom the application is made by the Federation are employed in manufacturing operations which commence with the treatment of shale and conclude with the production of oil. The question is whether these employees are engaged in the shale-mining industry.

Reg. 17 provides that: "An award, order or determination of the Central Reference Board . . . shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever."

A similar provision is to be found in the *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 31. In the present form of the section, the High Court is excluded from its application. But before the amendment excluding the High Court was made by Act No. 43 of 1930, s. 24, the provision was substantially the same as that contained in reg. 17, already quoted. It was held, however, that, notwithstanding the general prohibition of prohibition contained in the section, the High Court had jurisdiction under s. 75 (v.) of the Constitution to issue prohibition to the Commonwealth Court of Conciliation and Arbitration (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1)). This principle was applied to a tribunal which had functions under the *Industrial Peace Act* 1920 which were similar to those which the Regulations now under consideration vest in the Central Reference

(1) (1910) 11 C.L.R. 1.

Board: See *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1). The members of the Board are officers of the Commonwealth within the principles of these decisions. Thus reg. 17 does not exclude the power of the Court to issue a writ of prohibition under the Constitution, s. 75 (v.).

The affidavits filed on behalf of the applicant company state that miners are employed in mining shale from the earth and that other employees are engaged in the manufacture of oil from the shale. The mined shale is deposited on the surface in bins. It is then dealt with in what the applicant's affidavits describe as the manufacturing, as distinct from the mining, section of the company's works. The shale is crushed and carbonized in retorts and the gases are condensed into oil, which is cracked into raw petrol and refined. A product known as petroleum coke is also obtained as a result of the process. The company's operations are carried on at Glen Davis. Shale is mined and similar operations for the production of oil from shale are carried on at Baerami, in New South Wales. There are other establishments which treat shale for the purpose of producing oil, but they obtain their shale from other parts of the State, and not from mines or cuts adjacent to the works.

The affidavit filed on behalf of the Federation does not challenge any of the facts stated in the affidavits filed on behalf of the applicant, but further states that at least eighty per cent of the shale produced in New South Wales is mined at the two places mentioned, Glen Davis and Baerami, and is there retorted adjacent to the works. The affidavit contains the following statement:—"Shale is mined for the sole purpose of obtaining crude oil, which crude oil is by cracking, distillation and refining converted into petrol. In Australia shale is utilized solely for the obtaining of oil and petrol, and in the State in which shale is won from the earth it is not a commercial product and cannot be marketed. In order to obtain a saleable and useable product, it is necessary that shale should be obtained from the earth and treated to convert it into the commercial product, and the treatment of shale is an essential part of the shale-mining industry."

There is no evidence as to any usage of the term "shale-mining industry." The affidavit of the applicant argumentatively contends that the manufacturing part of its operations is not comprehended within the shale-mining industry, while the affidavit filed on behalf of the Federation argumentatively contends that those operations are included within that industry.

(1) (1920) 28 C.L.R. 456.

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In its primary sense the word " mining " relates to the extraction of something from the ground, as distinct from any process of manufacture which may subsequently be exercised upon that which is extracted. When the term " mining " is associated with the name of a particular product, according to the ordinary use of the word it relates to the production of that product (e.g., coal) beginning with the actual removal of either the product itself, or that which contains it (e.g., gold-bearing quartz), from the soil, and ending with the production of the product itself. Thus " gold mining " includes the extraction of gold-bearing material from the soil, and the treatment of that material so as to produce gold: See *Federal Commissioner of Taxation* v. *Henderson* (1). In that case evidence was given which showed that " according to the ordinary use of the term, gold mining includes not only excavation of material by digging, or mechanical methods, or hydraulic methods, but also treatment by a battery or otherwise, and by a chemical process, when carried out at the place where the gold-bearing material was obtained " (2). Thus operations so carried out which began in the ground with the extraction of material from the ground and ended with the conversion of it into the product gold were gold-mining operations.

The Regulations now under consideration relate in the first place to the coal-mining industry. In my opinion the coal-mining industry is the industry which produces coal as the consequence of mining operations. Coal-mining operations include, not only the actual excavation of the coal from the seam, but also the removal of it from the pit to the surface and placing it upon the surface in a disposable form. All those operations would, according to the ordinary use of language, properly be included within coal-mining operations and would be conducted as part of the coal-mining industry. The subsequent treatment of coal, however, by turning it into gas or into petrol or into dyes or other products, would not, in my opinion, be part of the coal-mining industry. The result of such processes would not be coal, but something else.

In my opinion similar reasoning should be applied for the purpose of determining the meaning of the words " shale mining industry," particularly when, by an artificial definition, it is to be regarded as included in the " coal mining industry." The shale-mining industry is a mining industry. It is not the shale-oil industry. The shale-mining industry is an industry in which mining is used for the purpose of producing shale, just as the coal-mining industry is an industry in which mining is used for the purpose of producing coal. When the shale has been produced, and it is subjected to further operations

(1) *Ante*, p. 29. (2) *Ante*, at p. 45.

for the purpose of producing a product, namely, oil, those operations do not constitute part of the shale-mining industry, though they are certainly included within the shale-oil industry.

A single employer may carry on two or more industries. The same man may be a farmer and a miller and a baker, but there is a distinction between the industry which produces wheat, the industry which produces flour, and the industry which produces bread. The applicant company in this case conducts two industries. One is an industry the product of which is shale, and the other is an industry the products of which are oil and petroleum coke.

The fact that two industries are carried on at the same place does not abolish the distinction between them. If a single company mined coal and then used the coal to manufacture gas in works alongside the mine, it would nevertheless still be the case that two industries were carried on by that company, one the mining of coal and the other the manufacture of gas. The manufacture of gas would not become " coal mining " because one company was engaged in both enterprises. Nor would the industry of gas manufacturing for that reason become a part of the industry of coal mining.

Accordingly, in my opinion, the employees engaged in what is described as the manufacturing section of the company's works are not engaged in the shale-mining industry and an industrial dispute with respect to their wages or conditions of labour is not an industrial dispute in that industry or a matter affecting industrial relations in that industry. Such employees, and the company in relation to those employees, are not subject to the jurisdiction of the Central Reference Board.

It was suggested in argument that s. 75 (v.) of the Constitution, relating to prohibition against an officer of the Commonwealth, did not authorize the issue of a writ of prohibition against the Federation, which is a party to the proceedings before the Board. It has been the regular practice of the Court to issue writs of prohibition under s. 75 (v.) against parties to proceedings in the Arbitration Court, and, in my opinion, there is no reason for regarding this practice as unauthorized. Par. v. of s. 75 of the Constitution is prefaced by the words: " In all matters," so that the relevant provision is: " In all matters in which a writ of . . prohibition . . . is sought against an officer of the Commonwealth the High Court shall have original jurisdiction." The provision is not merely that this Court may issue a writ of prohibition against an officer of the Commonwealth. Jurisdiction is conferred upon the Court in any matter in which such a writ is sought. In this matter a writ is sought against officers of the Commonwealth

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and against the Federation. The Court can deal with the whole matter, and therefore in my opinion the order should be made absolute against the members of the Board and against the Federation.

RICH J. In this matter my first impression was that the industry the subject of this application was of such a character as to subject it to the jurisdiction of the Central Reference Board. But after a more careful consideration of the facts—and the case is one of fact and degree—I have come to the conclusion that National Oil Pty. Ltd. carries on two enterprises—the mining of shale and the production or manufacture of petrol, which involves retorting and refining —processes requiring considerable chemical and scientific knowledge and skill. These processes are separate, distinct and independent from the operation which constitutes mining. And I think that reg. 4 is framed so as to control mining as such and not manufacturing processes of the nature described in the evidence in this case.

Accordingly I am of opinion that the order nisi should be made absolute as asked.

STARKE J. Order nisi calling upon the chairman and members of the Central Reference Board constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations* to show cause why a writ of prohibition should not issue prohibiting further proceeding with an application to the Board by the Coal and Shale Employees' Federation for the inclusion of employees of National Oil Pty. Ltd. engaged in carbonization of shale for the production of crude oil and the cracking, distillation and refining of the crude oil for standard-grade petrol in what is known as the Miners' Award (129 and 133 of 1941) made by the Central Reference Board pursuant to the *National Security* (*Coal Mining Industry Employment*) *Regulations*. The order nisi is based upon the jurisdiction conferred upon this Court by s. 75 of the Constitution in all matters in which a writ of prohibition is sought against an officer of the Commonwealth. The prerogative or common-law writ of prohibition is not available by reason of the provisions of reg. 17 of the *Coal Mining Regulations*.

The Central Reference Board consists of a chairman, who is a judge of the Commonwealth Court of Conciliation and Arbitration, and representatives of employers and employees, all of whom are appointed by the Governor-General in Council. The function of the Board is the prevention or settlement of any industrial dispute in the coal-mining industry, which includes the shale-mining industry.

The cases establish that the members of the Board are officers of

the Commonwealth by reason of their appointment and the powers and functions confided to them under the Regulations (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1); *The Tramways Case* [*No.* 1] (2); *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (3)). These decisions, which have been acted upon for many years, must be accepted, however debatable originally was the construction of s. 75 of the Constitution.

The question in this case is, therefore, whether workmen engaged in the carbonization of shale for the production of crude oil and the cracking, distillation and refining of the crude oil for standard-grade petrol are engaged in the "shale mining industry," which by the *Coal Mining Industry Employment Regulations* is, as already mentioned, included in the expression "coal mining industry." If so the Central Reference Board has jurisdiction to deal with the application which it is sought to prohibit: otherwise it has no such jurisdiction. Expressions such as the "mining industry," the "gold-mining industry," the "coal-mining industry," the "shale-mining industry," the "shale-oil industry" (See *Encyclopaedia Britannica*), the "iron industry," the "iron and steel industry", and so forth, are not technical expressions, but popular general descriptions without any definite or clear boundary lines. The character of the operations, their connected processes and usage must, in the end, determine the industrial classification under which the operations should be placed. Thus the very general description "the mining industry" would include not only mining for gold, silver and the base metals, but the various processes by which those metals are recovered. So the gold-mining industry would include mining for gold and the processes by which the gold is recovered, e.g., crushing, the use of tables, or the cyanide or any other process. Again, if we take the iron and steel industry, the multitude of processes used in that industry would all be included in the general description of the industry. But it was said that the coal-mining industry does not include the making of gas. Ordinarily that is quite true, because coal is ordinarily produced and sold as a commodity for various uses. If a coal-mining company produced gas from coal for its mining or other operations, then that operation might rightly be described as part of the coal-mining industry. Indeed, a shift of industrial operations might well bring the production of gas into the coal-mining industry.

The shale-mining industry, it is suggested, is on the same footing as the "coal mining industry"—it is included in that expression

(1) (1910) 11 C.L.R. 1. (2) (1913) 18 C.L.R. 54.
(3) (1920) 28 C.L.R. 456.

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Starke J.

and must be confined to the operation of mining and its attendant processes. The argument is unconvincing, for bituminous shales, that is, shales more or less rich in carbon and hydrogen, are sources of oil and are mined for that purpose. The object of mining the shale is to obtain oil by well-known processes which in most cases are, I suppose, connected or continuous processes. It may be that shale in some cases is sold as a commodity and the oil recovery thus separated from the mining operations. Operations in the mining industry are often separated from that industry: thus lead and zinc concentrates are often shipped elsewhere or sold for treatment by operators who have no part in mining operations. But a mining company which recovers those metals for itself would be engaged in the mining industry in the recovery of those metals. So in the case of the shales. Those engaged in mining for bituminous shales do so for the purpose of obtaining oil and operate connected industrial processes to that end. The affidavit of the secretary of the Australasian Coal and Shale Employees' Federation thus summarizes the facts:—"Shale is mined for the sole purpose of obtaining crude oil, which crude oil is by cracking, distillation, and refining converted into petrol. In Australia shale is utilized solely for the obtaining of oil and petrol, and in the State in which shale is won from the earth it is not a commercial product and cannot be marketed. In order to obtain a saleable and useable product, it is necessary that shale should be obtained from the earth and treated to convert it into the commercial product, and the treatment of shale is an essential part of the shale-mining industry." It is, I think, an essential part of the shale-mining industry because the object of mining the shale is for the purpose of obtaining the oil and is analogous to the case of gold mining, where the object of the mining is to recover the gold.

The order nisi should be discharged.

McTIERNAN J. This is an application to make absolute an order nisi for a writ of prohibition. The proceeding is in the original jurisdiction of the Court. The applicant is National Oil Pty. Ltd. The respondents are members of the Central Reference Board which is constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*.

The prosecutor invokes the jurisdiction conferred on the Court by s. 75 (v.) of the Constitution. The Court is thereby granted jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The first question that arises is whether the Central Reference Board is authorized by the *National Security* (*Coal Mining Industry*

Employment) *Regulations*, particularly regs. 5, 7 and 8, to consider and determine an application by the Australasian Coal and Shale Employees' Federation to the Board. This application is to vary an award made by the Board in the matter of industrial disputes to which the Federation and the prosecutor were parties, by including certain classifications of the prosecutor's employees who are not employed in the coal-mining industry as surface workers under the award. These men are employed in the carbonization of shale for the production of crude oil and the cracking, distillation and refining of the crude oil for petrol.

Reg. 4 provides that unless the contrary intention appears "coal mining industry" includes the "shale mining industry." It is submitted on behalf of the prosecutor that the industrial dispute or matter, the subject of the application to the Board, does not arise in the shale-mining industry. It clearly does not arise in the coal-mining industry.

The second question is whether a writ of prohibition lies against the respondents, or, in other words, whether, as members of the Board, they are officers of the Commonwealth. It is submitted on behalf of the prosecutor upon the authority of the case of *R.* v. *Hibble* (1), that the members of the Central Reference Board are officers of the Commonwealth, as no distinction can be drawn between any member of this tribunal and the chairman of the special tribunal in that case. Counsel did not press the application against the Federation. In the foregoing case it was pointed out that prohibition was sought against the "Australasian Coal and Shale Employees' Federation," and that they "are not officers of the Commonwealth" (per *Isaacs* J. and *Rich* J. (2)). It does not necessarily follow, however, that the Court has not jurisdiction "in the matter" to make the Federation a party to the writ.

It is necessary for this Court to determine whether the facts, which were necessary to give the Board jurisdiction to hear the application, existed: See *Ex parte Mullen*; *Re Hood* (3). The question of fact upon which the jurisdiction depends is whether the carbonization of shale for the production of crude oil and the cracking, distillation and refining of the crude oil for standard-grade petrol is an operation which falls within the field comprised by the shale-mining industry. The evidence upon which the determination of this fact depends was brought before the Court by affidavits filed on behalf of the prosecutor and the Federation respectively.

(1) (1920) 28 C.L.R. 456.
(2) (1920) 28 C.L.R., at p. 465.
(3) (1935) 35 S.R. (N.S.W.) 289, at pp. 298, 299; 52 W.N. 84, at p. 85.

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McTiernan J.

The prosecutor carries on its industry at Glen Davis. There it conducts two operations: first, shale mining, and, second, the carbonization of shale for the production of crude oil and the cracking, distillation and refining of the crude oil for standard petrol. It is contended on its behalf that the former operation only is within the field intended by the expression "shale mining industry." Mr. Barr-Smith, whose affidavit was filed by the prosecutor, deposed as follows: "In the mining section of the company's operations after the shale has been mined it is loaded into skips. The skips, each containing between four and five tons of shale, are hauled from the mine by electric locomotives to the weighbridge and weighed. After the skips and their contents have been weighed the shale is discharged therefrom into a concrete bin or hopper beneath the rail level. Such bin or hopper has a capacity of two hundred tons or thereabouts. It is at this stage that the mining section of the company's operations are concluded. In the manufacturing section of the works the shale is removed from the bin or hopper from time to time by an endless conveyor belt and fed into a primary crusher. After crushing, the shale is removed by a second endless conveyor belt to the screens which separate small shale known as fines and also the oversized shale from the retortable-grade shale. The retortable shale is then conveyed into the main storage reserve hoppers. As and when required shale is drawn by conveyor belt from the main storage reserve hoppers and discharged into larry cars which travel backwards and forwards on the top of the retorts. Such larry cars discharge the shale into the retorts as and when required. At the present time there is a bank of sixty-four retorts in operation treating the shale subject to the closing down of certain retorts for maintenance and repair when necessary. The shale is carbonized in the retorts by a heating process and the gas is drawn off by means of a centre off-take and then condensed into crude oil. Such crude oil is then transferred to one or both of the one million gallon storage tanks, where it is allowed to settle. After settling the crude oil passes through the refinery section, where it is cracked into raw petrol. The raw petrol subsequently passes through various processes and finally standard-grade petrol is obtained. In addition to standard-grade petrol, a by-product known as petroleum coke is obtained, which is used as a fuel in the boiler-house as part substitute for coal. In addition to treating the company's own production of crude oil it treats the total production of crude oil produced by Lithgow Oil Refineries Ltd. at Marrangaroo situated near Lithgow." Mr. Grant, whose affidavit was filed by the Federation, deposed as follows:—"At least eighty per cent of the shale produced in New

South Wales is mined at Glen Davis and Baerami and retorted adjacent to the works. Glen Davis is essentially a mining town and almost the whole of the population thereof is employed in connection with the shale-mining industry there carried on. The position is the same with regard to the mining settlement at Baerami. Shale is mined for the sole purpose of obtaining crude oil, which crude oil is by cracking, distillation and refining converted into petrol. In Australia shale is utilized solely for the obtaining of oil and petrol, and in the State in which shale is won from the earth it is not a commercial product and cannot be marketed. In order to obtain a saleable and useable product, it is necessary that shale should be obtained from the earth and treated to convert it into the commercial product, and the treatment of shale is an essential part of the shale-mining industry."

This evidence shows that the operations, which are described as in the manufacturing section, are a continuation of the mining operations and that there is a physical connection between those operations and the mining operations; that the direct end of the mining operations is to produce petrol; and that the processes for the production of the petrol are a necessary adjunct to the mining of the shale.

The inference which I draw is that the shale-mining industry consists not of mining alone but of this combination of surface and mining operations which are carried on by the prosecutor. It follows that the facts necessary to the jurisdiction of the Board to hear the Federation's application existed. It is not necessary to deal with the second question.

In my opinion the order nisi should be discharged.

WILLIAMS J. This is a motion by National Oil Pty. Ltd. to make absolute a rule nisi for a writ of prohibition under s. 75 (v.) of the Constitution prohibiting the chairman and members of the Central Reference Board constituted under the *National Security (Coal Mining Industry Employment) Regulations* and the Australasian Coal and Shale Employees' Federation and each of them from further proceeding with a certain application dated 27th September 1943 (made by the Australasian Coal and Shale Employees' Federation) to the Central Coal Reference Board. The object of this application was to obtain from the Central Reference Board an order which would include men employed by the applicant company engaged in what I shall hereinafter describe as the manufacturing section of its works in the same award as the men engaged in what I shall hereinafter describe as the mining section of its works.

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WILLIAMS J.

In order that the motion should succeed the applicant company must establish that the members of the Central Reference Board are officers of the Commonwealth within the meaning of s. 75 (v.) of the Constitution. Applying the decisions of this Court in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1) and *R.* v. *Hibble* (2), this point must, in my opinion, be determined in favour of the applicant company. Moreover, if the rule can be made absolute against the members of the Board, I can see no reason why the prohibition should not be made completely effective by ordering that the writ should also issue against the remaining respondent, Australasian Coal and Shale Employees' Federation.

The applicant company must also establish that the application to the Board which it is sought to prohibit cannot be dealt with by the Board because it is in excess of the jurisdiction conferred upon the Board by the Regulations. The facts may be shortly stated as follows. The applicant company is carrying on at Glen Davis, in the State of New South Wales, at the same works the operations of shale mining and the carbonization of shale for the production of crude oil, and the cracking, distilling and refining of the crude oil for standard-grade petrol. The applicant company claims that these operations constitute two distinct industries. It has proved that, in what it claims to be the mining section of the company's operations, the shale is mined and loaded into skips, that the skips are then hauled from the mine by electric locomotives to the weighbridge and weighed, and that after the skips and their contents have been weighed the shale is discharged therefrom into a concrete bin or hopper beneath the rail level. It has also proved that, in what it claims to be the manufacturing section of the works, the shale is removed from the bin or hopper from time to time by an endless conveyor belt and fed into a primary crusher, that after crushing the shale is removed by a second endless conveyor belt to the screens which separate small shale known as fines and also the over-sized shale from the retortable grade shale, that the retortable shale is then conveyed into the main storage reserve hoppers, and that, as and when required, shale is drawn by the conveyor belt from the main storage reserve hoppers and discharged into larry cars, which travel backwards and forwards on the top of the retorts and discharge the shale into the retorts. The shale is then carbonized in the retorts by a heating process; the gases are drawn off by means of a centre off-take and condensed into crude oil, which is then transferred to storage tanks, where it is allowed to settle; after settling the crude

(1) (1910) 11 C.L.R. 1. (2) (1920) 28 C.L.R. 456.

oil passes through the refinery section where it is cracked into raw petrol; the raw petrol subsequently passes through various processes, and finally standard-grade petrol is obtained.

There are other companies besides the applicant carrying on the business of extracting oil from shale and refining it into petrol. In some instances they carry out at their works the same total operations as the applicant company, but in other instances they purchase the shale after it has been mined and only carry out the manufacturing operations themselves. The only profitable commercial use of shale at the present time is for the purpose of these manufacturing operations.

Reg. 4 of the *Coal Mining Industry Employment Regulations* defines coal-mining industry to include the shale-mining industry. The question is whether the shale-mining industry in this definition includes both sets of operations carried on by the applicant company, or only the first set of operations. The expression shale-mining industry occurs in the definition in collocation with the expression coal-mining industry. The definition as a whole relates to mining. In *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) Lord *Watson* said that "for a very long period the word" (mine) "has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out."

To mine coal means to extract the coal from the ground, usually by means of underground excavations. Prima facie, therefore, to mine shale would mean to extract shale from the ground. This work would be done by workmen who could properly be described as miners, and the hours and conditions of their employment would be the fixed hours and other conditions which would be appropriate to workmen engaged in that type of work. On the other hand the manufacture of shale into oil and its refinement into petrol is a continuous process for which hours and other conditions of employment in order to be appropriate would have to be fixed on some other basis.

It is clear that the industry of coal mining would not include the manufacture of coal into other substances such as the manufacture of coal into gas. It would seem to be equally inappropriate to include in shale mining the manufacture of shale into oil and petrol. The fact that shale is only commercially useful at the present time for one process of manufacture does not afford any real distinction. The important point is that the manufacture of shale into oil and petrol could not fairly be described as mining. It might be different if the Regulations referred to the shale-oil industry, but they do not

(1) (1888) 13 App. Cas. 657, at p. 677.

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refer to oil at all. They only refer to mining, and evidently contemplate that a Board qualified to control industrial conditions in an industry like coal mining, which is essentially a mining industry, would also be qualified to control industrial conditions in the shale-mining industry. This also supports the view that the Regulations were not intended to include the manufacturing section of the applicant company's business.

For these reasons I am of opinion that the rule nisi should be made absolute.

Order absolute with costs.

Solicitors for the prosecutor, *Fisher & Macansh*, Sydney, by *Blake & Riggall.*

Solicitors for the Australasian Coal and Shale Employees' Federation, *W. C. Taylor & Scott*, Sydney, by *James J. Newman.*

E. F. H.