[HIGH COURT OF AUSTRALIA.]

ROLA COMPANY (AUSTRALIA) PROPRIETARY LIMITED . . . . } PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1944.

MELBOURNE, *June* 2, 5.

SYDNEY, *July* 27.

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

Federal Judiciary—Judicial power—Women's employment—Regulations — Validity —Power to Committee of Reference to make determinations of fact—Administrative or judicial tribunal—The Constitution (63 & 64 *Vict.* c. 12), *ss.* 71, 72—*Women's Employment Act* 1942 (*No.* 55 *of* 1942)—*Women's Employment Regulations, reg.* 5c*—*Statutory Rules* 1944 *No.* 42, *reg.* 2 (2).

The *Women's Employment Regulations* set up a Women's Employment Board, with power to decide whether females may be employed on certain classes of work and to decide matters with respect, *inter alia*, to their hours and conditions of employment and their rates of pay. The Board's decision is to be binding on specified employers and employees and organizations of employees and upon being filed in the Commonwealth Court of Conciliation and Arbitration is to have effect as if it were an award or order of that Court. Reg. 5c in its original form (as inserted into the Regulations by Statutory Rules 1943 No. 251) authorized Committees of Reference to determine, in relation to decisions of the Women's Employment Board, certain facts—namely, facts as to what females are or were employed on work specified in a decision of the Board and as to the nature of the work upon which they are or were employed. The regulation made the determinations of Committees binding on the employers and on females specified in the determinations, but by amendment made by Statutory Rules 1944 No. 42 this provision was replaced by a provision that a determination of a Committee should be deemed to form part of the decision of the Board in relation to which it was made.

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that neither in its original form nor as amended did reg. 5c purport to confer judicial power upon Committees of Reference.

DEMURRER.

Rola Co. (Australia) Pty. Ltd. brought in the High Court against the Commonwealth of Australia and the Electrical Trades Union of

* Statutory Rules 1943 No. 251, 1944 No. 42.

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Australia an action in which the statement of claim (which was indorsed on the writ but was subsequently amended) was substantially as follows :—

1. The plaintiff company has been duly incorporated under the *Companies Acts* of the State of Victoria and carries on business in the State of Victoria.

2. The plaintiff company is bound by the Metal Trades Award of the Commonwealth Court of Conciliation and Arbitration Serial No. 4655 as varied.

3. The defendant union is an organization of employees bound by the Metal Trades Award and members of the union, including females, are employed by the plaintiff company.

4. On 29th January 1943 the Women's Employment Board constituted under the *Women's Employment Act* and Regulations of the Commonwealth of Australia made a decision in the matter of certain applications by the Broken Hill Proprietary Co. Ltd. and in the matter of other applications which decision is commonly referred to as "The Metal Trades Common Rule" in respect of the work covered by the said applications and by its decision the Board declared that such decision should bind, *inter alia*, all organizations of employers and employees bound by the Metal Trades Award which exist in the State of Victoria and all other employers and employees in Victoria who are bound by the Metal Trades Award.

5. The Minister of State for Labour and National Service pursuant to the provisions of reg. 5c of the *Women's Employment Regulations* by a notice in the Commonwealth Government *Gazette* published on 13th October 1943 purported to establish and maintain a panel of persons who might act as chairmen of Committees of Reference for the purpose of reg. 5c and included in the panel was one George Austin Mooney.

6. On 31st December 1943 the chairman of the Women's Employment Board in relation to the aforesaid decision of the Board purported to refer to George Austin Mooney the questions—

(*a*) as to what females, if any, who are or were employed by the plaintiff are or were employed on work specified in the said decision ; and

(*b*) as to the nature of the work on which females who are or were employed on work specified in the said decision are or were respectively employed.

7. Upon receipt of the reference Mr. Mooney duly nominated a representative of employers and a representative of employees and thereby purported to constitute a Committee of Reference to determine the questions referred as aforesaid.

8. The Committee of Reference duly met and the defendant union claimed before the Committee that females employed by the plaintiff company on the following classes of work are employed on work specified in the decision, namely, spray painters, process workers (limited as to the process workers to the operations of gauging with micrometer) and machines covering wire with thread.

9. On 13th January 1944 the Committee by a majority purported to decide that females employed by the company as spray painters and process workers (limited to the operations of gauging with micrometer) are employed on work specified in the decision of the Women's Employment Board and deferred the claim as to females employed on machines covering wire with thread.

10. The defendant union claims that females employed by the company as spray painters and process workers (limited to the operations of gauging with micrometer) are entitled to the rates of payment and the other conditions specified in the decision.

11. The plaintiff company claims that reg. 5c of the *Women's Employment Regulations* is beyond the power of the Commonwealth of Australia and invalid and void by reason of the fact that it purports to confer power on a Committee of Reference constituted under the Regulations to exercise the judicial power of the Commonwealth contrary to the provisions of the *Commonwealth of Australia Constitution Act* and that reg. 2 of Statutory Rules 1944 No. 42 in so far as it purports to give force and effect to the determination mentioned in par. 9 hereof is beyond the power of the Commonwealth of Australia and is invalid and void by reason of the fact that it purports to confer judicial power upon the Women's Employment Board or alternatively purports to operate upon the footing that such power is exercisable by the said Board and of the further fact that its operation depends upon a regulation to wit 5c which is itself invalid for the reasons hereinbefore stated.

The plaintiff therefore claims :—

(*a*) A declaration that the said regulation 5c is invalid and void.

(*b*) A declaration that the said regulation as amended is invalid and void.

(*c*) A declaration that the chairman of the Women's Employment Board had no power to refer the said questions to the said George Austin Mooney.

(*d*) A declaration that the said Committee of Reference had no power to determine the said questions.

(*e*) A declaration that the alleged decision of the said Committee of Reference is invalid and void and not binding on the plaintiff.

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(*f*) Such further or other relief in the premises as to the Court may seem meet.

The Commonwealth demurred to the statement of claim, stating as grounds for the demurrer that :—

1. Reg. 5c of the *Women's Employment Regulations* is not beyond the power of the Commonwealth of Australia.

2. Reg. 5c of the *Women's Employment Regulations* is not invalid and void.

3. Reg. 5c of the *Women's Employment Regulations* upon its true construction does not purport to and does not confer power upon any persons or body of persons to exercise the judicial power of the Commonwealth.

It was agreed that counsel for the plaintiff should begin.

Menzies K.C. (with him *Spicer*), for the plaintiff. Reg. 5c, before the relevant amendment, did not confer arbitral power on a Committee of Reference, but conferred on it power to determine a dispute *inter partes* as to whether a particular case fell within the arbitral rule laid down by the Board : that is judicial power, notwithstanding that the power of the Board itself is arbitral, not judicial. The questions which the Committee is to determine are the very questions which a court would have to decide on a prosecution of an employer for failure to comply with a decision of the Board. The Board acts in the ordinary arbitral way, as the Arbitration Court would. It therefore exercises a function which has been described as " legislative." It lays down the general rule. Normally, in the case of the Arbitration Court, the enforcement of that rule as against a particular employer would be entrusted to the ordinary courts. The ordinary court dealing with the matter would have to determine, first, whether the work done and the relationship and identity of the parties was such as to attract the operation of the award ; second, whether, the operation of the award being attracted, there had been a breach ; third, if there had been a breach, what penalty should be imposed. Each of those steps is part of the judicial process, and it is not competent to the Executive, acting under Parliamentary authority, to confer upon a non-judicial body the final determination *inter partes* of any of those steps. It is true that a Committee of Reference has no power to deal with offences and impose penalties, but, otherwise, its functions resemble those of a court ; it makes a final determination of facts and therein exercises judicial power : See reg. 5c (5) (before amendment), which makes the decision " binding " on employer and employee. On a prosecution before a court for an offence, the court could not inquire

for itself into the matters which the Committee had determined, but would be bound by the Committee's determination. As to what is judicial power within the meaning of the Constitution, see *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3), in the Privy Council, *sub nom. Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (4); *Australian Apple and Pear Marketing Board* v. *Tonking* (5); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (6); *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (7); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (8); *In re Judiciary Act* 1903-1920, *and Navigation Act* 1912-1920 (9); *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (10). The power to find any fact that is fundamental to a legal liability is part of the judicial power. Where the finding amounts to a binding determination as between parties, the tribunal empowered to make the finding necessarily exercises judicial power. Reg. 5c, before the amendment, was therefore invalid because it conferred judicial power in contravention of the Constitution. As amended, it is still invalid. So far as the amendment provides (by the new reg. 5c (5) as substituted by Statutory Rules 1944 No. 42) that a determination shall be deemed to form part of the decision of the Board in relation to which it is made, it is invalid; what is an invalid decision on the part of the Committee cannot be made valid by incorporation in the decision of the Board, because the Board is open to the same attack on this point as is the Committee. The provision in reg. 2 (2) of Statutory Rules 1944 No. 42 that determinations made by the Committee before the amendment "shall have full force and effect" means that the determination is to have full force and effect as if it were a part of the decision of the Board and not as if incorporated in the Regulations themselves. Reg. 2 (2) is, in any event, invalidated by s. 48 (2) of the *Acts Interpretation Act*, because its effect would be to fix rates of wages retrospectively.

Fullagar K.C. and *P. D. Phillips*, for the Commonwealth.

(1) (1918) 25 C.L.R. 434.
(2) (1925) 35 C.L.R. 422, at pp. 432, 438, 439.
(3) (1926) 38 C.L.R. 153.
(4) (1931) A.C. 275, at p. 295; (1930) 44 C.L.R. 530, at pp. 542, 543.
(5) (1942) 66 C.L.R. 77, at p. 83.
(6) (1943) 67 C.L.R. 1, at pp. 9, 21.
(7) (1943) 67 C.L.R. 116, at pp. 142, 167, 168.
(8) (1943) 67 C.L.R. 413, at pp. 416, 417, 422.
(9) (1921) 29 C.L.R. 257, at p. 267.
(10) (1938) 59 C.L.R. 556, at pp. 557, 575, 576.

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Fullagar K.C. The Women's Employment Board is not a judicial body. Its functions are in all respects analogous to the arbitral functions of the Commonwealth Court of Conciliation and Arbitration. It does not determine rights and liabilities ; it creates them. Its functions are analogous rather to legislative than to judicial functions. The use of the word " binding " in reg. 9 of the *Women's Employment Regulations* does not make the functions of the Board judicial where otherwise they would be arbitral, and that word in reg. 5c (5) (before amendment) has no greater effect than in reg. 9. The exercise of a judicial function is not necessarily the exercise of a judicial power. A characteristic of judicial power is that it is conclusive, but, if the word " binding " in reg. 5c (5) has the same meaning in relation to a Committee as it has in reg. 9 in relation to the Board, it does not operate to make the power judicial. In a prosecution or other legal proceeding based on a decision of the Board neither the Board's decision nor the Committee's determination would be conclusive ; it would do no more than establish a prima-facie case. It would be open to the defendant to show, for instance, that the Board's decision was made without jurisdiction, that it was invalidated by some irregularity, that the plaintiff or person alleged to be entitled to the benefit of the decision was not in one of the classes so entitled ; and likewise as to the determination of the Committee. [As to what constituted judicial power, he referred to the *British Imperial Oil Co.'s Case* (1) ; the second *British Imperial Oil Co.'s Case* (2) ; *Lowenstein's Case* (3).] The kind of interpretation of an award or decision which is involved in reg. 5c is not a judicial function and does not involve the exercise of judicial power (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4) ; *Pickard* v. *John Heine & Son Ltd.* (5)). It is not interpretation in the ordinary legal sense at all, but is rather in the nature of an exercise of arbitral power. A power conclusively to determine questions of law or jurisdictional facts would be judicial, but a mere power to determine facts is not necessarily judicial (*Passavant & Co.* v. *United States* (6) ; *Riverside Oil Co.* v. *Hitchcock* (7) ; *Crowell* v. *Benson* (8)). As to the amended reg. 5c, substantially the same arguments apply. Even if those arguments are wrong, reg. 2 (2) of Statutory Rules 1944 No. 42 is

(1) (1925) 35 C.L.R., at pp. 435, 436.
(2) (1926) 38 C.L.R., at p. 179 ; (P.C.) (1931) A.C., at p. 297.
(3) (1938) 59 C.L.R., at p. 576.
(4) (1924) 34 C.L.R. 482, at pp. 529, 543.
(5) (1924) 35 C.L.R. 1, at pp. 6, 7.
(6) (1893) 148 U.S. 214 [37 Law. Ed. 426].
(7) (1903) 190 U.S. 316 [47 Law. Ed. 1074].
(8) (1932) 285 U.S. 22 [76 Law. Ed. 598].

not affected with invalidity, as contended by the plaintiff. That sub-regulation takes the determination of the Committee and legislatively enacts it; that is valid legislation as to industrial conditions under the defence power, and no question can arise as to judicial power. [He referred to the second *British Imperial Oil Co.'s Case* (1).] As to the amended reg. 5c (5), a determination of the Committee since the amendment is "binding" under reg. 9, as part of the decision of the Board, in the same way as arbitral decisions of the Commonwealth Court of Conciliation and Arbitration are binding under the *Commonwealth Conciliation and Arbitration Act*, and the provisions of the Constitution relating to judicial power are in no way contravened.

P. D. Phillips. As to the original reg. 5c, if the argument that the regulation is wholly valid is not accepted, the alternative may be that it is valid in part. The original reg. 5c (2) purported to empower the reference of two separate questions, (1) what females were employed on work specified in the decision of the Board, and (2) the nature of the work on which the females specified in the Board's decision were employed. The power of the Board under reg. 6 is to say that particular work is work suitable to be done by females, not to declare females (whether individuals or members of a particular class) to be suitable to be employed on work. Accordingly the answer to question 1 under reg. 5c (2) is not one which could be included in a decision of the Board, whereas the answer to question 2 merely renders more explicit and detailed a fact which must be included in every decision of the Board. In the result, the function of the Committee in relation to question 2 is legitimate, just as the functions of the Board are, even if its function in respect of question 1 is judicial and therefore not legitimate. Although it appears from the statement of claim in the present case that both questions were referred, the terms of the Committee's determination are not appropriate as an answer to question 1; the proper inference is that the determination did no more than answer question 2, and it was therefore given in the exercise of a legitimate function. For the purposes of the present case there is no material difference between the original and the substituted reg. 5c (2). The word "binding" in the original reg. 5c (5) is capable of different meanings according as the determination relates to question 1 or question 2; as to question 1 it might have a meaning which would result in an improper grant of judicial power, whereas it could, as to question 2, properly mean binding in the sense that it prescribes a rule which must be obeyed,

(1) (1926) 38 C.L.R., at pp. 173, 174, 210-212.

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so that this question and its answer would be valid. Moreover, the provisions of the original reg. 5c (5) that the determination " shall be binding " and " shall be evidence " are inconsistent ; if the effect of the word " binding " would be to give a judicial character to what otherwise would be an administrative or quasi-legislative act, the sub-regulation should be read, pursuant to s. 46 (*b*) of the *Acts Interpretation Act*, as giving a determination a merely evidentiary effect, which would not involve judicial power. As to reg. 2 (2) of Statutory Rules 1944 No. 42, no question can arise as to the limitation of the retrospective operation of a regulation under s. 48 (2) of the *Acts Interpretation Act*. This sub-regulation has no retroactive effect as to rates of wages. The basis of a claim to a particular rate of wages is the Board's decision, and reg. 12, which was part of the schedule to the *Women's Employment Act*, is an enactment by Parliament itself empowering a decision having a retroactive effect as to rates of payment. The result is that the demurrer should be allowed even if reg. 5c is not wholly valid.

Spicer, in reply. The validity or otherwise of reg. 5c is not necessarily to be determined by any particular meaning which is given to the word " binding." The real problem is to determine the character of the decision which is committed to the Committee of Reference. In all branches of the questions which may be referred to the Committee, it is involved in the task of interpreting the decision of the Board and applying it, as so interpreted, to the facts which are before it : that is an exercise of judicial power. The question whether an exercise of judicial power is involved is not a question whether the interpretation is easy or difficult in a particular case. If the process which the Committee has to undertake is, first, to interpret the decision of the Board and then to ascertain who are the people who fall within the four corners of the award (and it cannot do the latter unless it first reaches a conclusion as to what the decision means), it is exercising the judicial function because it is determining the rights of those people and determining them in a conclusive way. There is no real distinction in this regard between the two questions in the original reg. 5c (2). To answer the second question, " as to the nature of the work on which the females . . . employed on work specified in the decision, are . . . employed," the Committee must determine who are the females employed on the work specified ; this involves an interpretation of the language used in the decision for the purpose of specifying the work. The provision in reg. 2 (2) of Statutory Rules 1944 No. 42 that a prior determination " shall have full force and effect " is

invalid. Assuming that Parliament or the Executive could have given legislative effect to the substance of the determination, that is not what the Executive has done or purported to do in this sub-regulation ; what it has purported to declare is that the determination shall have effect *as such* notwithstanding that it may have been an invalid exercise of judicial power. The retrospective operation of this sub-regulation cannot be supported by reference to reg. 12, which relates only to decisions of the Board. The definition of " determination " in reg. 4, which still remains in the form in which it was enacted in the *Women's Employment Act*, necessarily does not cover or refer to determinations under reg. 5c, which did not exist when the Act commenced, and it is significant that the definition has not been amended. The rates of pay which would become payable if reg. 2 (2) of Statutory Rules 1944 No. 42 operated would not be payable by reason of a decision of the Board, but would be payable under the terms of the sub-regulation itself. There is nothing in reg. 12 which authorizes the Executive to give retrospective operation to a regulation which merely proceeds on the basis that something that is not a decision of the Board is to be treated as a decision of the Board.

Cur. adv. vult.

July 27.

The following written judgments were delivered :—

LATHAM C.J. Demurrer to an amended statement of claim in an action in which the plaintiff company claims a declaration that reg. 5c of the *Women's Employment Regulations* as enacted by Statutory Rules 1943 No. 251 (30th September 1943) is invalid and that an amending regulation—reg. 2 of Statutory Rules 1944 No. 42—which amends reg. 5c is also invalid. The defendants demur, contending that the regulations are valid.

Reg. 5c was enacted after the decision of this Court in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (1), that the Regulations as they then existed were (with certain exceptions) valid.

The regulation in question relates to the constitution and powers of Committees of Reference, and the objection to the regulations is that they purport to confer judicial power upon the Committees. The basis of the objection can be expressed in the words of *Knox* C.J. in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2), where, referring to *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3), his Honour said that it was held in the

(1) (1943) 67 C.L.R. 347.
(2) (1925) 35 C.L.R. 422, at pp. 432, 433.
(3) (1918) 25 C.L.R. 434.

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latter case " that the judicial power of the Commonwealth can only be vested in ' courts,' that is, in courts of law in the strict sense ; and that, if any such court be created by the Parliament, the tenure of office of the justices of such court, by whatever name they may be called, shall be for life subject to the power of removal contained in s. 72 of the Constitution." The members of the Committees of Reference for which the Regulations provide are not appointed for life, and the Committee is plainly not a court within the meaning of the Constitution.

The Regulations, which are to be found in the schedule to the *Women's Employment Act* 1942 as subsequently amended by statutory rules, provide in reg. 5 for the constitution of a Women's Employment Board. By reg. 6 it is provided that where an employer proposes to employ, is employing, or has at any time since 2nd March 1942 employed females on certain work specified under headings (*a*), (*b*) and (*c*), the employer shall, with certain exceptions, make an application to the Board for a decision in accordance with the regulation. The work to which the regulation refers is work—

" (*a*) which is usually performed by males ;

(*b*) which, within the establishment of that employer, was performed by males at any time since the outbreak of the present war ; or

(*c*) which, immediately prior to the outbreak of the present war, was not performed in Australia by any person."

Reg. 6 (4) provides that when an application is made the Board shall decide—

" (*a*) whether the work specified in the application is work specified in sub-regulation (1) " (that is, whether it falls within any of the classes (*a*), (*b*) or (*c*) above mentioned) ; " and

(*b*) if so, whether females may be employed or continue to be employed on the work."

Sub-reg. 5 provides that if the Board decides that females may be employed on the work it shall decide matters with respect to hours of employment, conditions of employment, and employment on probation. Sub-reg. 7 provides that the Board shall, subject to the regulation (as to which see sub-regs. 8 and 9) decide the rates of payment to be made to females employed on the work. Reg. 7c provides that before the Board gives a decision it shall specify the employers on whom it proposes that the decision shall be binding, and that a decision given under the Regulations shall, according to its tenor, apply to all or some class of employers employing females on work of the kind specified in the decision.

Reg. 9 provides that every decision (that is, of the Board) shall be binding on the employer or employee specified in the decision, his or their employees and organizations of employees affected by the decision. This regulation also provides that the decision shall be filed in the Commonwealth Court of Conciliation and Arbitration, and shall thereupon have effect in all respects and be enforceable as if it were an award or order of the Court.

The challenged regulation, reg. 5c, before it was amended, was as follows :—

"5c—(1) The Minister may, by notice in the *Gazette*, establish and maintain a panel of persons (all or any of whom may be Conciliation Commissioners) who may act as Chairmen of Committees of Reference for the purposes of this regulation.

(2) The Minister, the Attorney-General or the Chairman of the Board may, in relation to any decision of the Board, refer to a person on the panel of persons established under the last preceding sub-regulation (in this regulation referred to as 'the Chairman'), any question as to what females (if any) who are or were employed by an employer, are or were employed on work specified in the decision or any question as to the nature of the work on which the females, who are or were employed on work specified in the decision, are or were respectively employed.

(3) Upon receipt of a reference under the last preceding sub-regulation, the Chairman shall nominate an appropriate representative of employers and an appropriate representative of employees, and the Chairman, together with those representatives, shall constitute a Committee of Reference which shall meet at the direction of the Chairman and determine the questions referred to the Chairman.

(4) At all sittings of a Committee of Reference—

(*a*) the determination of the majority shall prevail; and

(*b*) the Chairman shall have a deliberative, but not a casting, vote.

(5) A determination made under this regulation shall be binding on the employer and females specified in the determination, and shall be evidence of any matters of fact so specified."

It will be seen that the regulation purports to authorize a Committee to decide—

(*a*) what females, if any, who are or were employed by an employer are or were employed on work specified in a decision; and

(*b*) any question as to the nature of the work on which the females employed on work so specified are or were respectively employed.

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The Committee is therefore authorized to decide certain facts—facts as to what females are or were employed on certain work, and as to the nature of the work upon which they are or were employed. The determination of the Committee under the power so conferred upon it is made binding on the employer and females specified in the determination. It is evident that there may be a controversy as to such facts between the employer and the females, or between the employer and an organization of employees. Thus the Committee is given power to decide in a controversy between subjects an issue relating to a disputed matter of fact. It is contended that such a power is essentially judicial in character and that therefore it cannot be validly conferred upon a body which does not satisfy the requirements of a court as defined in the Constitution of the Commonwealth, s. 72.

The argument for the plaintiff depends upon the provision that the determination of the Committee is binding upon the persons concerned. If legal proceedings were instituted by a female employee for the purpose of securing payment of wages as fixed by a decision of the Board, the proof of a determination of a Committee would (it is argued) finally conclude as against the defendant the question of fact as to whether the female claimant was employed upon work specified in the decision of the Board. The determination would decide the same question of fact as might have to be decided by a court if, in the absence of such a provision, such legal proceedings were instituted. It is accordingly submitted that the Committee is substituted for a court in the performance of a function which is judicial in character.

It may be observed that the authority of the Board, and of a Committee of Reference, depends upon the actual existence of one of the three states of fact specified in reg. 6 under the headings (*a*), (*b*) and (*c*). Neither the Board nor a Committee can give itself power by its own decision that a particular state of facts exists. The position is the same as in the case of the Commonwealth Arbitration Court which, under the *Commonwealth Conciliation and Arbitration Act*, has authority to act, when jurisdiction depends upon the existence of an inter-State industrial dispute, only when such a dispute actually exists; the Court cannot give itself jurisdiction by its own decision that such a dispute exists (*Federated Engine-Drivers and Firemen's Association of Asia* v. *Broken Hill Pty. Co. Ltd.* (1); *Caledonian Collieries Ltd.* v. *Asian Coal & Shale Employees' Federation* [*No.* 1] (2), and cases there cited; *Caledonian*

(1) (1911) 12 C.L.R. 398, at pp. 415, 444, 453, 454, 460.

(2) (1930) 42 C.L.R. 527, at p. 556.

Collieries Ltd. v. *Asian Coal & Shale Employees' Federation* [*No.* 2] (1)). The awards of the Court are binding upon certain persons, but the provisions of the *Arbitration Act* to this effect (s. 29) do not become operative in any case unless the necessary jurisdictional facts actually exist, and the Arbitration Court cannot conclusively determine the question whether they do exist. The position is the same in the case of the Women's Employment Board and a Committee of Reference. Thus the provision that the decisions of the Board and the determinations of the Committees shall be binding must be read as referring only to decisions and determinations which it is actually within the power of those bodies to make—not to any decisions which they may think proper to make.

In the next place, it should not be forgotten that the word " binding " is used in more than one connection and that it is not a word limited to the description of obligations created by judicial action. A man is " bound " by a statute which applies to him: he is " bound " by a contract which he makes: he is " bound " by an award of an arbitrator pursuant to a submission by him: he is " bound " by an industrial award which applies to him.

It appears to me that a decision of the Board presents the same relevant characteristics in relation to judicial power as a determination of the Committee. (In the *Women's Employment Case* (2) no objection was taken to the Regulations upon any ground connected with judicial power.) The Board has power not only to lay down a rule for the future conduct of persons (a function which is arbitral in character—See *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3)), but also has power to decide (though as I have said, not conclusively) whether work specified in the application of an employer is work specified in sub-reg. 1 of the regulation. Such a decision is a decision as to a fact. The decision when made applies to employers according to its tenor (reg. 7c) and under reg. 9 is binding on employers and employees. Accordingly, if the fact that a determination of a Committee is " binding " upon employers and employees is fatal to the validity of the provisions relating to Committees, then it is equally the case that the fact that the decision of a Board is binding upon employers and employees is fatal to the validity of the provisions constituting the Board. The whole functioning of the Board depends upon an initial decision as to whether work specified in an application is work specified in sub-reg. 1 of reg. 6, and if the Board were not able to exercise this function it would not be able to exercise any of the other functions committed to it by the Regulations.

(1) (1930) 42 C.L.R. 558, at p. 577. (2) (1943) 67 C.L.R. 347.
(3) (1918) 25 C.L.R. 434.

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It has, however, already been determined in this Court that the making of an industrial award is not an exercise of judicial power (See *Alexander's Case* (1)), although the award binds the parties to the industrial dispute in relation to which the award is made. The *Commonwealth Conciliation and Arbitration Act* 1904-1934 provides in s. 29 that an award of the Court is binding upon the persons there specified. This fact, however, does not mean that the making of an award is an exercise of the judicial power of the Commonwealth. In the same way it should, in my opinion, be held that the provision in reg. 5c that a determination made by a Committee shall be binding on certain persons does not, by reason of the use of the word " binding," involve an exercise of the judicial power of the Commonwealth.

These considerations are not conclusive of the case. An industrial award lays down rules of conduct for the future. It does not purport to ascertain and enforce existing rights ; it is directed to the creation of new rights. It is urged on behalf of the plaintiff that a determination of the Committee does not create a rule of conduct binding the parties for the future, but that it authoritatively determines a possibly controverted question of fact and that the making of such an authoritative determination is necessarily an exercise of judicial power. Reference is made to the frequently quoted statement of *Griffith* C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (2), approved by the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3) :—" I am of opinion that the words ' judicial power ' as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." Reg. 5c gives Committees power to decide controversies between subjects relating to their rights and the regulation purports to make those decisions binding and authoritative.

I am not satisfied that the words of *Griffith* C.J. are properly interpreted when it is said that they mean that a power to make binding and authoritative decisions as to facts is necessarily judicial power. I direct attention to the concluding words—" is called upon to take action." In my opinion these words are directed to action to be taken by a tribunal which has power to give a binding and

(1) (1918) 25 C.L.R. 434. (2) (1908) 8 C.L.R. 330, at p. 357.
(3) (1931) A.C. 275, at pp. 295, 296.

authoritative decision. The mere giving of the decision is not the action to which the learned Chief Justice referred. If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, according to the definition quoted, all the attributes of judicial power are plainly present. I refer to what I say more in detail hereafter, that the Privy Council, in the *Shell Case* (1), in which approval was given to the definition quoted, expressly held that a tribunal was not necessarily a court because it gave decisions (even final decisions) between contending parties which affected their rights.

In *Huddart Parker's Case* (2) *Isaacs* J. referred to the statement of *Palles* C.B. in *R.* v. *Local Government Board for Ireland* (3) "'to erect a tribunal into a "court" or "jurisdiction," so as to make its determinations judicial, the essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights. By this,' said the learned Chief Baron, 'I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the *power* authorizing it is *judicial*.' There we get a modern use of the term 'judicial power.'" This statement of the characteristics of judicial power looks to what, in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4), *Isaacs* and *Rich* JJ. referred to as the creation of instant liability in specified persons as distinct from laying down a rule or standard of conduct for the future.

The decision of an ordinary court that B is bound to pay money to A applies a pre-existing standard of rights and duties not created by the court itself, with the result that there is an immediately enforceable liability of B to pay to A the sum of money in question. The decision of the Women's Employment Board does not create

(1) (1931) A.C. 275.
(2) (1908) 8 C.L.R. 330, at pp. 383, 384.
(3) (1902) 2 I.R. 349, at p. 373.
(4) (1924) 34 C.L.R. 482, at p. 512.

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any such liability, nor does the determination of a Committee of Reference create any such liability. In order to impose an immediately enforceable liability upon any employer, for example, to pay wages to a particular female, it would be necessary for the female or some person on her behalf (See reg. 9A) to sue in a court of competent jurisdiction. If such a proceeding succeeded there would then be a liability created by the determination of the court. In such a proceeding the determination of the Committee of Reference would be evidence of the facts to which it related, but that determination would not in itself create liability.

That this distinction is well-founded appears from the decision of their Lordships of the Privy Council in the *Shell Case* (1). In that case their Lordships were considering the validity of the provisions relating to Boards of Review constituted under the *Income Tax Assessment Act*, the decisions of which, unless appealed against, were binding upon the parties, namely, the taxpayer and the Commissioner. Their Lordships, as already stated, approved the statement of *Griffith* C.J. in *Huddart Parker's Case* (2) as to the nature of judicial power. But they nevertheless held in explicit terms that (See *Shell Case* (3)) a tribunal is not necessarily a court in the strict sense of exercising judicial power because it gives a final decision; nor because two or more contending parties appear before it between whom it has to decide; nor because it gives decisions which affect the rights of subjects; nor because it is a body to which a matter is referred by another body.

In the *Shell Case* (4) the Judicial Committee affirmed the decision of the High Court, reported *sub nom. British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (5), and said :—" Their Lordships find themselves in agreement with *Isaacs* J., where he says :—' There are many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action . . . If consistent with either strictly judicial or executive action, the matter must be examined further . . . The decisions of the Board of Review may very appropriately be designated . . . " administrative awards," but they are by no means of the character of decisions of the Judicature of the Commonwealth.' They agree with him also when he says that ' unless . . . it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to

(1) (1931) A.C. 275.
(2) (1908) 8 C.L.R. 330.
(3) (1931) A.C., at p. 297.
(4) (1931) A.C., at p. 298.
(5) (1926) 38 C.L.R. 153.

stand as the true expression of the national will.' " *Isaacs* J. emphasized in his judgment in *British Imperial Oil Co.'s Case* (1) that controverted matters of fact were to be decided by the Board of Review, and gave a number of examples of " tribunals set up for administrative purposes, but all of them empowered to exercise the functions of deciding between contestants questions of fact and discretion and of doing so with the effect in some way of binding the rights of one or more of the contestants " (2). But, it was held, these tribunals did not exercise judicial power in discharging such functions.

Upon the basis of these authorities I reach the conclusion that the fact that a Committee of Reference is given power to decide contested questions of fact, and the further fact that its determination upon such questions is made binding upon parties who are in controversy as to facts, do not show that judicial power has been entrusted to the Committee.

By an amending regulation (Statutory Rules 1944 No. 42) reg. 5c was amended by, *inter alia*, omitting sub-reg. 5 (the sub-regulation which used the word " binding ") and inserting in its stead the following sub-reg. 5 : " A determination made under this regulation shall be deemed to form part of the decision in relation to which it is made."

This amendment makes the determination of the Committee binding in the same manner as the decision of the Board. The functions of the Committee might have been conferred upon the Board itself. The division of functions does not produce any difference in their character. A determination of the Committee therefore has the same effect and operation under the regulations as a decision of the Board. It is binding, but in the same manner as an industrial award is binding, and the making of the determination, for reasons already stated, does not involve any exercise of judicial power.

The amending statutory rule also added the following provision to reg. 5c :—

" Where any Committee of Reference has before the commencement of this regulation made or purported to make a determination in pursuance of regulation 5c of the *Women's Employment Regulations*, that determination shall have full force and effect and shall be deemed to form part of the decision in relation to which it was made or purported to be made."

It was argued that if a determination of the Committee was ineffective because involving an unconstitutional exercise of judicial power the amending regulation could not validate it. As I am of opinion

(1) (1926) 38 C.L.R., at p. 176. (2) (1926) 38 C.L.R., at p. 179.

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that the original determinations were valid it is not necessary to consider whether there is any substance in this argument.

The demurrer should be allowed.

RICH J. The question raised by the present demurrer is whether reg. 5C of the *Women's Employment Regulations*, as amended by Statutory Rules 1944 No. 42, is invalid as purporting to vest in a body which is neither a Federal court nor a court duly invested with Federal jurisdiction part of the judicial power of the Commonwealth, contrary to s. 71 of the Constitution.

It is provided by reg. 7 that, subject to a specified exception, an employer shall not employ any female on work specified in reg. 6 (1), that is, work (*a*) which is usually performed by males, (*b*) which, within the establishment of that employer, was performed by males at any time since the outbreak of the present war, or (*c*) which, immediately prior to the outbreak of the present war, was not performed in Australia by any person, unless there is in force a decision that females may be employed on that work. Reg. 6 provides that where an employer proposes to employ, is employing, or has at any time since 2nd March 1942 employed, females on any such work, he must make application to the Women's Employment Board for a decision. The Board is required to decide whether the work in question comes within any of the categories stated, and, if so, whether females may be employed or continue to be employed on it. If it decides that females may be employed, it is required to decide on what terms and conditions. By reg. 7B, any organization of employees to which any female employee employed on work specified in reg. 6 (1) belongs may apply to the Board for a determination of the rate of payment to be made to, or the hours and conditions of employment to be observed in respect of, females employed on that work, and the Board shall deal with the application as if it were an application under reg. 6. The Board is also empowered by reg. 7C, on its own initiative or on the application of an organization of employers or employees, to give any decision which it could be required to give on an employer's application, and such a decision may apply to all or any employers, or all or any of a specified class, or in a specified area, employing females on work of a specified kind. Any rate of payment to be made in accordance with a decision of the Board shall apply in respect of the work done by a female as on and from such date, whether before or after the commencement of the Regulations (subject to a certain qualification) but in any event not earlier than 2nd March 1942, as the Board specifies (reg. 12). Reg. 9 provides that every decision

of the Board shall be binding on the employer or employers therein specified and upon the employees and organizations affected, and shall be filed in the Commonwealth Court of Conciliation and Arbitration and thereupon be enforceable as an award or order of that Court.

Reg. 5c, which is the regulation the validity of which has been challenged, enables the Minister to establish and maintain a panel of persons who may act as chairmen of Committees of Reference. The Minister, the Attorney-General, or the chairman of the Board may, in relation to any decision of the Board, refer to a person on the panel as chairman any question as to (*a*) what females (if any) who are or were employed by an employer, are or were employed on work specified in the decision, (*b*) which of them are or were employed on work specified in reg. 6 (1), or (*c*) the classification of the work on which any such female is or was employed. On receipt of a reference, the panel chairman must nominate a representative of employers and one of employees, and the panel chairman with the representatives constitute a Committee of Reference to determine the questions referred. Such a determination shall be deemed to form part of the decision of the Board in relation to which it is made. The last-mentioned provision was substituted by amendment in February 1944 for an earlier provision that a determination made under reg. 5c should be binding on the employer and females specified therein and be evidence of any matters of fact so specified.

In considering whether reg. 5c purports to invest a Committee of Reference with part of the judicial power of the Commonwealth, it is important to remember that judicial power, and power in the exercise of which there is a duty to act judicially, are two different things. The former is a special case of the latter. If a person is invested with power, not to create new legal rights or to impose new legal duties or liabilities, but to determine, as between disputants, whether one of them possesses, as against the other, some already existing legal right to which he claims to be entitled, or is subject to some already existing legal liability to the other which the other is claiming against him, then, not only when exercising the power, is he required, amongst other things, to act judicially, but the power itself is judicial power (*Boulter* v. *Kent Justices* (1); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2)). On the other hand, if he has no authority to determine the already existing legal rights or liabilities of persons, but is empowered to impose on them new legal duties or liabilities from which they were previously free, or to alter or abrogate legal rights to which they

(1) (1897) A.C. 556, at p. 569.

(2) (1918) 25 C.L.R. 434, at p. 463.

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were previously entitled, his power is not judicial, although in exercising it he may be, and commonly is, subject to a legal duty to act judicially (that is, to observe the principles of natural justice) (*Everett* v. *Griffiths* (1); *R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee Co.* (1920) *Ltd.* (2); *R.* v. *Hendon Rural District Council*; *Ex parte Chorley* (3); *R.* v. *Commissioner of Patents*; *Ex parte Weiss* (4)). It must be remembered also that it is not necessary, in order that power may be judicial, that it should be concerned with the ascertainment and determination of existing legal rights and liabilities as between litigants. A superior court exercises original judicial power when, in its supervisory jurisdiction, by the use of the prerogative writs of prohibition or certiorari, it keeps inferior courts or bodies within the limits of their jurisdiction or authority, or constrains them to observe the principles of natural justice (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. Ltd.*; *Ex parte Municipal Tramways Trust, Adelaide* [*No.* 1] (5)), and it may exercise this judicial power in the case of prohibition notwithstanding that it is a stranger to the proceedings who applies for the writ.

Questions whether a person is entitled to make decisions which are unexaminable by a court of justice may arise in relation both to judicial power, and to non-judicial power in the exercise of which there is a duty to act judicially. The books are full of cases in which an inferior court has been invested with jurisdiction in matters of a specified class, and it has been necessary to determine whether it was intended that the inferior court should decide, unexaminably, as part of the exercise of the jurisdiction so conferred, whether a particular set of facts constituted a matter within the class, or whether the fact of the particular matter being one of the class was intended to be a condition of the inferior court's having jurisdiction to deal with it at all, so that an alleged mistake by it on that point could be made a ground for challenging the jurisdiction of the court by means of the prerogative writs (*Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (6)).

Similar questions frequently arise in cases in which a person is expressed to be invested with authority to exercise power which is not judicial, if a specified state of things exists. The question then is whether it is intended that he may exercise the power if in his opinion the state of things exists, or that he may exercise the power only if the state of things in fact exists. If the latter is intended, a

(1) (1921) 1 A.C. 631, at pp. 682-687.
(2) (1924) 1 K.B. 171, at pp. 204-207.
(3) (1933) 2 K.B. 696.
(4) (1939) 61 C.L.R. 240, at p. 255.
(5) (1914) 18 C.L.R. 54.
(6) (1938) 59 C.L.R. 369, at pp. 384, 385, 391, 392.

superior court may, in many cases, review an exercise by him of the power and set it aside if of opinion that the state of things prescribed for its exercise did not exist (*Livingstone* v. *Westminster Corporation* (1)). In either case, whether the opinion which such a person forms is conclusive or only tentative and subject to review by a superior court, he is not, in forming it, exercising judicial power, although he may be subject to a legal duty to act judicially in doing so.

A number of applications having been made to the Board, it gave a decision on 29th January 1943 (presumably pursuant to reg. 7c), which is binding on the plaintiff and others, and is described as a common rule. The Minister, acting under reg. 5c in its unamended form, on 13th October 1943 established a panel of chairmen of Committees of Reference ; and on 31st December 1943 the Chairman of the Board, in relation to its decision of 29th January 1943, referred to G. A. Mooney, one of the panel chairmen, the questions (*a*) what females, if any, who are or were employed by the plaintiff, are or were employed on work specified in the Board's decision, and (*b*) what kinds of work the females so employed are or were doing. On 13th January 1944, a Committee of Reference constituted by Mr. Mooney and his nominees determined that females employed by the plaintiff as spray painters and process workers (limited to the operations of gauging with micrometers) are employed on work specified in the Board's decision, and it deferred determination of a claim as to females otherwise employed.

All that the Board is empowered by the Regulations to do is to decide, with respect to work, (1) whether (putting it very broadly) it is men's work, (2) if so, whether females may be employed on it, and (3) if so, at what rates of pay and upon what working conditions, and to give decisions as to these matters, binding a particular employer or group of employers. When, however, it gives a decision, that decision is binding on the employer or employers and his or their employees, and must be filed in the Commonwealth Court of Conciliation and Arbitration, and thereupon has effect and is enforceable as if it were an award or order of the court. Hence, the Regulations empower and require an administrative body—a Board—to decide whether or not certain classes of work come within a certain definition, and, if it decides that they do, to impose upon employers new legal duties towards any females whom they may employ upon such classes of work, and to confer on any females so employed new, corresponding, legal duties. These powers are clearly not judicial powers.

(1) (1904) 2 K.B. 109, at pp. 118, 119.

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It is obvious that questions may arise as to whether or not female employees who are doing or not doing particular work, or particular female employees, are entitled to the new legal rights so created. For example, it may have been contended before the Board that three classes of work, (*a*), (*b*) and (*c*), were all of them men's work. The contention may have failed as to (*a*) but succeeded as to (*b*) and (*c*), and the Board may have fixed different rates of pay for (*b*) and (*c*) respectively. Certain female employees may thereafter raise a contention that, properly understood, the work which they are doing is not (*a*) but (*b*) or (*c*), and others, that they are doing not (*b*) but (*c*), which carries a higher rate of pay. The normal way to determine whether any particular female or class of females is entitled to the now existing, although new, legal rights which are claimed, is for her or them to commence proceedings in a court of justice. This is expressly contemplated by reg. 9A. Reg. 5C purports to enable a Committee of Reference, at the initiative of the Minister, the Attorney-General, or the chairman of the Board, to determine whether female employees are or were doing work which the Board has already specified, in a decision already given, as work the doing of which confers on female employees special legal rights. In its original form, reg. 5C went on to provide by sub-reg. 5 that such a determination by a Committee should be binding on the employer and females specified in the determination, and should be evidence of any matters of fact so specified. After the determination of the Committee of Reference which is now challenged had been made on 13th January 1944, the Regulations were amended by No. 42 of 1944, and a new sub-reg. 5 was substituted, providing that a determination by a Committee of Reference shall be deemed to form part of the decision of the Board in relation to which it is made. It was provided also that where such a Committee had, before this amendment, made or purported to make a determination under reg. 5C, the determination should have full force and effect and be deemed to form part of the decision of the Board in relation to which it was made or purported to be made.

There is no doubt that both the Board and a Committee of Reference are administrative bodies. There can be equally no doubt that a competent authority can invest such a body with power to create new legal rights and duties either for persons coming within a particular description or for particular individuals, or it can vest such a power in two of such bodies, one acting in aid of the other. Thus, where it is desired to enable the conferring upon particular individuals of new legal rights, it may provide that one administrative body is to have power to define classes of work and to state

what rates of pay and conditions of employment it regards as appropriate for different types of work falling within the classes so defined, that another administrative body is to have power to decide whether particular persons or persons of a particular class are doing work of a particular type within one of the classes, and that such a decision by the latter body shall confer upon those persons a legal right to the pay and conditions decided by the former body to be appropriate to that type of work. By such a scheme, new legal rights would become vested in individuals only when the second administrative body had performed its function, and there could be no question of judicial power being exercised by either of the bodies.

But the scheme set up by the Regulations now in question is quite a different one. The first body, the Board, is empowered and required itself to decide what rates of pay shall be made to all females employed on work specified by it, and upon what conditions they are to be employed. This decision is binding of itself, and itself creates new legal rights and duties. It requires no supplementary finding by a Committee of Reference to confer the new legal rights upon the females who are in fact employed upon such work. This is clear from reg. 9A, which contemplates the bringing of an action in a court of justice by or on behalf of female employees who claim to have become entitled to new legal rights under a decision of the Board, and are seeking to enforce them, as existing legal rights, by action in the ordinary way.

Upon a review of the Regulations as a whole, I find myself forced to the conclusion that the function of a Committee of Reference, as provided for by reg. 5C, is not to vest in individuals new legal rights which they did not possess until conferred upon them by the Committee, but to determine, with respect to particular individuals or individuals of a particular class, a fact the determination of which decides whether they are entitled to legal rights which, if they have them at all, they possess because these rights have already been conferred upon them independently by another body. This is essentially a judicial function, and involves the exercise of judicial power.

The remaining question is whether the amendment introduced by No. 42 of 1944, providing that a determination made by a Committee of Reference under reg. 5C shall be deemed to form part of the decision of the Board in relation to which it is made, so alters the character of a determination of a Committee as to make it one which itself creates new legal rights, not one determinative of legal rights independently created by the Board and already existing. I cannot find in the scheme of the Regulations anything to this effect.

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On the contrary, reg. 7E treats any money payable to an employee as being payable under a decision, by which I take to be meant an actual decision of the Board's, and provides that, unless it is paid within fourteen days from the date when it became due and payable, it shall carry interest at the rate of ten per cent per annum from the date on which it became due and payable. This regulation deals separately with the case of a Committee of Reference having determined that a particular employee was employed on work specified in a decision of the Board (and therefore entitled to special pay), and it provides that in such a case the sum due and payable under the Board's decision shall not commence to carry interest until fourteen days after the date of the Committee's determination or the date on which the sum becomes due and payable, whichever is the later. This provision treats the determination of the Committee as not affecting the date on which money becomes due and payable to an employee by virtue of her new legal rights created by the Board's decision. It determines that the money is receivable by her, by so doing postpones until fourteen days from the date of the determination her right to begin to receive interest, and, since the determination is now deemed to form part of the Board's decision, would, if valid, make her rights enforceable as an industrial award.

For the reasons which I have stated, I am of opinion that reg. 5C, both in its original and in its amended form, is invalid, as purporting to invest part of the judicial power of the Commonwealth in a body which is not qualified to exercise it, and that there should therefore be judgment for the plaintiff on the demurrer.

STARKE J. Demurrer to a statement of claim which claimed that reg. 5C inserted in the *Women's Employment Regulations* by Statutory Rules 1943 No. 251 and as amended by Statutory Rules 1944 No. 42, and also Statutory Rules 1944 No. 42, reg. 2 (2), so far as it purports to give force and effect to a determination of 13th January 1944 of a Committee of Reference constituted under Statutory Rules 1943 No. 251, and also the determination, are invalid.

The ground upon which the regulations were attacked is that they confer judicial power of the Commonwealth upon Committees of Reference constituted in a manner contrary to the provisions of the Constitution, and the determination is attacked because it is an exercise of the judicial power of the Commonwealth, which cannot be conferred upon any Committee of Reference (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1)).

Reg. 5C, inserted in the *Women's Employment Regulations* by Statutory Rules 1943 No. 251, is, so far as material, as follows :—

(1) (1918) 25 C.L.R. 434.

" 5c.—(1) The Minister may, by notice in the *Gazette*, establish and maintain a panel of persons . . . who may act as Chairmen of Committees of Reference for the purposes of this regulation.

(2) The Minister, the Attorney-General or the Chairman of the Board " (that is, of the Women's Employment Board) " may, in relation to any decision of the Board, refer to a person on the panel of persons " (referred to as the chairman) " any question as to what females (if any) who are or were employed by an employer, are or were employed on work specified in the decision or any question as to the nature of the work on which the females, who are or were employed on work specified in the decision, are or were respectively employed."

(3) The chairman shall nominate an appropriate representative of employers and employees respectively, " and the Chairman, together with those representatives, shall constitute a Committee of Reference which shall meet . . . and determine the questions referred to the Chairman."

(4) The determination of the majority shall prevail, and the chairman shall have a deliberative, but not a casting, vote.

(5) A determination made under the regulation is binding on the employer and females specified in the determination and is evidence of any matters of fact so specified.

Reg. 5c was amended by Statutory Rules 1944 No. 42, and, so far as material, is as follows :—

(*a*) Sub-reg. 2 above set forth was omitted and the following sub-regulation was inserted :—

" (2) The Minister, the Attorney-General or the Chairman of the Board may, in relation to any decision of the Board, refer to a person on the panel of persons " (referred to as the chairman) " any question as to—

(*a*) what females (if any) who are or were employed by an employer, are or were employed on work specified in the decision ;

(*b*) which of those females are or were employed on work specified in sub-regulation (1) of regulation 6 of these Regulations ; or

(*c*) the classification of the work on which any such female is or was employed " ;

(*b*) After sub-reg. 3 (above) the following sub-regulation was inserted :—

" (3A) Before a Committee of Reference determines any question in pursuance of this regulation, the Chairman shall give to all persons and organizations who or which, in the opinion of the Chair-

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man, are interested in the question, an opportunity of being heard " ; and

(*c*) Sub-reg. 5 was omitted and the following sub-regulation inserted in its stead :—

" (5) A determination made under this regulation shall be deemed to form part of the decision in relation to which it is made."

Reg. 2 (2) of Statutory Rules 1944 No. 42 provided :—

" (2) Where any Committee of Reference has before the commencement of this regulation made or purported to make a determination in pursuance of regulation 5c of the *Women's Employment Regulations*, that determination shall have full force and effect and shall be deemed to form part of the decision in relation to which it was made or purported to be made."

Under the regulation 5c and before its amendment by Statutory Rules 1944 No. 42 there were referred to one of the panel of persons the questions—

(*a*) as to what females (if any) who are or were employed by the plaintiff are or were employed on work specified in a decision of the Women's Employment Board of 29th January 1943, and

(*b*) as to the nature of the work on which females who are or were employed on work specified in the said decision are or were respectively employed.

A Committee of Reference was constituted under the regulation, and on 13th January 1944 the majority of the Committee decided that females employed by the plaintiff as spray painters and process workers (limited to the operation of gauging with micrometer) are employed on work specified in the said decision.

The limits of the legislative, the executive and judicial powers of the Commonwealth are nowhere defined. A strict division is, as I have said before, impossible, and we find more and more, as a matter of practical government, a mingling of functions : See *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1). " The authorities . . . show," said the Judicial Committee in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2), " that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power." Some negative propositions were enumerated. Affirmatively, however, it may be said that the character of the act depends upon substance and not upon form. " The words ' judicial power ' as used in s. 71 of the Constitution mean the power which every sovereign authority must

(1) (1943) 67 C.L.R. 314, at p. 326. (2) (1931) A.C. 275, at pp. 296, 297.

of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action" (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1), approved by the Judicial Committee in the *Shell Co. Case* (2)). "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end" (*Prentis* v. *Atlantic Coast Line Co.* (3), per *Holmes* J.). But, nevertheless, administrative authorities have been created for the purpose of ascertaining facts, supplementing the courts, and entrusted with power to make at least initial determinations in matters within, and not outside, ordinary judicial power. The Commissioner of Taxation, Boards of Review under the Income Tax Acts, the Commissioner of Patents, the Registrar of Trade Marks, and so forth, are but a few illustrations of such administrative authorities. Consequently it is not an exclusive attribute of judicial power that all determinations of fact in matters affecting public or private rights shall be made by some court in which judicial power has been vested. No-one doubts that the ascertainment or determination of facts is part of the judicial process, but that function does not belong exclusively to the judicial power. It is said that if there be no limitation of administrative authority "for the investigating and finding of facts" then the Parliament might "completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department": Cf. *Crowell* v. *Benson* (4). Unless, however, the determination of facts is an exclusive attribute of judicial power, then it is a matter for the consideration of the legislative body how and to what extent facts should be submitted to administrative tribunals in aid of or to supplement judicial power. The true function of judicial power is, as already indicated, to investigate, declare and enforce rights and obligations on present or past facts, by whatever authority such facts are ascertained or determined, and under laws supposed already to exist (*Prentis* v. *Atlantic Coast Line Co.* (5)).

Turning now to reg. 5c in its original form and as amended, the only function of the Committee of Reference is to determine matters of fact, that is, whether females are or were employed on work specified in the Board's decision or in reg. 6 (1) or the nature of the work

(1) (1908) 8 C.L.R. 330, at p. 357.
(2) (1931) A.C., at pp. 295, 296.
(3) (1908) 211 U.S. 210, at p. 226 [53 Law. Ed. 150, at p. 158].
(4) (1932) 285 U.S. 22, at p. 57 [76 Law. Ed. 598, at p. 616].
(5) (1908) 211 U.S. 210 [53 Law. Ed. 150].

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or the classification of the work on which any such females are employed. " The answer " to any of these questions " may itself be an inference from a wide area of facts," but is still an " answer of fact " : See speech of Lord *Sumner* in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1). And it should be observed that the determination of the Committee of Reference is not an adjudication of legal rights or obligations but of facts necessary or relevant to establish such rights or obligations. But it is the office and function of the judicial power to determine whether they do establish such rights or obligations or not. Moreover, it must be observed that under the amendment of reg. 5c by Statutory Rules 1944 No. 42 the determination of the Committee of Reference is to form part of the decision of the Board in relation to which it is made, which suggests that the determination is not in substance " a function of one of the courts of the Commonwealth in the strictly judicial sense " (See *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2)), but an addition or supplement to the decision of the Women's Employment Board constituting a rule of conduct for those bound by it rather than an adjudication of their rights and obligations. It, no doubt, binds employers and females specified in the determination, but to say that a determination or award of a tribunal " shall be binding " does not establish an exercise of judicial power. The phrase is devoid of any significance in relation to the exercise of judicial power, for it is as appropriate to the determinations of administrative tribunals as to determinations of tribunals in which judicial power of the Commonwealth is vested.

The contention that both the regulation as originally framed and as amended and the determination of the Committee of Reference involve an interpretation of the decision of the Board and the determination of a dispute between parties, namely, whether females employed by the plaintiff were employed on work specified in a decision of the Board and the nature of the work upon which they were employed, is unfounded. The regulation, as I have said, merely authorizes the Committee to ascertain certain facts, and the determination does no more than ascertain those facts. But it is said that the meaning of the Board's decision was necessarily involved because the meaning of its terms must be ascertained and also the relationship of the parties. But ascertaining whether persons were or are employed upon work specified in a decision of the Board is a matter of identification rather than of interpretation. And the question whether persons were employed on such work looks to the work upon which the females were engaged rather than to the

(1) (1915) A.C. 433, at p. 466.

(2) (1924) 34 C.L.R. 482, at p. 528.

relationship subsisting between their employers and themselves. And similarly as to other matters remitted to the Committee of Reference. The object of the Committee is to work out the decision of the Women's Employment Board in a practical manner by persons supposed to have special knowledge of the subject matter. These Committees of Reference are somewhat analogous to Boards of Reference appointed under s. 40A of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, which have a similar object: See *Federated Engine-Drivers & Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (1).

The final challenge was to the provision in Statutory Rules 1944 No. 42, reg. 2 (2), which provides that any determination of a Committee of Reference made in pursuance of reg. 5C in its original form shall have full force and effect and be deemed part of the decision in relation to which it was made. In its final form the argument was that neither the legislative nor any rule-making authority could give legal effect to a judicial decision reached by a body that had no authority to give such a decision. But the Committee of Reference, if I am right, never gave any judicial decision, but merely ascertained or determined certain matters of fact. And another answer is that under the defence power the regulation-making authority might itself have prescribed the matters contained in the decision of the Committee of Reference: See *Women's Employment Regulations Case* (2). All that the rule does is to pick up a decision which the rule-making authority itself might have prescribed, validate it, and declare that it shall form part of the Board's decision.

The demurrer should be allowed.

McTIERNAN J. In my opinion the demurrer should be allowed.

I agree with the analysis which the Chief Justice has made of the regulations and the decisions upon which the present question depends. It follows in my opinion that the determinations which a Committee of Reference is empowered to make are in the nature of administrative awards: they are not of the nature of decisions which only the Judicature of the Commonwealth can lawfully give.

WILLIAMS J. This is a demurrer in an action brought by the plaintiff company against the Commonwealth of Australia and the Electrical Trades Union of Australia in which the following declarations are sought:—(*a*) a declaration that reg. 5C of the *Women's Employment Regulations* is invalid; (*b*) a declaration that the regulation as amended by reg. 2 of Statutory Rules 1944 No. 42 is

(1) (1913) 16 C.L.R. 245, at pp. 262, 272, 279. (2) (1943) 67 C.L.R. 347.

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invalid; (*c*) a declaration that the chairman of the Women's Employment Board had no power to refer the questions mentioned in the statement of claim to G. A. Mooney; (*d*) a declaration that the Committee of Reference mentioned in the statement of claim had no power to determine these questions; and (*e*) a declaration that the alleged decision of the Committee of Reference mentioned in the statement of claim is invalid and void and not binding on the plaintiff.

The relevant facts alleged in the statement of claim, which must be taken to be admitted for the purposes of the demurrer, are, shortly stated, as follows:—On 29th January 1943 the Women's Employment Board gave a decision binding on the plaintiff in the matter of certain applications by the Broken Hill Proprietary Co. Ltd., and in the matter of other applications, which decision is commonly referred to as "The Metal Trades Common Rule" in respect of the work covered by the former applications. On 13th October 1943 the Minister of State for Labour and National Service, pursuant to the provisions of reg. 5c of the *Women's Employment Regulations*, purported to establish and maintain a panel of persons, including G. A. Mooney, who might act as chairmen of Committees of Reference for the purpose of that regulation. On 31st December 1943 the chairman of the Women's Employment Board in relation to that decision purported to refer to Mooney the questions (*a*) as to what females, if any, who are or were employed by the plaintiff, are or were employed on work specified in that decision; and (*b*) as to the nature of the work on which females who are or were employed on work specified in that decision are or were respectively employed. On 13th January 1944 the Committee of Reference convened by Mooney purported to decide that females employed by the plaintiff as spray painters and process workers (limited to the operations of gauging with micrometers) are employed on work specified in that decision, and deferred the claim as to females employed on machines covering wire with thread.

The plaintiff claims that reg. 5c is invalid because it purports to confer power on a Committee of Reference to exercise the judicial power of the Commonwealth contrary to the Constitution; and that reg. 2 of Statutory Rules 1944 No. 42, in so far as it purports to give force and effect to the determination of 13th January 1944, is invalid because it purports to confer judicial power upon the Women's Employment Board, or, alternatively, purports to operate upon the footing that such power is exerciseable by that Board; and also because its operation depends upon reg. 5c, which is itself invalid.

The substantial ground of the demurrer is that reg. 5c, on its true construction, does not confer power upon any persons or body of persons to exercise the judicial power of the Commonwealth.

Reg. 5c, in addition to providing for the establishment of Committees of Reference, provides, so far as material :—

(2) That the Minister, the Attorney-General or the chairman of the Board may, in relation to any decision of the Board, refer to a person on the panel of persons, in the regulation called the chairman, any question as to what females (if any) who are or were employed by an employer are or were employed on work specified in the decision or any question as to the nature of the work on which females, who are or were employed on work specified in the decision, are or were respectively employed.

(5) That a determination of a Committee of Reference made under this regulation shall be binding on the employer and females specified in the determination, and shall be evidence of any matters of fact so specified.

In *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1) Lord *Sankey* L.C., delivering the judgment of the Privy Council, said :—" What is ' judicial power ' ? Their Lordships are of opinion that one of the best definitions is that given by *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2) where he says : ' I am of opinion that the words " judicial power," as used in s. 71 of the Constitution, mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

Under the *Women's Employment Regulations* every decision of the Board is binding on the employer or employers specified in the decision, his or their employees, and the organizations of employees whose members are affected by the decision, and must be filed in the Commonwealth Court of Conciliation and Arbitration, and shall thereupon have effect in all respects and be enforceable as if it were an award or order of the Court : See reg. 9. In *Alexander's Case* (3) this Court held that the power to enforce awards conferred upon the Commonwealth Court of Conciliation and Arbitration by the *Commonwealth Conciliation and Arbitration Act* 1904-1915 was part of the judicial power of the Commonwealth within the

(1) (1931) A.C. 275, at pp. 295, 296. (2) (1908) 8 C.L.R. 330, at p. 357.
(3) (1918) 25 C.L.R. 434.

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meaning of s. 71 of the Constitution, and could only be vested in the courts mentioned in that section, and it was in consequence of that decision that the Act was amended by appointing the Judges of that Court for life and thereby constituting it a court within the meaning of the section. In the joint judgment of *Isaacs* J. and *Rich* J. in *Alexander's Case* (1) it is stated that when an award is once made the dispute is settled and the arbitral function is at an end, and that enforcement of the rights thereby created by a court is in its nature an entirely separate process from their creation.

Reg. 5c purports to confer on a Committee of Reference functions which are, in my opinion, part of the judicial power of the Commonwealth. It is the decision of the Board which, by force of the *Women's Employment Act*, and the Regulations made thereunder, creates rights and obligations which are binding on employers and employees. Once that has been done the determination of a controversy whether any employee is entitled to those rights and any employer is subject to those obligations is an exercise of judicial power. A Committee of Reference is empowered by reg. 5c to find an essential step in the determination of that controversy. A determination of a Committee of Reference is made binding on the employer and females specified in the determination. It is therefore a tribunal "which has power to give a binding and authoritative decision" which is not even subject to any appeal. A determination of a Committee of Reference is not, as was contended, part of the decision of the Board. It does not create rights and obligations. If it did, the question would immediately arise as to the date from which these rights and obligations were created. But the only provision in the Regulations which has any relation to this question is reg. 7E, which provides that where, in relation to an employer, any question has been referred to any person under reg. 5c of these Regulations, and a Committee of Reference has, upon that reference, determined that the employee is or was employed on work specified in the decision, the sum due to the employee under a decision of the Board shall not commence to carry interest until the expiration of fourteen days after the date of the determination or the date on which the sum becomes due and payable, whichever is the later. This provision also shows that the determination is a step in the enforcement of an existing obligation. The determination that the Committee of Reference is empowered to make under reg. 5c is exactly the same as that which reg. 9A (2) contemplates that the court may have to make before judgment can be pronounced in an action brought by the Attorney-General to recover wages and interest due to employees under a decision of the Board.

(1) (1918) 25 C.L.R., at p. 465.

For these reasons I am of opinion that the words of reg. 5c, on their plain ordinary grammatical construction, are not intended to enable a Committee of Reference to create rights and obligations, but are intended to empower it to play an important part in the determination of the incidence and enforcement of existing rights and obligations.

A great deal of argument was addressed to the Court on the meaning of the word "binding" in reg. 5c (5). It means, in my opinion, that a determination that certain females are or were employed on work specified in the decision shall be binding upon the females and their employers, so that in any subsequent proceedings, as, for instance, proceedings to recover the wages specified for that class of work in the decision of the Board, that question would be conclusively determined between the parties. In other words, it relieves, and indeed prevents, the court from making the determination referred to in reg. 9A (2).

A great deal of argument was also addressed to the court upon the question whether it is an infringement of the judicial power to appoint a tribunal that is not a court conclusively to decide questions of fact, the decision of which is a necessary step in the determination of a controversy whether one person has an enforceable legal right against another person. If such tribunals can be appointed, then, since, in many cases, there is no dispute as to the law, and the whole controversy turns on questions of fact, all that would be left for a court to do would be to give a formal judgment, and, as an entirely ancillary and subordinate body, to enforce rights and obligations, the controversy as to which had, in every substantial sense, been predetermined by a tribunal that is not a court. That is not, in my opinion, the true meaning, or even a remote approach to the true meaning of judicial power. It is immaterial, to my mind, whether the controversy as to whether one person is entitled to enforce a legal right against another person turns upon questions of fact or of mixed fact and law or of law. In each case the determination of the controversy is an exercise of judicial power, and any attempt to remit any of the elements involved in the determination *in invitos* the parties to any tribunal which is not a court, is an infringement of that power, and therefore completely null and void. That does not mean, of course, that the Commonwealth Parliament cannot, as it has done in many cases, appoint administrative officials and set up administrative boards to administer Commonwealth Acts. Examples of this are the commissioners appointed and boards set up under Taxation Acts, and commissioners and registrars, such as those of patents and trade marks, appointed under the Patents and Trade

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Marks Acts. In order to administer Taxation Acts officials must be appointed to ascertain the amount of tax taxpayers should pay in accordance with the Acts and issue assessments, and in order to administer such Acts as Patent Acts and Trade Marks Acts officers must be appointed to inquire and ascertain whether applicants are entitled to the grant of letters patent, or to have trade marks registered; but where an Act creates a liability, such as a Taxation Act, to pay a tax, or a right of property, such as a right to the grant of letters patent or to have a trade mark registered, subject to the performance of certain conditions, the determination of a controversy between the Taxation Commissioner and a taxpayer as to the amount of tax for which the taxpayer is liable, or with the Commissioner of Patents or Registrar of Trade Marks as to the right to the grant of letters patent or to have the trade mark registered must, in the last resort, unless the subject prefers otherwise (*Shell Co.'s Case* (1)), be determined by a court. Further, although it may be proper for the Parliament to direct on whom the onus of proof of facts lies, and to give many evidentiary and procedural directions, no attempt to fetter the right of the court effectively to determine every question of fact and law necessary to decide the controversy could be valid.

Sub-reg. 5 provides that "a determination shall be evidence of any matters of fact so specified." If a determination is binding, then it is conclusively binding, and it is difficult to attribute any meaning to these added words unless they mean that the determination can be put in evidence in subsequent proceedings, in which case it would be conclusive evidence of the facts specified. Mr. *Phillips* contended that, if this Court was of opinion that the provision that a determination was to be binding was an infringement of judicial power, the evidentiary provision was severable and could be saved by s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941. But to strike out the first provision would, in my opinion, cause the second provision to operate in a different manner to that in which it was intended that it should operate if the whole sub-regulation had been valid. For this reason, s. 46 (*b*) cannot, in my opinion, be invoked to save this part of the sub-regulation (*Pidoto* v. *Victoria* (2)).

For these reasons I am of opinion that reg. 5c infringes the judicial power of the Commonwealth and is therefore invalid.

I pass now to reg. 2 of Statutory Rules 1944 No. 42, which amends reg. 5c by omitting sub-regs. 2 and 5 and inserting fresh sub-regulations in their stead. I can see no distinction in substance between the new sub-reg. 2 introduced by Statutory Rules 1944 No. 42 and the old sub-reg. 2. It still remits to a Committee of Reference

(1) (1931) A.C., at p. 297. (2) (1943) 68 C.L.R. 87.

findings of fact which are the same essential step in the determination of a controversy as to the females entitled to the benefit of a decision of the Board. The new sub-reg. 5 provides that a determination made by a Committee of Reference shall be deemed to form part of the decision in relation to which it is made. As a part of the decision it would, as before, be binding, but this time under reg. 9, on the employers and employees specified in the determination.

Modern legislators have adopted with enthusiasm the practice of deeming things to be that which they are not, and, in so far as the legislation is made by a parliament with untrammelled powers, or within the plenary powers conferred upon a parliament whose powers, like those of the Commonwealth Parliament, are limited by a constitution, effect must be given to the notional conditions thereby created. But upon a constitutional question the court must consider the real substance and operation of the legislation, and if in substance and operation it is an enforcement or step in the enforcement of existing rights and obligations, then the legislation, however disguised, is an exercise of judicial power. The new sub-reg. 5 is legislation of this nature. To make a determination part of the decision of the Board is not to create new rights or to vary existing rights. It is still a determination of the same nature as that referred to in the previous sub-regulation and in regs. 7E and 9A (2).

Reg. 2 of Statutory Rules 1944 No. 42 also contains sub-reg. 2, which provides that where any Committee of Reference has before the commencement of this regulation made or purported to make a determination in pursuance of reg. 5C of the *Women's Employment Regulations*, that determination shall have full force and effect and shall be deemed to form part of the decision in relation to which it was made or purported to be made. If this sub-regulation could be construed as a legislative enactment creating certain rights to certain wages in favour of certain female employees against certain employers, I would be of opinion that legislative rights were created in their favour by the sub-regulation in the same manner as the rights created by s. 4 of the *Women's Employment Act* and reg. 3 of Statutory Rules 1943 No. 75 which came before this Court in the *Women's Employment Regulations Case* (1). With respect to this section and regulation, I pointed out that the Commonwealth Parliament could have determined all matters left to the Women's Employment Board by direct legislation, and that this section and regulation were both cases of such direct legislation (2). But sub-reg. 2 is different in substance and operation to the section

(1) (1943) 67 C.L.R. 347.

(2) (1943) 67 C.L.R., at p. 408.

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and regulation there referred to. It provides that a determination of a Committee of Reference is to have full force and effect, which must mean full force and effect as a determination of a Committee of Reference, and, therefore, for the reasons already given, as an exercise of judicial power; and that it is to be deemed to be part of the decision in relation to which it is made or purported to be made; but, for the reasons already given, it does not form part of the decision in the sense of creating new rights and obligations, but is in substance and operation a binding determination made for the purpose of enforcing existing rights and obligations. In other words, the sub-regulation does the very thing which *Isaacs* J. said, in *Federal Commissioner of Taxation* v. *Munro* (1), that Parliament cannot do, that is, it attempts to give to a determination, not even well disguised, the status of a judicial determination.

For these reasons I am of opinion that the demurrer should be overruled.

Demurrer allowed.

Solicitors for the plaintiff, *Moule, Hamilton & Derham.*

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

E. F. H.

(1) (1926) 38 C.L.R. 153, at p. 173.