[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

FOSTER AND OTHERS;

Ex parte CROWN CRYSTAL GLASS COMPANY PROPRIETARY LIMITED.

Women's Employment—Jurisdiction of Women's Employment Board—"Work"—Actual operation of employee previously performed in Australia—Product of labour not previously produced—Women's Employment Act 1942 (*No.* 55 *of* 1942), *Schedule, regs.* 6 (1), (4)-(8)—*S.R.* 1943 *No.* 75—1943 *No.* 251.

The word "work" in reg. 6 of the *Women's Employment Regulations* refers to the particular labour or operations performed by individual workers and not, in the case of a manufacturing process, to the whole process of producing the commodity manufactured. If the work performed by an employee is some mechanical or other operation that was done in Australia before the present war, such work is not "work . . . which immediately prior to the outbreak of the present war was not performed in Australia by any person" within the meaning of reg. 6 (1) (*c*) of the *Women's Employment Regulations* merely because the employee is performing that operation in order to manufacture an article which had not been manufactured in Australia before the war.

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Sydney, *Aug.* 14, 22.

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

Order Nisi for prohibition.

An application under reg. 7B of the *Women's Employment Regulations* was made on 2nd February 1944 by the Australian Glass Workers' Union to the Women's Employment Board constituted under those Regulations for a determination of the rates of payment and the hours and conditions to be observed in respect of female employees employed by Crown Crystal Glass Co. Pty. Ltd. on the work specified in the application.

It was alleged in the application that the company: (*a*) had since 2nd March 1942 employed and continued to employ females on work which was usually performed by males, and (*b*) had employed

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and was employing females on work which had been prior to that employment of females, or was, performed by males in the establishment of the company.

The application, as amended at the hearing before the Board, related to seven classes of work which were described in some detail. The classification of the work was made under the following headings: (1) cutter; (2) ampoule section; (3) tube-glass fabrication, pharmaceutical and scientific glass articles; (4) testing hydrometers; (5) laboratory tube and ampoule examining and/or sorting; (6) pharmaceutical and scientific glass packers; and (7) calibrating glass instruments, that is, testing laboratory glass, waxing and marking by machine, colouring and powdering, sorting.

The work was performed as part of the work of manufacturing scientific glassware. It was not disputed that scientific glassware was not manufactured in Australia before the commencement of the present war. But some of the work referred to in the application, e.g., the cutting of glass tubes, had been performed in Australia before the war, and some of the work had usually been done by females.

The contention of the union was that the work which the females in question were doing was the manufacture of scientific glassware and that the industry of manufacturing such products was a new industry in Australia. The company's contention was that the work consisted in the seven operations described under the seven classifications shown above.

During the course of the hearing the company tendered, "for the assistance of the Board" and without prejudice to the company's contention as to the jurisdiction of the Board, a document showing "the margin suggested by the company for the operations if work performed by adult males." The operations were described under several headings, some were shown as "elementary," some as "intermediate," and some as "advanced," whilst the category of some was not shown. An exhibit consisting of certain samples of glassware was shown to the Board in three groups illustrating articles from the classifications "glass-tube fabrication," "elementary," "intermediate" and "advanced" referred to in the document mentioned above.

On 13th July 1944, the Board, "in respect of the work covered by this application and in respect of females covered thereby and included within the jurisdiction of the Board," decided, *inter alia*, 1. that the said work was work specified in reg. 6 (1) (*c*) of the *Women's Employment Regulations*; 2. that females might be employed or continue to be employed on the said work; 3. that, subject to the

provisions of the *National Security (Hours of Work) Regulations*, the hours during which females might be employed on such work should be those prescribed for males under the Glass Makers' (State) Award (N.S.W.); 4. that the conditions under which females might be so employed should be those prescribed for males under that award; 5. that a special condition to be observed by the employer in order to safeguard the safety, health and well-being of the said females should be that a weight greater than thirty-five pounds might not be lifted or carried by any one female; 6. that the employment of all females except junior females should in first instance be on probation for a period indicated in the schedule to the decision, with a proviso excepting females who had served a working period equal to the prescribed period upon work of a substantially similar character; 7. that the rates of payment to be made to females, other than junior females, during and after probation should be those included in the said schedule; 8. that the rates of payment to be made to junior females should be equal to the rate prescribed for junior males of a similar age by the State award mentioned above; 9. that the rate of payment to be made in accordance with the decision should apply in respect of the work done by any female covered thereby as and from the commencement of the first pay period after 22nd September 1943; and 10. that the decision should bind the union and its members and the company.

The schedule to the decision made specific reference only to two of the classes of work mentioned in the application, namely, "glass-cutters" and "sorters and packers." The only other references in the schedule were to "elementary grade," "intermediate grade" and "advanced grade." These terms were not defined either in the schedule or in the body of the decision, and it was not suggested that they bore any trade meaning. It could not be ascertained either from the decision or the schedule as to what work was included in the respective grades.

No formal order expressing the decision was drawn up.

The company obtained an order nisi for a writ of prohibition directed to the members of the Board and to the union calling upon them to show cause why the writ should not issue to prohibit them from proceeding upon the union's application and the Board's decision, the grounds therefor being:—(*a*) that the Board had no jurisdiction under reg. 6 (1) (*c*) to make the decision; (*b*) that there was not any evidence that the work covered by the application was work specified in reg. 6 (1) or more particularly in par. (*c*) thereof; (*c*) that an admission made during the hearing before the Board that some of the work was of a type never performed in Australia

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before the war did not entitle the Board to find that the work covered by the application was work specified in reg. 6 (1) (*c*); (*d*) that the fact that there was evidence that the work covered by the application was performed in the making of scientific glassware, which was not being made in Australia immediately prior to the outbreak of the present war, was not *per se* sufficient to entitle the Board to find that that work was work specified in reg. 6 (1) (*c*); (*e*) that even if the Board had jurisdiction under reg. 6 (1) (*c*) to make a decision in respect of some only of the work covered by the application it was not entitled to make a decision in respect of the whole of the work covered by the application; and (*f*) that the decision did not sufficiently specify the work to which the periods of probation and the rates of pay therein set out were intended to apply.

Further facts and the relevant provisions of the *Women's Employment Regulations* are set forth in the judgments hereunder.

K. A. Ferguson, for the prosecutor. In determining applications under reg. 6 (1) of the *Women's Employment Regulations* regard should be had not merely to the result but to the various processes by which that result was obtained. In other words, regard should be had to each industrial operation and not to the result of industrial operations. There is not any evidence that scientific glassware has never been made in Australia, nor is there any admission to that effect. Even though scientific glassware as such may not previously have been manufactured in Australia, some at least of the various processes necessary thereto have been performed in Australia. As to some or all of the work, it is beyond the jurisdiction of the Board. That is so even if as to some of the work it was within the jurisdiction and there were females performing it. The Board did not define the expressions "elementary grade," "intermediate grade" and "advanced grade" used by it in its decision. Decisions made by the Board should specify clearly the work in respect of which wages are determined. The evidence shows that for many years prior to the war nearly all the operations necessary for the production of scientific glassware were performed in Australia by men and women. The only purpose of par. (*c*) of reg. 6 (1) is to cover work which is entirely new. Pars. (*a*) and (*b*) are concerned with the substitution of females for males in industry, and par. (*c*) is concerned with the introduction of females into a new industry. The nature of the various processes, the results, and whether or not they were performed or obtained in Australia before the war, by males or females, should be determined as questions of fact.

Maughan K.C. (with him *Louat* and *Dignam*), for the respondent members of the Women's Employment Board. The decision of the Board is correct. Decisions of the Board are not in themselves awards; they are decisions superimposed upon existing awards. The main purpose is to fix the wages of females relatively to the wages of males. Evidence is taken as to the classification of work but not as to the amount of skill required. If, as alleged, the decision does not purport to impose an obligation it is not bad, it is a nullity. If the decision is unintelligible or uncertain and liability is not fixed it follows that there is nothing to prohibit. In such case the matter should be referred back to the Board for elucidation or interpretation. What is "work" within the meaning of reg. 6 (1) (*c*) is a question of fact. The answer must depend upon the nature of the thing made and the nature of the work done in all the circumstances. The Board, on the evidence, regarded the work under consideration as being of a different character from that performed before. The members of the Board are empowered to inform their minds in any way they choose, therefore they were entitled to accept as an admission the statement made by the employer's representative. "Work" means the finished product; any other interpretation would be too narrow. The newness of the work should be determined by having regard to the commercial product rather than by having regard to the industrial operation on the performance of which the worker is employed. The Regulations are directed towards industry and towards the relation of employer and employee.

Kirby, for the respondent union. This respondent adopts the argument addressed to the Court by Mr. *Maughan*. The word "work" as used in reg. 6 refers to more than one particular operation; otherwise more appropriate words would have been used to describe the work in greater detail. As used in regs. 6 (5) (*b*), 7 and 8 the word refers to the particular operation of a particular employee. The Board is required only to have regard to the conditions under which the particular work of a female was being performed and to prescribe the conditions under which that work should be performed. The correct method of ascertaining the meaning of the word "work" is to consider the finished articles and also all the inherent operations necessary to produce them. The Board has not definitely stated that it adopted a limited meaning of that word. The union's claim as originally submitted was based upon pars. (*a*) and (*b*) of reg. 6 (1) and not upon par. (*c*) of that sub-regulation. If there be a difficulty in enforcing the decision as it stands these proceedings should be adjourned and the matter referred back to the Board to enable the

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Board to express itself more clearly as to the meaning of the word "work." It is a matter of fact and not a matter of degree. The Board is entitled to consider the finished articles and also to consider the evidence so as to decide whether the work performed by females in the process of manufacture was work, or whether the completed article was work, that had not been performed before in Australia. There was evidence upon which the Board could find that the work performed fell within reg. 6 (1) (*c*). The Board had jurisdiction to make the decision. The evidence shows also that the matter came within the scope of pars. (*a*) and (*b*) of reg. 6 (1).

Ferguson, in reply. The document tendered on behalf of the employer was tendered only as a guide and did not purport to be a comprehensive statement. It was not incorporated in the decision. Even if it had been so incorporated it would not have relieved the confusion caused by the terms of the decision. The decision itself purports to fix the wages to be paid irrespective of the submissions in the application. It also purports to prescribe conditions. This the Board had no jurisdiction to do. It is a question of fact whether or not the work has been performed previously in Australia. That question cannot be answered by merely considering whether the product of the work had been produced previously in Australia.

Cur. adv. vult.

Aug. 22.

The following written judgments were delivered :—

LATHAM C.J. Return of order nisi for a writ of prohibition directed to the members of the Women's Employment Board and to the Australian Glass Workers' Union calling upon them to show cause why the writ should not issue to prohibit them from proceeding upon an application made by the union and a decision given by the Board. The Women's Employment Board is appointed under the *Women's Employment Regulations* contained in the schedule to the *Women's Employment Act* 1942 as amended from time to time, the last amendment which is material in this case being contained in Statutory Rules 1943 No. 251. The members of the Board so appointed are officers of the Commonwealth within the meaning of s. 75 (v.) of the Constitution, which confers jurisdiction upon this Court in matters in which a writ of prohibition is sought against such officers.

Reg. 7 provides that (subject to an exception not material in this case) an employer who proposes to employ females on work specified in reg. 6 (1) shall not employ any female on that work unless there

is in force a decision that females may be employed on that work. Reg. 7B permits an application for a decision of the Board to be made by organizations of employees.

Reg. 6 (1) is now as follows :—

"6—(1) Where an employer proposes to employ, is employing, or has at any time since the second day of March, 1942, employed, females on 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,

the employer shall, unless an application in relation to that employment has already been made (whether prior to the date of disallowance of Statutory Rules 1942 No. 548, or after the commencement of this regulation), or a decision in respect of that work is in force, forthwith make application to the Board for a decision in accordance with this regulation."

The respondent union made an application to the Board to give a decision with respect to the wages to be paid and the hours and conditions to be observed in respect of females employed by the prosecutor, Crown Crystal Glass Co. Pty. Ltd. The work in respect of which the application was made was described in the application as—(*a*) work which is usually performed by males ; and (*b*) work which was, prior to the employment of females by the company, or is, performed by males in the establishment of the company. The phrasing of par. (*b*) of the application shows that it was based upon the Regulations as they originally appeared in the schedule to the *Women's Employment Act*, and not upon the Regulations in their later form. In the application of the union the work to which the application related was not alleged to fall under head (*c*) of reg. 6 (1), that is, it was not alleged to be work which, immediately prior to the outbreak of the present war, was not performed in Australia by any person. In the opinion of the Board, however, the work was covered by reg. 6 (1) (*c*) and the decision of the Board proceeded upon that basis.

The application related to seven classes of work which were described in some detail in the application. The classification of the work was made under the following headings :—(1) cutter ; (2) ampoule section ; (3) tube-glass fabrication, pharmaceutical and scientific glass articles ; (4) testing hydrometers ; (5) laboratory

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tube and ampoule examining and/or sorting; (6) pharmaceutical and scientific glass packers; (7) calibrating.

The work mentioned in the application was performed as part of the work of manufacturing scientific glassware. It was not disputed that scientific glassware was not manufactured in Australia before the war, so that the industry of manufacturing such products might properly be described as a new industry. But some of the work mentioned, for example the cutting of glass tubes, had been done in Australia before the war, and some of the work had usually been done by women.

It was contended for the union that the work which the females in question were doing was the manufacture of scientific glassware. For the company it was contended that the work which the women were doing consisted in the seven operations described under the seven headings above set out.

The Board gave a decision applying to "the work covered by the application", and in the reasons for its decision said that the work concerned in the application was new in Australia, being a notable achievement for the Australian glass industry. The "work" to which reference was thus made was clearly the manufacture of scientific glassware and did not consist in the particular operations referred to in the application. In the course of argument the learned Chairman of the Board said to a witness who was giving evidence that cutting glass had been done for many years by girls: "It depends on what you mean by 'work.' If you mean the manufacture of these scientific instruments, this is the first time that work has been done in Australia." The witness replied that he was speaking of the actual cutting. The Chairman then said: "Cutting may be old work, but if it is part of the manufacture of scientific instruments, then it becomes part of that work. . . . If the right definition" (of work) "is 'making scientific glass instruments' then you admit that was never done in Australia before. If you mean by the word 'work' cutting bits of glass into pieces, that has been done by girls for years." The company objects that the jurisdiction of the Board depends upon the work in respect of which it makes a decision being in fact work which falls within one of the descriptions contained in reg. 6 (1), and contends that it is evident that some of the work of females to which the decision of the Board applies is not work included within the regulation if the meaning of "work" is properly understood, namely as relating to the actual operations performed by an employee.

A further objection is taken to the decision. It is the duty of the Board in making a decision to decide "the rates of payment to

be made to females employed on the work" (reg. 6 (7)). The decision of the Board refers specifically only to two of the classes of work mentioned in the application, namely, "glass-cutter" and "sorters and packers." The rest of the decision relates to some otherwise undescribed work referred to as "elementary grade" and "intermediate grade." The terms "elementary" and "intermediate" are not defined in the decision. There is no suggestion that they bear any trade meaning. The transcript of evidence shows that they doubtless refer to a suggestion for classification of "work" made by the employer in the course of the hearing which was placed before the Board in an exhibit. But the decision does not refer to this exhibit, and it is therefore not possible to ascertain from the decision what rates of pay are prescribed in the case of whatever work may be included in elementary and intermediate grades respectively. It is contended for the company that the Board has therefore not decided what rates of payment are to be made to females and that the decision is therefore not a decision which the Board has jurisdiction to make. No formal order expressing the decision has, however, been drawn up, and I am not prepared to decide the case upon a ground which would probably disappear if a formal decision were drawn up. I granted the order nisi, but I suggest that in future, except perhaps in special cases, an order nisi for prohibition should not be granted unless a formal order has been drawn up.

The Regulations do not define the term "work," and, in order to discover what it means in the Regulations, it is necessary to consider the Regulations as a whole. A person may do all the work in the manufacture of an article and in such a case his work may quite properly be described as making that article, whether the article be a glass ampoule or a woman's hat. In many cases, however, a product is the result of the combined work of many people. The calibrating of a glass tube in a particular factory may be rightly described as work in the industry of scientific instrument making. It may also be accurately described as the work of calibrating glass tubes.

The view of the Board has already been stated—that the work of the female employees in question should be regarded as that of manufacturing scientific glassware, and that, as such glassware had not been made in Australia before the outbreak of the war, the application related to work which fell within the description of reg. 6 (1) (*c*). On the other side it was argued that the Board adopted a wrong criterion in determining the nature of the work done by the seven classes of women in question—that it was a mistake

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in the present case to regard only the ultimate product of the industry, and that attention should be directed to the actual operations carried on by the different operators.

In my opinion a consideration of the Regulations shows that the latter is the correct view. Various provisions in the Regulations show that it is the duty of the Board to consider the work in respect of which an application is made in relation to the females to be employed upon that work. It is possible to consider the relation of females to work only when one considers the actual operations which the females perform. Consideration in detail of reg. 6 demonstrates, I think, that this is the case.

The Regulations apply where an employer employs females on work. The phrase " employ a person on work " must refer to the particular operation or job which the person is hired to do. Thus, for example, a man who is employed to stoke an engine in a glass factory is employed on the work of stoking, and there would be no relevance for the purpose of these Regulations in saying that he was employed in the work of making glassware. Every person in the factory might be said in a sense to be employed in the work of making glassware, but such a description of their activities would not make it possible to apply any industrial standards of wages, hours, efficiency, &c., to them. Accordingly, in my opinion, the governing words of reg. 6, " employ . . . on work," show that the particular operation performed by the operative is the crucial matter in applying these Regulations.

Other provisions in reg. 6 lead to the same conclusion. For example, reg. 6 (4) provides that the Board shall decide whether females may be employed on work mentioned in the application. In order to make such a decision the Board must look at the particular operations which the females are employed to perform, and not merely at the industry of the employer. It would be useless, for example, for the Board to determine whether females might be employed in the industry of " shipbuilding," where scores of operations are necessary in order to bring about the final result. It would be necessary for the Board to look at the particular operation which the females in question were performing, or which it was proposed that they should perform.

Reg. 6 (5) (*b*) requires the Board to decide the special conditions (if any) regarding the safety, health and welfare of females employed on the work which should be observed by the employer. Questions of safety, health and welfare in relation to work can be considered only when the particular work which is actually being done by the person in question is considered. In the present case, for example,

the evidence shows that some of the work in question is performed under conditions of high temperature and close atmosphere. That is the kind of thing which should be considered when the Board is exercising its function under sub-reg. 5 (*b*). It would be quite impossible for the Board to lay down conditions with relation to safety, health and welfare by considering the work as consisting merely in the making of scientific glassware, and not in performing the particular operation which the operative was hired to do.

Under reg. 6 (7) the Board is to decide the rates of payment to be made to "females employed on the work." This regulation evidently requires the Board to distinguish between the work done by different women so as to fix appropriate rates of payment. In the present case it could hardly be suggested that the Board would discharge its function if, regarding "work" as consisting in the manufacture of scientific glassware, the Board decided that a particular rate of pay should be paid to all women engaged in and about the making of scientific glassware, whatever the character of their work might be—manual or clerical, skilled or unskilled. It seems obvious that in applying this provision the particular work done by the operative must be considered.

Reg. 6 (8) requires the Board to pay attention to "the efficiency of females in the performance of the work and any other special factors which may be likely to affect the productivity of their work in relation to that of males." Here the comparison must be between, e.g., a male calibrator and a female calibrator. It would be impossible, having regard to the large number of varying operations concerned, to make any comparison between the efficiency and productivity of females and males in the industry of making scientific glassware generally, irrespective of the particular work which is done by females and males.

Finally, reg. 6 (9) requires rates of payment to adult females to be not less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature. Again, the standard must be applied in relation to particular rates of payment for specific classes of work. Much, if not most, of the work with which the Board deals must be work to which industrial awards of one kind and another apply. The standard prescribed by reg. 6 (9) would generally be applied by reference to such awards. It may be added that the awards will, as a general rule, provide a classification of work which will be of great assistance in applying such a regulation as reg. 6, which requires work to be identified and defined. Such identification and definition is a question of fact determined by informed

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opinion. Existing recognitions of classifications of work contained in industrial awards should enable the Board to identify and classify work without any serious risk of it being held that a decision of the Board had adopted a faulty criterion of the meaning of the word "work" in regulations.

The result of these considerations shows that the Board has included in its decision work, in the sense of the particular operation which the employee is hired by the employer to perform, which is not shown to fall within any of the headings (*a*), (*b*) and (*c*) in reg. 6 (1). Further, it is shown that some of the work to which the decision applies does not fall within any of those headings. Accordingly the decision was not authorized by reg. 6 (1) and the order nisi should be made absolute.

RICH J. I agree that the Board interpreted the regulation wrongly and accordingly that the rule nisi should be made absolute. In such a case the principle applicable is that "a judge cannot give himself jurisdiction by construing an Act of Parliament or a document wrongly" (*R.* v. *Judge of County Court of Lincolnshire* (1); *Liverpool Gas Co.* v. *Everton* (2), where *Elston* v. *Rose* (3), referred to by my brother *Williams*, is cited).

STARKE J. Rule nisi to prohibit a decision of the Chairman and members of the Women's Employment Board given on 13th July 1944 in the matter of an application by the Australian Glass Workers' Union under reg. 7B of the *Women's Employment Regulations*. That regulation provides that any organization of employees to which any female employed on work specified in sub-reg. 1 of reg. 6 of the Regulations belongs, may make application 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 the work, and the Board shall forthwith deal with the application as if it were an application under reg. 6 of the Regulations. And sub-reg. 1 of reg. 6 provides that where an employer proposes to employ, is employing, or has at any time since 2nd March 1942 employed, females on work—(*a*) which is usually performed by males; (*b*) which, within the establishment of the 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, the employer shall make application to the Board for a decision in accordance with the regulation.

(1) (1887) 20 Q.B.D. 167, at p. 170.
(2) (1871) L.R. 6 C.P. 414, at pp. 420, 423
(3) (1868) L.R. 4 Q.B. 4.

The Board shall decide whether the work specified in the application is work specified in sub-reg. 1 and if the Board decides that females may be employed on the work it shall decide, *inter alia*, subject to the regulation, the rate of payment to be made to females employed on the work, the hours of labour and any special conditions regarding the safety, health and welfare of females employed thereon. The rate of payment to be made to any adult female, in accordance with any decision under the regulation, shall not be less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature.

The application was based on clauses (*a*) and (*b*) of reg. 6, sub-reg. 1, but the Board acted upon clause (*c*) of reg. 6, sub-reg. 1, relying, no doubt, upon the provisions of reg. 7C (1). The Board held that the word " work " in these Regulations referred to the product of the operations or labour of the females or, in other words, that the work with which the application was concerned was new in Australia because " scientific glass instruments " which were the product of female labour were never before made in Australia. The Board stated in its reasons that it was agreed that the females concerned in the application fell within the Board's jurisdiction under reg. 6 (1) (*c*), but that agreement or admission was made upon the assumption and on the basis that the Board's construction of the regulation was correct. If the Board was in error in its construction of the regulation and gave itself jurisdiction by applying a wrong rule of law to the facts, then its decision cannot stand and is in fact without jurisdiction (*Elston* v. *Rose* (1)).

" Work " is not defined by the Regulations, but in its context the word plainly refers to the labour or operations performed by the workers and not to the product of their labour or, in other words, the commodity manufactured. Thus reg. 5C refers to the nature of the work, reg. 6 to work performed by males within the establishment of the employer, to the hours during which females may be employed on the work and the special conditions (if any) regarding the safety, health and welfare of females employed on the work, to the efficiency of females in the performance of the work and the productivity of their work in relation to that of males. The rate of payment for adult females is to be not less than sixty per cent nor more than one hundred per cent of the rate of payment made to adult males employed on work of a substantially similar nature. And reg. 7C provides that a decision given under the regulation may be applied to all or any employers. All which, in my opinion, makes it clear

(1) (1868) L.R. 4 Q.B. 4.

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that " work " in the regulation means the operation or labour performed by the workers and not the commodity manufactured. But it is, of course, a question of fact whether the work on which females are or may be employed was usually performed by males or was within the establishment of the employer performed by males at any time since the outbreak of war or was not immediately prior to the outbreak of war performed in Australia by any person. And the determination of those questions of fact involves a comparison of operations, the nature and character of the operations and their relation to the commodities manufactured. It may be that some of the work performed by the females concerned in the application before the Board was not prior to the outbreak of war performed in Australia by any person, and it seems likely that some of the work was usually performed by males or was in the establishment of the employer performed by males since the outbreak of the war. But those are matters to be investigated by the Board and which it has never yet investigated. The Board has asserted and exercised jurisdiction merely because the commodities made or manufactured, scientific glass instruments, were never before produced in Australia. The decision of the Board is therefore bad, but it is desirable to point out instances of erroneous conclusions which the Board probably reached because it applied a wrong rule of law or of construction to the facts. The decision provides rates of remuneration for females engaged as glass cutters at ninety per cent of the base rate prescribed by the Glass Makers' (State) Award, New South Wales, and as sorters and packers at ninety per cent of the appropriate male rate, although there is evidence that females had been employed to do work of this nature before the war. And there is evidence to the same effect in some branches of the fabricating section of the prosecuting company. Another objection has also been taken to the Board's decision, namely, that it does not sufficiently specify the work to which the periods of probation and the rates of pay therein set out are intended to apply. The decision classifies the work in the fabricating section of the company's industry into three grades, elementary, intermediate and advanced. But it nowhere defines what work is elementary, intermediate or advanced. The company, it is true, suggested this classification, and it made some suggestions as to the nature of the work that was included in each grade. The Board did not adopt these suggestions, but left it to be determined by an appropriate industrial tribunal. Reg. 6 (7), however, prescribes that the Board shall, subject to the regulation, decide the rates of payment to be made to females employed on the work, that is, on the work specified in the application to the Board. No such decision has been made by the Board : it is quite impossible to

ascertain from the decision what work falls within the various grades or what rate of payment is to be made in respect of any work in the fabricating section of the company's business.

The objection is good and is also fatal to the decision of the Board, for it is an integral whole and, in my opinion, is incapable of severance.

The constitutional validity of the *Women's Employment Act* 1942 and the Regulations was not challenged in this case, and I need do no more than refer to the case of *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations* (1)), with which I was, and still am, unable to agree.

The rule nisi for prohibition should be absolute.

McTIERNAN J. I agree that the order nisi should be made absolute and with the reasons of the Chief Justice.

WILLIAMS J. This is an application by Crown Crystal Glass Co. Pty. Ltd., to make absolute a rule nisi for a writ of prohibition prohibiting his Honour Judge *Foster* as Chairman and the members of the Women's Employment Board and the Australian Glass Workers' Union from further proceeding upon a decision given by that Board on 13th July last in respect of an application dated 2nd February 1944 made by the respondent union under reg. 7B of the *Women's Employment Regulations* to determine the rates of payments to be made and the hours and conditions to be observed in respect of female employees employed by the applicant company on the work specified in the application.

Reg. 6 of the *Women's Employment Regulations* confers jurisdiction upon the Board to decide whether the work specified in the application is work specified in sub-reg. 1 of that regulation, and to exercise the other powers conferred by the Regulations. The work specified in sub-reg. 1 is divided into three classes, namely, work (*a*) which is usually performed by males; (*b*) which, within the establishment of the particular 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.

It was claimed by the union in the application that the work which the females were doing in the present case was work which fell within classes (*a*) or (*b*), but the Board did not decide that the work fell within either of these classes, but stated that it had been agreed that the work fell within class (*c*). The evidence includes a copy of the proceedings before the Board which shows that the company's solicitor admitted that the articles upon the production

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

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of which the females were engaged, which can be broadly described as glassware mainly for laboratory purposes, were goods which had never been manufactured in Australia prior to the war; and that the Board held the opinion that if an article was not produced in Australia before the war, the persons engaged upon its production were engaged upon work which was not performed in Australia before the war.

Upon this view of the construction of reg. 6 (1) the Board was justified, in the light of the solicitor's admissions, in finding that it had jurisdiction.

I agree with Mr. *Maughan* that the application to make the rule absolute must fail if there was evidence on which the Board could make this finding. In order, however, to ascertain whether there was any such evidence, it is necessary to determine the proper construction to be placed upon the word "work" in reg. 6 (1). The word in its ordinary and natural grammatical signification refers to what a person is doing, and a careful consideration of the Regulations as a whole confirms my opinion that it is in this sense that the word is used in the sub-regulation. In order to determine whether the work in question was work which was not being performed in Australia by any person before the war, it is necessary to take the whole of the circumstances into account, including the article which is produced by the operation on which the employee is engaged, but I agree with Mr. *Ferguson* that if all the employee is doing is performing some mechanical or other operation that was done in Australia before the war, such work does not fall within reg. 6 (1) (*c*) because the employee is performing that operation in order to manufacture an article which had not been manufactured in Australia before that date.

For these reasons I am of opinion that, except on a wrong assumption of law, the admission that the glassware in question was not made in Australia before the war was not sufficient to enable the Board to decide that the work in question fell within reg. 6 (1) (*c*), so that its decision can be reviewed by prohibition (*Elston* v. *Rose* (1)), and that the rule should be made absolute.

Order nisi for writ of prohibition made absolute.

Solicitors for the prosecutor, *J. Stuart Thom & Co.*

Solicitor for the respondent members of the Women's Employment Board, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent union, *Abram Landa, Barton & Co.*

J. B.

(1) (1868) L.R. 4 Q.B. 4.