[HIGH COURT OF AUSTRALIA.]

# THE KING

AGAINST

# CONNELL AND ANOTHER;

# EX PARTE THE HETTON BELLBIRD COLLIERIES LIMITED AND OTHERS.

H. C. OF A. 1944.

SYDNEY, *Aug.* 15, 17, 22.

MELBOURNE, *Oct.* 3.

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

*National Security—Economic organization—Remuneration "in respect of any employment"—Alteration by any industrial authority prohibited by Regulations—Coal-mining industry—Disputes—Members of Industrial Federation—Industrial Authorities appointed under statute passed subsequent to Regulations—Applicability of Regulations—Statutes—Implied repeal—Coal Production (War-time) Act* 1944 (*No.* 1 *of* 1944), *ss.* 5, 29-35, 41—*National Security (Economic Organization) Regulations* (*S.R.* 1942 *No.* 76—1944 *No.* 52), *regs.* 4, 16, 17—*National Security (Coal Mining Industry Employment) Regulations* (*S.R.* 1941 *No.* 25—1944 *No.* 48), *regs.* 7, 14, 18.

*National Security—Economic organization—Coal-mining industry—Rates of remuneration—"Anomalous"—Industrial authority—"Satisfied"—Jurisdiction—Decision—Prohibition—Award requiring approval of Minister—Award filed in Commonwealth Court of Conciliation and Arbitration—Decision according to equity and good conscience—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 75 (v.)—*Coal Production (War-time) Act* 1944 (*No.* 1 *of* 1944), *ss.* 31, 32 (1), 34 (1) (*c*), 35, 40—*National Security (Economic Organization) Regulations* (*S.R.* 1942 *No.* 76—1944 *No.* 52), *regs.* 16, 17.

Regulations 16 and 17 of the *National Security (Economic Organization) Regulations** prohibited, with certain exceptions, the inclusion by an Industrial Authority in any award of any provision altering in respect of any employment the rates of remuneration applicable to that employment on 10th February 1942.

*Held*, by the whole Court, that the Central Industrial Authority and the Local Industrial Authority appointed under the *Coal Production (War-time) Act* 1944 were Industrial Authorities within the meaning of the *National*

* Statutory Rules 1942 No. 76 as from time to time amended up to and including Statutory Rules 1942 No. 490, since repealed and replaced—see Statutory Rules 1945 No. 11.

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*Security (Economic Organization) Regulations* and bound by regs. 16 and 17; these regulations were not impliedly repealed by the *Coal Production (War-time) Act* 1944 in relation to the Authorities constituted under that Act.

Regulation 17 (1) (*b*) of the *National Security (Economic Organization) Regulations* provided that an Industrial Authority might alter any rate of remuneration "with the approval of the Minister, if the Industrial Authority is satisfied that the rates of remuneration . . . are anomalous."

*Held*, by the whole Court,

(1) that to be "anomalous" within the meaning of reg. 17 (1) (*b*) a rate of remuneration must be incongruous with some general rule; and

(2) that an Industrial Authority is not "satisfied" within the meaning of that regulation, so as to found its authority to alter existing rates, if its opinion is based upon a misconstruction of the regulation.

A Local Industrial Authority appointed under the *Coal Production (War-time) Act* 1944, after hearing evidence in a dispute in which alteration of rates of remuneration was claimed, stated that he was satisfied that "an anomaly exists" and awarded increased rates of remuneration for certain duties to shift men employed at certain collieries. His award was approved by the Minister in accordance with reg. 17 (1) (*b*) of the *National Security (Economic Organization) Regulations* and filed in the Commonwealth Court of Conciliation and Arbitration pursuant to ss. 35 and 31 of the *Coal Production (War-time) Act* 1944. By these sections a Local Industrial Authority is to act according to equity, good conscience and the merits of the case without regard to technicalities and by s. 40 the decision of an Industrial Authority appointed under the Act is not to be subject to prohibition on any account whatever.

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

(1) that having regard to the terms of the claim, the evidence, and the award the Local Industrial Authority was not properly "satisfied" that the rates of remuneration were "anomalous" within the meaning of the regulation; and

(2) that prohibition lay against him in respect of his award.

*Per McTiernan* J.: The Local Industrial Authority was *functus officio* after his award was approved by the Minister and filed in the Court and prohibition would not lie.

*Held*, by the whole Court, that the award of an Industrial Authority is not bad because it does not disclose jurisdiction on its face.

ORDER NISI for prohibition.

A dispute arose between the Australasian Coal and Shale Employees' Federation on the one hand and The Hetton Bellbird Collieries Ltd., Hebburn Ltd., J. & A. Brown and Abermain Seaham Collieries Ltd., Caledonian Collieries Ltd. and Cessnock Collieries Ltd., proprietors of collieries on the Maitland coal-field, on the other

hand, upon a claim made by the Federation that " shiftmen working or timbering in high places shall be paid additional allowance as follows, when called upon to work in places of certain heights :— 14 feet to 16 feet—2s. per day extra ; over 16 feet to 18 feet—4s. per day extra ; over 18 feet to 20 feet—6s. per day extra ; over 20 feet to 22 feet—8s. per day extra ; over 22 feet to 24 feet—9s. per day extra ; at heights in excess of 24 feet—11s. per day extra."

The Central Industrial Authority appointed under s. 29 of the *Coal Production (War-time) Act* 1944 referred the claim to Mr. James Connell, a Local Industrial Authority appointed under s. 33 of the Act, for investigation and settlement.

In accordance with the reference meetings were held on 29th May 1944 and 5th June 1944 at which representatives of the proprietors of the collieries, as employers, and the employees respectively were in attendance.

Evidence was given on behalf of the parties to the dispute.

In his decision, made on 15th June 1944, Mr. Connell set forth the various contentions submitted to him on behalf of the parties and stated that all such matters and all the evidence submitted had been carefully considered by him. He awarded, ordered and determined that " at collieries in the Maitland and North-West Districts of New South Wales (with the exception of the Pelton Colliery) the following shall apply :—

1. Where shiftmen are called upon to erect cross timbers at a height of 16 feet or more to make such place safe for working whilst so occupied on such work the shiftmen shall in addition to the recognized shift rate of wages be paid four shillings (4s.) per shift during the time they are necessarily occupied on such work.

2. Where shiftmen are called upon to erect props 17 feet in length and up to 20 feet they shall be paid one shilling (1s.) per shift extra. Over 20 feet in length up to 24 feet two shillings (2s.) per shift extra. Over 24 feet and more in length three shillings (3s.) per shift extra.

3. Where a mobile loader operates on a fall each member of the crew shall be paid a consideration payment of two shillings (2s.) per shift in addition to the recognized shift rate of wage during the time they are so occupied.

4. Where shiftmen are called upon to perform work of boring trimming or taking down coal or stone at or near a pillar face and the height of such place is 24 feet or more, whilst so occupied on such work the shiftmen shall in addition to the recognized shift rate of wage, be paid six shillings (6s.) per shift.

The foregoing reading and construction shall become operative at the Aberdare Extended Colliery as from the 17th day of April

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1944, and at Abermain No. 2 Colliery as from and on the 24th day of May 1944. At all others as from and on the 26th day of June 1944."

Upon an application made to the High Court on behalf of the colliery proprietors as prosecutors, *Williams* J. granted an order nisi calling upon Mr. Connell, as Local Industrial Authority, and the Australasian Coal and Shale Employees' Federation to show cause why a writ of prohibition should not issue directed to each of them prohibiting them and each of them from further proceeding upon any of the clauses of Mr. Connell's award. The grounds, so far as material, upon which the application was based were as follows:—

1. That clauses 1, 2 and 3 of the said award were made unlawfully because they were made in breach of reg. 16 of the *National Security (Economic Organization) Regulations* and were not justified by reg. 17 of those Regulations.

2. That clauses 1, 2 and 3 of the said award were made in excess of jurisdiction.

3. That clauses 1, 2 and 3 contain provisions purporting to alter in respect of the employment therein mentioned the rates of remuneration applicable to those employments on 10th February 1942.

4. That Mr. Connell was not satisfied that the rates of remuneration in respect of which he purported to make the said alterations were anomalous.

5. That there was no ground upon which Mr. Connell could be satisfied that the rates of remuneration in respect of which he purported to make the said alterations were anomalous.

7. That clause 3 of the award went beyond the terms of the reference to Mr. Connell by the Central Industrial Authority in that it purported to award a consideration payment (*a*) to employees other than shiftmen, (*b*) in respect of work other than work in high places.

The secretary of the Northern Colliery Proprietors Association, of which the colliery proprietors parties to the dispute were members, deposed, *inter alia*, that he was present at the whole of the hearing of the dispute by Mr. Connell, as a Local Industrial Authority; that no evidence was led, no statements were made, and no arguments were put by the representatives of the Federation to Mr. Connell directed to show that the shiftmen's rates of remuneration which Mr. Connell was requested to alter were anomalous; that for many years prior to 10th February 1942 the shiftmen's rates of remuneration as fixed from time to time by award or industrial agreement and as in fact paid to shiftmen on the Maitland coal-field were

rates fixed and paid on the basis that it was part of a shiftman's normal duties to work in high places; that, under an award of the Commonwealth Court of Conciliation and Arbitration in force at that date, no extra payment over and above the shiftman's ordinary rate was payable to a shiftman for working in a high place, although in certain collieries an extra payment was payable to shiftmen for certain work in a place where a high fall of coal and/or stone from the roof had occurred; that from a date prior to April 1942 until late in March 1944 Mr. Connell, as chairman of the Local Reference Board (Maitland District) appointed under the provisions of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, refused all of the many claims made to the Board for extra payment for shiftmen called upon to work in high places save where the shiftmen were called upon to work in a place where a high fall had occurred; that in a decision given on 20th March 1944 by Mr. Connell as such chairman he stated: "In all cases determined by the Board extra payments, where conceded, have been confined to shiftmen where they are called upon to timber and make safe falls of roof above a height of 16 feet"; that of the five matters involving a claim for extra payment to shiftmen dealt with by Mr. Connell since he was appointed a Local Industrial Authority, three only were granted, one in respect of certain shiftmen when occupied in doing certain work above the recognized parting; another in respect of certain shiftmen at Bellbird Colliery when employed on certain work in pillar extraction, and a third to certain shiftmen at Abermain No. 1 Colliery where they are called upon to work at a height in excess of 16 feet taking down stone roof or floaters, trimming the rib side of lips of top coal or preparing a chanch at a height above 16 feet, or erecting cross timbers or sets of timber to secure the roof. The deponent said, in reference to clause 1 of the award, that for many years past and prior to 10th February 1942 in various mines in the Maitland district it has been in the normal course of the duties of shiftmen from time to time to erect cross timbers at a height of 16 feet or more in places where no fall has occurred; in reference to clause 2, that for many years past and prior to 10th February 1942 in various mines in the Maitland district it has been in the normal course of duties of shiftmen regularly and frequently to erect props 24 feet in length and more in places where no fall has occurred; in reference to clause 3, that employees other than shiftmen are employed on mobile coal-loaders; that at the hearing of the matter before Mr. Connell no claim was made by representatives of the Federation in respect of employees other than shiftmen; and that for some years past and prior to 10th February 1942 in various mines in the

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Maitland district mobile coal-loaders have from time to time operated on falls less than 16 feet in height and have operated on falls where such operation is not carried out to make the place safe for working.

Upon the return of the order nisi argument was heard on the preliminary question whether regs. 16 and 17 of the *National Security* (*Economic Organization*) *Regulations* apply to a Local Industrial Authority appointed under the *Coal Production* (*War-time*) *Act* 1944.

Further facts and the relevant statutory provisions and regulations appear in the judgments hereunder.

*Kitto* K.C. (with him *Ashburner*), for the prosecutors. Regulations 16 and 17 of the *National Security* (*Economic Organization*) *Regulations*, although earlier in point of time, do limit and affect the powers, capacities and functions of Industrial Authorities acting under the *Coal Production* (*War-time*) *Act* 1944. There is not any intention shown in the scheme of legislation that that Act should establish a tribunal immune from the limitations of jurisdiction which applied to the tribunal which preceded it, and particularly the limitations which apply to the Commonwealth Court of Conciliation and Arbitration, because the jurisdiction conferred upon the Central Industrial Authority and a Local Industrial Authority is conferred by reference to the jurisdiction of the Court and the Court is itself subject to the limitations imposed by the *Economic Organization Regulations*. These Regulations, having the effect which is prescribed by s. 18 of the *National Security Act* 1939-1943 notwithstanding inconsistency with any other Act of the Commonwealth Parliament, should be regarded as paramount unless the Parliament has clearly shown the intention that a subsequent Act shall not be construed as limited by an existing regulation. Parliament has not evinced an intention under the *Coal Production* (*War-time*) *Act* 1944 to establish tribunals which, although given powers almost in precise terms identical with those which had belonged to their predecessors, would have a jurisdiction unfettered by a provision which was a fundamental provision under the *Economic Organization Regulations* for the economy of the people for war-time purposes. Regulation 16 of those Regulations obviously was passed for the purpose of ensuring that there should be no undue increase in the remuneration of employees during the war and care was taken that no subsequent regulation should limit precisely the cases in which increases might be given. That regulation imposes a general limitation, and unless it plainly appears that Parliament intended to abrogate that legislation in regard to a particular field in that one

industry, the Court should not hold that it had done so. It appears from s. 31 of the Act that the Act removes the settlement of a dispute in the coal-mining industry from some tribunals to another tribunal, but it does not alter the law. The Act is a special Act in that it creates a special tribunal, but it does not indicate that that tribunal shall not be within the limitations imposed by law on all tribunals. The provisions of the Act are completely consistent with the continued application of reg. 16 and reg. 17 of the *Economic Organization Regulations*.

*Weston* K.C. (with him *Conybeare*), for the respondent Australasian Coal and Shale Employees' Federation. The Parliament intended by the *Coal Production (War-time) Act* 1944 to place the matters dealt with by it in a special category for every purpose. It is significant that this was done by statute and not by regulation. This method was chosen, doubtless, in order that the statute might repeal, so far as there was any inconsistency, not only regulations previously promulgated, but any provision of the *National Security Act* itself. It was desired, within the limits of the defence power, to ensure that there would be no competitive legislation of any kind, earlier in time, in relation to that statute. The scheme of the *Coal Production (War-time) Act* 1944 is that it should, as shown by the first step to that end made in statutory rule No. 295 of 1943, place the coal-mining industry outside the provisions of the ordinary industrial law. Reg. 16 of the *Economic Organization Regulations* is an express provision relating only to the " pegging " of the rate of remuneration in force on the specified date. The absence from the *Coal Production (War-time) Act* of a similar express provision shows that Parliament intended that the Industrial Authorities established under the Act should have power, *inter alia*, to deal with remuneration, that is, rates of pay, in the coal-mining industry. Section 3 shows that the paramount object of the Act is to secure the production of coal and that any impediment under existing law against achieving that objective was to cease in relation to the coal-mining industry, even if it meant the paying of a higher wage than the worker in the industry was entitled to. Prices fixed by the Commonwealth Coal Commissioner under the powers conferred upon him by s. 17 (2) (*b*) of the Act would override any fixation of prices by the Prices Commissioner under the *National Security (Prices) Regulations*. The *Economic Organization Regulations* and the *Prices Regulations* are *pro tanto* repealed by s. 17 (2) (*b*). Similarly, the *Contracts Adjustment Regulations* are *pro tanto* repealed by s. 17 (2) (*g*). A Local Industrial Authority under the

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Act has the powers, *mutatis mutandis*, mentioned in s. 31. One of the additional powers provided by the combined operation of s. 31 and s. 34 of the Act is a right to disregard the " pegging " of wages under the *Economic Organization Regulations*; it is a power to settle a dispute without regard to any pre-existing law. Section 18 of the *National Security Act* 1939-1943 was meant to deal with pre-existing Acts of Parliament and not future Acts.

*Watt* K.C. (with him *E. J. Hooke*), for the respondent Connell, and *Sugerman* K.C. (with him *Dignam*), for the Commonwealth (intervening), adopted the argument of *Weston* K.C. and had nothing to add.

*Kitto* K.C., in reply. The words " in addition to any other powers conferred on him by this Act " in s. 31 (1) are satisfied by the specific powers conferred by sub-ss. 3, 4 and 6 of s. 31.

*Cur. adv. vult.*

Aug. 17.

The following written judgments on the preliminary question were delivered:—

LATHAM C.J., RICH and WILLIAMS JJ. In this matter the Court has heard argument upon the question whether regs. 16 and 17 of the *National Security* (*Economic Organization*) *Regulations* (Statutory Rules 1942 No. 76 as amended) apply to a Local Industrial Authority constituted under the *Coal Production* (*War-time*) *Act* 1944.

Regulation 16 of the *Economic Organization Regulations* is as follows:—" Subject to this Part, an Industrial Authority shall not, after the commencement of these Regulations, include in any award, order or determination any provision altering, in respect of any employment, the rate of remuneration applicable to that employment (whether in pursuance of any award, order or determination or otherwise) on the tenth day of February, One thousand nine hundred and forty-two." Reg. 17 provides certain exceptions to the general rule contained in reg. 16.

" Industrial Authority " is defined in reg. 4 so as to include " any . . . tribunal or person constituted by or under any law of the Commonwealth for the purpose of hearing and determining industrial disputes and making awards or orders in settlement thereof."

At the time when the *Economic Organization Regulations* were made (19th February 1942) the *National Security* (*Coal Mining Industry Employment*) *Regulations* were in operation. Under those Regulations a Central Reference Board and Local Reference Boards

were established which had powers under reg. 7 and reg. 14 to hear and determine certain industrial disputes and to make awards or orders in settlement thereof. Those bodies accordingly were industrial authorities within the meaning of the *Economic Organization Regulations*.

Statutory rule No. 295 of 1943, made on 10th December 1943, amended the *Coal Mining Industry Employment Regulations* in certain respects, introducing a Central Coal Authority upon which were conferred powers to settle disputes in which the Australasian Coal and Shale Employees' Federation (one of the respondents to these proceedings) was concerned. Other amendments related to the powers of Local Reference Boards with respect to such disputes.

The *Coal Mining Industry Employment Regulations* included a provision in reg. 18 which prevented the operation of any award of the Commonwealth Court of Conciliation and Arbitration which was inconsistent with an award or order made under the Regulations.

The *Coal Production (War-time) Act* came into operation on 8th March 1944. (Statutory Rules 1944 No. 48 made on 10th March 1944 made amendments in the *Coal Mining Industry Employment Regulations* designed to remove from the operation of those Regulations the matters for which the Act made special provision.) The Act provided for the appointment of a Commissioner charged with the duty of securing an increase in the production of coal and with wide powers of regulating and controlling the production, handling, marketing, &c., of coal. The Commissioner was given a specific power to fix the prices of coal. This power, it is said, can be effective only if the fixation of the price of coal by the Commissioner supersedes any fixation of prices under the more general *National Security (Prices) Regulations*. It was contended for the respondents that this provision with respect to prices indicates an intention that the Act shall supersede in relation to coal any prior legislation as to prices which applied to coal, and that similar reasoning applies to the powers of Industrial Authorities under the Act. But this proposition can be accepted only in relation to prior legislation which is inconsistent with the Act. In the case of the fixation of prices it may be that effect could not be given to the later Act conferring price-fixing powers upon the Coal Commissioner appointed under the Act unless his power prevailed over the power of the Prices Commissioner appointed under the earlier *Prices Regulations*. There cannot be at one and the same time two different fixed maximum prices for the same commodity. The later legislation in this case may be inconsistent, in relation to coal, with the earlier Prices regulation. But, even if this should be so, there is no necessary inconsistency in

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regarding the prohibition contained in reg. 16 of the *Economic Organization Regulations* as applying to the Industrial Authorities set up under the later statute. They can discharge their functions, subject to the prohibition, in the same way as other Industrial Authorities discharge their functions, subject to the same prohibition.

Section 29 of the Act provides for the appointment of a Central Industrial Authority and s. 30 provides that that Authority shall have cognizance of industrial disputes between the Australasian Coal and Shale Employees' Federation and employers or associations of employers referred to him by the Federation or the employers or associations parties thereto or by the Commissioner. "Industrial dispute" is defined in s. 5 as meaning any dispute as to industrial matters in relation to, *inter alia*, wages or rates of pay. The Central Industrial Authority also has cognizance of other industrial matters mentioned in s. 30, including any matter affecting industrial relations in the coal-mining industry which the Commissioner declares is, in the public interest, proper to be dealt with under the Act.

Section 31 provides that the Central Industrial Authority shall have power to consider and determine any industrial dispute or any matter of which he has cognizance, and for that purpose shall have (in addition to any other powers conferred on him by the Act) all powers which are given to the Court or the Chief Judge of the Court as regards an industrial dispute of which the Commonwealth Court of Conciliation and Arbitration has cognizance. Section 32 provides that the award or order made by the Central Industrial Authority shall be binding on the parties, shall be filed in the Court and shall thereupon have effect as if it were an award or order of the Court.

Section 33 provides for the appointment of persons to be Local Industrial Authorities. Mr. James Connell, one of the respondents to these proceedings, has been appointed as a Local Industrial Authority. Section 34 (1) provides that, subject to the Act, a Local Industrial Authority may—"(*a*) settle disputes as to any local industrial matters likely to affect the amicable relations of employers in the Coal Mining Industry and their employees who are members of the Federation (other than those employees who are excepted by the Commissioner by order); (*b*) investigate and report upon any industrial dispute or matter or part thereof referred to him by the Central Industrial Authority; (*c*) settle any local industrial dispute or matter or part thereof referred to him by the Central Industrial Authority for settlement; and (*d*) inquire into and report to the Central Industrial Authority on industrial matters not covered by any award of the Court or award or order of the Central Industrial Authority."

Section 35 provides that, subject to the Act, the provisions of ss. 31 and 32 of the Act shall, so far as applicable, apply, with such alterations as are necessary, in relation to matters before a Local Industrial Authority in pursuance of s. 34 (1). Section 41 provides that, during the currency of an award or order made by the Central Industrial Authority or a decision of any Local Industrial Authority, no award or order made by the Arbitration Court or any tribunal having jurisdiction in industrial matters in the coal-mining industry dealing with the same subject matter and inconsistent with such award or order shall be effective.

It is contended for the prosecutors in these proceedings that a Local Industrial Authority under the Act falls within the definition of " Industrial Authority " in the *Economic Organization Regulations* and that therefore it is subject to the prohibition contained in reg. 16, which, to use the ordinary phrase, pegs wages at the rates payable on 10th February 1942, subject to the exceptions provided in the Regulations. This argument is supported by reference to s. 31, which, it is said, confers on the Central Industrial Authority (and accordingly upon a Local Industrial Authority—s. 35) the powers, but only the powers, of the Arbitration Court or the Chief Judge of the Court. Those powers are admittedly subject to reg. 16 of the *Economic Organization Regulations*, and therefore it is said there is, by virtue of s. 31, an incorporation in the *Coal Production (Wartime) Act* of the limitation of the powers of Industrial Authorities contained in reg. 16 of the *Economic Organization Regulations*.

On the other hand, it is argued that the *Coal Production (Wartime) Act* is special legislation relating to certain disputes and industrial matters in the coal-mining industry which confers on the Industrial Authorities appointed thereunder a power to settle those disputes in such way (as to, *inter alia*, wages and rates of pay) as those authorities think proper, irrespective of any limitations created by the *Economic Organization Regulations*. The argument depends upon the words of s. 31 and s. 34. Section 31, it is pointed out, is introduced by the words " The Central Industrial Authority shall have power to consider and determine " certain industrial disputes. Those words contain the grant of power which, it is said, should be given full operation.

The respondents meet the particular argument based upon the second part of s. 31 by urging that the words which provide that " for that purpose ", i.e., for the purpose of considering and determining industrial disputes, the Authority shall have the powers of the Arbitration Court, are ancillary only to the main power granted

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in the introductory words. They should not (it is argued) be used to import, in relation to the coal Industrial Authorities, a limitation imposed by the *Economic Organization Regulations* upon the power of the Arbitration Court to consider and determine industrial disputes. A similar argument is submitted with respect to s. 34, which contains a positive provision that a Local Industrial Authority may settle local industrial disputes referred by the Central Industrial Authority and other similar provisions. Here again, it is said, there is a general grant of power which should be allowed to operate fully according to its terms so as to enable the Authority to settle a dispute in such way as it thinks proper, without any limitation upon that power derived from any other legislation.

The particular argument that the latter part of s. 31 confers upon an Industrial Authority the powers of the Arbitration Court as limited by the *Economic Organization Regulations* does not appear to us to be well founded. There is in the Act (s. 34 combined with s. 31) a grant of power to settle disputes and it is for that purpose that the powers of the Arbitration Court are given to the Industrial Authority. The power of the Authority to settle disputes is derived from the *Coal Production (War-time) Act* and not from the specification in the *Arbitration Act* or elsewhere of the powers of the Arbitration Court.

But this conclusion is not decisive of the question before the Court. The argument for the respondents really amounts to an argument that regs. 16 and 17 of the *Economic Organization Regulations* are impliedly repealed by the *Coal Production (War-time) Act* in relation to the Authorities constituted under that Act. There is no express repeal of the regulations, and there is no provision that the regulations, though continuing in existence, shall not apply to the Industrial Authorities set up under the Act. The regulations are general in terms, applying to all Industrial Authorities, and the words of the regulations plainly include in terms the Industrial Authorities set up under the *Coal Production (War-time) Act*. Therefore the regulations apply to those Authorities unless, there being no express repeal, there is an indication in the Act that it was intended that they should not so apply. Such an indication must be clear, because repeal by implication is never favoured: See the cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 561; *Flannagan* v. *Shaw* (1). In the present case the contention that the *Economic Organization Regulations* do not apply to the Industrial Authorities constituted under the Act depends upon what can be described as only more or less dubious inference. There is no incon-

(1) (1920) 3 K.B. 96, at p. 101.

sistency between the Regulations and the Act. The Authorities constituted under the Act can perform their functions in relation to wages and rates of pay completely if they are subject to the Regulations, just as all other Industrial Authorities can perform such functions committed to them subject to the limitation imposed by the Regulations. It would have been easy for Parliament to exclude, in the case of the new coal Industrial Authorities under the Act, the application of the Regulations. Parliament has not adopted that course, and the Court should not readily impute to Parliament an intention to exclude the application of a provision which in terms is precisely applicable to these Authorities.

For these reasons we are of opinion that the Authorities constituted under the *Coal Production (War-time) Act* are Industrial Authorities within the meaning of the *Economic Organization Regulations* and are bound by regs. 16 and 17 thereof.

Further hearing of this matter will be adjourned until Tuesday, 22nd August, in order to permit the filing of further affidavits, if desired.

STARKE J. The *National Security (Economic Organization) Regulations* prohibited Industrial Authorities—except in cases immaterial here—from altering the rate of wages applicable to employment on 10th February 1942. The regulation, I take it, was necessary to suppress inflation and other evils arising from conditions brought about by the war, and, adapting a passage in *Dr. Foster's Case* (1), for as much as the Regulations were established with such gravity and wisdom for the advancement of the Commonwealth they ought not by any constrained construction out of the general and ambiguous words of a subsequent statute to be abrogated. It is not surprising that the *Coal Production (War-time) Act* 1944 No. 1 does not expressly exempt the coal-mining industry from the terms of the regulation, for that would give that industry a more favourable position than other industries and weaken the remedy for the mischief which the regulation was designed to suppress. And further, if the Parliament did not in its wisdom explicitly exempt the coal-mining industry from the regulation, then an exemption by implication is difficult to sustain unless the provisions of the *Coal Production (War-time) Act* 1944 be so inconsistent with or repugnant to the provisions of the regulation that the two cannot stand together, which is far from being the case.

In conclusion I would add that I agree with the reasoning of, and the conclusion reached by, the Chief Justice in the opinion prepared by him.

(1) (1614) 11 Co. Rep. 56b, at p. 63a.

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McTIERNAN J. In my opinion the question which has been argued at this first stage of the application should be answered by saying that the Central Industrial Authority and the Local Industrial Authorities appointed under the *Coal Production (War-time) Act* 1944 are bound by reg. 16 of the *National Security (Economic Organization) Regulations*. I state my reasons without going over again the provisions of the Act, the above-mentioned Regulations and the other statutory provisions and regulations read in argument.

The Central Industrial Authority and a Local Industrial Authority each satisfies completely the description of an Industrial Authority as defined in reg. 4, to which reg. 16 is expressed to apply. The terms of reg. 16 plainly extend to the rates of pay of the employees who come within the jurisdiction of the Central Industrial Authority or a Local Industrial Authority. Parliament has transferred to the jurisdiction of these Authorities a group of employees, consisting of members of the respondent Federation, without expressing the intention in the present Act or elsewhere that the determination of their rates of pay should not be fettered as it was while they were under the jurisdiction of the existing Industrial Authorities by reg. 16. It becomes a question, therefore, whether reg. 16 is excluded by necessary implication. To reach the conclusion that reg. 16 does not bind the Central or any Local Industrial Authority it is necessary to hold that the provisions of the regulation on the one hand and of the present Act on the other are repugnant and inconsistent provisions.

It seems to me that the constitution and powers of these bodies are not so different in principle or in any material respect from the constitution and powers of the Industrial Authorities which previously had jurisdiction to determine the rates of pay of members of the Federation, as to afford any substantial reason for presuming that the Parliament intended that the new Industrial Authorities should not be bound by reg. 16. It is obvious that the provisions of this regulation and the provisions under which the rates of pay of members of the Federation had been determined before the passing of the present Act did march together. The provisions of the present Act raise no necessary implication that the Industrial Authorities for which it provides should not be bound by the principle which reg. 16 imposes generally on all Industrial Authorities which fulfil the description of an Industrial Authority contained in reg. 4. The Act does not by necessary implication work any modification or partial repeal of reg. 16. The answer to the question whether any such modification or repeal as would exempt the Central or Local Industrial Authority from reg. 16 is made by the provisions of the

Act, is governed by the principle which is expressed in *Maxwell* on the *Interpretation of Statutes*, 7th ed., (1929), p. 144, in these terms: "Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments on the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

Judging the matter by this principle it is clear, I think, that no modification or partial repeal of reg. 16 is made by the Act. It follows that the rate of remuneration payable on 10th February 1942 to employees coming within the scope of the Act cannot be lawfully altered by an award or order made by the Central Industrial Authority or any Local Industrial Authority except subject to the provisions of reg. 16 and regs. 17 and 18 of the *National Security* (*Economic Organization*) *Regulations*.

Aug. 22.

Upon the further hearing of the matter:—

In an affidavit filed on behalf of the Federation a record of the whole of the proceedings before Mr. Connell in this matter was put in evidence. The deponent stated that he was present throughout the whole of those proceedings and deposed that evidence was led, statements were made and arguments were put by representatives of the Federation to Mr. Connell directed to show that shiftmen's rates of remuneration which Mr. Connell was requested to alter were anomalous, and he further deposed that there was evidence before Mr. Connell that such rates were anomalous.

A statement containing the written submissions made to Mr. Connell by a representative of the employers was tendered to the Court by way of affidavit.

A letter forwarded on 15th June 1944 by Mr. Connell, as Local Industrial Authority, to the Minister for Labour and National Service was, omitting formal parts, in the following terms:—"I attach hereto a draft award on a matter referred to me for settlement by the Central Industrial Authority. The matter is one applicable to all collieries in the Maitland and North-West Collieries where shiftmen are called upon to work timbering and securing roof and sides in high places. Claims have been conceded by me for 4s. and 9s. per day on the grounds of restoration of previous payments which was made either by agreement or award. Two arbitrations

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conducted by Mr. Charles Hibble in which he was called to give decisions provided for 3s. 1d. per shift in excess of the shiftman's rate at Bellbird Colliery and 3s. at Cessnock No. 2 Colliery. By local agreement at Abermain No. 2, Aberdare, Aberdare Extended and Aberdare Central shiftmen were conceded 4s. per day for working on falls over 16 feet in height and 9s. per shift extra when such falls extended to the stone roof. Those decisions and agreements have been inoperative for many years. In most instances the employees say they were forced to forego some during the depression period under a threat of the colliery being closed down. Shiftmen at other collieries have been conceded equivalent consideration payments by decisions of the Local Reference Board (Maitland District), and anomaly proven to my satisfaction. I am satisfied that an anomaly exists inasmuch as there is a departure from the general practice by reason of coal loaders being used to fill away falls, also pillar extraction being to a height of 24 to 30 feet in some of the collieries involved and I see no reason why the claim made by the employees for uniformity in this regard should not be granted and all collieries put on the same basis of rates of remuneration for the extra skill and responsibility involved in this work. Trusting you will give your approval in accordance with the *National Security (Economic Organization) Regulations* 17 (1) (*b*)."

On 24th June 1944, pursuant to reg. 17 (1) (*b*), the Minister approved an alteration in the rates of remuneration paid to shiftmen employed at collieries in the Maitland and North-West Districts of New South Wales when called upon to work timbering and securing roof and sides in high places in the manner set out in Mr. Connell's award, he having stated in his letter that he was satisfied that an anomaly existed.

Further facts appear in the judgments hereunder.

*Kitto* K.C. (with him *Ashburner*), for the prosecutors. The only matter to which the Court will direct its attention will be the actual proceedings consisting of the reference and the award. On the face of those proceedings a want of jurisdiction appears, and this is so even if the reasons be looked at. Further, if the letter forwarded by Mr. Connell to the Minister be looked at it still does not appear that Mr. Connell was really satisfied of any anomaly relevant to the case. If he purported to be satisfied he must have entirely misdirected himself and not come to any real conclusion on the subject of anomaly. There was not any evidence upon which a reasonable person could form the opinion that there was an anomaly in the sense of reg. 17 (1) (*b*) of the *Economic Organization Regulations*. It

is important that when this Court is applied to in the exercise of its constitutional power to grant a prohibition, it should be in a position to see very readily where the particular Authority has kept within the limits prescribed and where it has not. The award should show on its face not only that the rates of remuneration are anomalous but also what constitutes the anomaly (*Day* v. *King* (1); *Christie* v. *Unwin* (2); *Taylor* v. *Clemson* (3)). This principle has been laid down for the purpose of enabling the superior courts to exercise their prohibition jurisdiction. It does not appear from his stated reasons, assuming they may be looked at, that Mr. Connell was satisfied as to any anomaly. On the other hand a strong inference arises therefrom that at the time the reasons were written Mr. Connell did not regard himself as concerned with whether he had to find an anomaly or not. The letter referred to above does not overcome the difficulty. It does not suggest the existence of an anomaly in respect of shiftmen, or, if it does so suggest, the nature of the alleged anomaly. The only alleged anomaly defined in the letter is limited to coal-loaders and pillar extraction, and has no relation to the matters now under consideration. The matter of jurisdiction is left to the discretion of the tribunal or person exercising it, and, on challenge, the question is whether that tribunal or person has acted arbitrarily (*Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (4); *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (5); *Sharp* v. *Wakefield* (6)). The fact of the satisfaction of the Local Industrial Authority is a jurisdictional fact. Regulation 16 of the *Economic Organization Regulations* carves a portion out of his jurisdiction and reg. 17 restores it conditionally upon something happening and of his being satisfied. Regulation 17 (1) (*b*) is a condition of jurisdiction. The proper inference from all the documents is that the Local Industrial Authority did not have any proper appreciation of what was an anomaly and did not really approach that question. An anomaly involves a departure from a standard, or, in other words, an anomaly is an irregularity of some kind and there can only be an irregularity if there is a regulated course with which the alleged anomaly or anomalous condition can be compared. The evidence shows that the subject work was part of the ordinary normal work of shiftmen. The rates of remuneration as at 10th February 1942 fully covered that work and there is nothing anomalous about those rates because there is nothing exceptional about the work; it was

(1) (1836) 5 A. & E. 359 [111 E.R. 1201].
(2) (1840) 11 A. & E. 373 [113 E.R. 457].
(3) (1844) 11 Cl. & F. 610 [8 E.R. 1233].
(4) (1935) 53 C.L.R. 534, at p. 555.
(5) (1932) 47 C.L.R. 621, at p. 632.
(6) (1891) A.C. 173, at p. 179.

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simply part of the normal working. There is not any suggestion in the evidence that the shiftmen who work in high places, not being falls, are not doing part of the ordinary work of shiftmen. If, on the facts shown, Mr. Connell's decision be right, then reg. 16 could be rendered nugatory, thereby defeating the whole purpose of maintaining the economic stability of the nation. The decision could be justified only in the absence of reg. 16. The decision or award was in reality outside the Local Industrial Authority's jurisdiction because he was not satisfied, or, alternatively, he could not be satisfied on the evidence shown.

*Weston* K.C. (with him *Downing*), for the respondent Australasian Coal and Shale Employees' Federation. References to anomaly—sometimes *eo nomine* and sometimes merely by stating the fact—occur frequently throughout the evidence and, in the main, that evidence is uncontradicted. The evidence disclosed four types of anomaly, namely, (*a*) an anomaly as between rates of remuneration received by employees in the different mines; (*b*) an anomaly between working in a high place where there has been a fall and where in some instances the employees receive extra pay, and working in equally dangerous places for which they do not receive extra pay; (*c*) an anomaly of the same rate of pay for work in low places as for work in high places although the skill and the risk required for the low and the high work differ; and (*d*) an anomaly of equal pay for erecting long and short props. It is anomalous if an employee should be kept in a position where his rate of pay is less than the degree of skill required for the work he performs. Rates of remuneration are anomalous if work utterly diverse in skill, risk and arduousness is recompensed by exactly the same quantum of pay. The anomalies are twofold: a difference between rates for similar work and equal pay for work which differs. On the state of the evidence this Court is not in a position to determine what is the normal practice or the abnormal practice. There is not any evidence that the normal practice was not to pay extra money for work in high places after falls, but there is ample evidence that work equally dangerous is paid for at different rates of pay. The cases referred to on behalf of the prosecutors, in support of the proposition that it had to appear on the face of the record that the particular matter was within jurisdiction, have no application to this case because there is not in the relevant sense a proceeding in this case and, in addition, under the Act the Local Industrial Authority may inform his mind as to the differences in any way he thinks fit. The discretion vested in the Local Industrial Authority was properly exercised. The Parliament

intended that authority to be the sole judge of whether " the rates of remuneration in respect of which the alteration is sought are anomalous " (*Ex parte Mullen*; *Re Hood* (1); *Colonial Bank of A/asia* v. *Willan* (2); *R.* v. *Nat Bell Liquors Ltd.* (3)). In *A/asian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (4) the question considered was whether there was any other evidence; in this case however the Parliament has set out to render the decision of the Industrial Authority binding. The jurisdiction of the Industrial Authority is derived from reg. 17, not from reg. 16. The jurisdiction so conferred does not infringe the Constitution. As regards clauses 1 and 2 of the award there is not any warrant for prohibition. The respondent Federation did not ask for a decision in respect of the matter referred to in clause 3 and has never sought to enforce it. There was not any need to apply for prohibition in respect of that clause because it was not approved by the Minister.

*Watt* K.C. (with him *E. J. Hooke*), for the respondent Mr. Connell. The argument addressed to the Court by Mr. *Weston* K.C. is adopted on behalf of this respondent. The function of the Court is not properly exercised in granting a prohibition when the only arguments before it are really only relevant to error and not prohibition. The form of the tribunal is such that this Court has not the authority to deal with the question, because this Court undertakes judicial inquiries and sits as a court of justice, whereas the tribunal appealed from is practically relieved of all forms as a court of justice. The Local Industrial Authority was satisfied that there was an anomaly. Therefore, having regard, *inter alia*, to the fact that he is given a jurisdiction to inquire free from all legal forms and technicalities and to act according to his idea of equity and good conscience, his decision cannot be inquired into by this Court on prohibition (*R.* v. *Nat Bell Liquors Ltd.* (5); *Moses* v. *Parker* (6); *Colonial Bank of A/asia* v. *Willan* (7); *Ince Bros.* v. *Federated Clothing and Allied Trades Union* (8)). A wrong view of the facts is simply error and is not a matter of jurisdiction.

*Sugerman* K.C. (with him *Dignam*), for the Commonwealth (intervening). The Commonwealth adopts the arguments addressed to the Court on behalf of the respondents. Regulations 16 and 17 of the *Economic Organization Regulations* are merely general rules of

(1) (1935) 35 S.R. (N.S.W.) 289, at p. 298.
(2) (1874) L.R. 5 P.C. 417, at pp. 442-445.
(3) (1922) 2 A.C. 128, at p. 158.
(4) (1935) 53 C.L.R. 534.
(5) (1922) 2 A.C., at p. 151.
(6) (1896) A.C. 245, at p. 248.
(7) (1874) L.R. 5 P.C., at p. 442.
(8) (1924) 34 C.L.R. 457, at p. 464.

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law directed to a wide diversity of tribunals but not touching the jurisdiction of any such tribunals. Those regulations apply to all Industrial Authorities as defined by reg. 4. Jurisdiction in this case was derived from s. 31 (1) of the *Coal Production (War-time) Act* 1944. Regulation 16 simply lays down a rule to be followed by the tribunal.

*Kitto* K.C., in reply. The purpose of reg. 16 is not to lay down a rule of law which tribunals are to apply, but to subtract from the area of their jurisdiction the whole subject matter, that is, of altering rates of remuneration which were in force on 10th February 1942. The whole purpose and intention is to subtract jurisdiction from all tribunals. Although the existence of an anomaly may be a matter for the opinion of the Industrial Authority that Authority is not entitled to make an arbitrary, fanciful or capricious decision (*Commissioner of Taxes (Q.)* v. *Ford Motor Co. of Australia Pty. Ltd.* (1) ).

[WILLIAMS J. In *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2) the Privy Council decided very much along the same lines.]

An anomaly arises only where similar types of similar work are paid for at different rates. Notwithstanding the fact that clause 3 of the award was neither asked for nor sought to be enforced by the respondent Federation and that Ministerial approval thereto has not been given, it nevertheless is contained in the award and should be included in the prohibition.

*Cur. adv. vult.*

Oct. 3.

The following written judgments were delivered :—

LATHAM C.J. Return of an order nisi for a writ of prohibition directed to James Connell and the Australasian Coal and Shale Employees' Federation prohibiting further proceeding upon clauses 1, 2 or 3 of an award made by the said James Connell on 15th June 1944 on the ground that the said award was made unlawfully, in that the said James Connell had no power or jurisdiction to make it.

The award was made by James Connell acting as a Local Industrial Authority under the *Coal Production (War-time) Act* 1944. The award applied only to collieries in the Maitland and North-West Districts of New South Wales, with the exception of Pelton Colliery. Clauses 1 and 2 of the award were as follows :—" 1. Where shiftmen are called upon to erect cross timbers at a height of 16 feet or more to make such place safe for working whilst so occupied on such work

(1) (1942) 66 C.L.R. 261, at p. 274. (2) (1940) A.C. 127.

the shiftmen shall in addition to the recognized shift rate of wages be paid four shillings (4s.) per shift during the time they are necessarily occupied on such work. 2. Where shiftmen are called upon to erect props 17 feet in length and up to 20 feet they shall be paid one shilling (1s.) per shift extra. Over 20 feet in length up to 24 feet, two shillings (2s.) per shift extra. Over 24 feet and more in length three shillings (3s.) per shift extra." Clause 3 dealt with mobile coal-loaders operating on falls. It is admitted that this matter was not referred to Mr. Connell under the Act, nor was his decision in respect of it approved by the Minister, and that therefore he had no power to include it in his award. Clause 4 relates to a matter which admittedly was within his jurisdiction.

It has already been decided by the Court in this case that Local Industrial Authorities acting under the Act are subject to the provisions of regs. 16 and 17 of the *National Security* (*Economic Organization*) *Regulations*. Regulation 16 is as follows :—

"16. Subject to this Part, an Industrial Authority shall not, after the commencement of these Regulations, include in any award, order or determination any provision altering, in respect of any employment, the rate of remuneration applicable to that employment (whether in pursuance of any award, order or determination or otherwise) on the tenth day of February, One thousand nine hundred and forty-two."

Regulation 17, so far as relevant, provides that :—

"17. (1) Notwithstanding anything contained in this Part, an Industrial Authority may, by any award, order or determination, alter any rate of remuneration—"

(*a*) [The provisions contained in this paragraph are immaterial for the purpose of this case.]

"(*b*) with the approval of the Minister, if the Industrial Authority is satisfied that the rates of remuneration in respect of which the alteration is sought are anomalous."

The challenged award admittedly increases rates of payment which were applicable to the employment in question on 10th February 1942 by awarding extra payment for work in high places, which had, prior to the award, been performed without any such extra payment. Mr. Connell formed the opinion that the rates of remuneration in respect of which the alteration was sought were anomalous, and accordingly submitted his award for the approval of the Minister. The Minister approved the award so far as the clauses now in question (clauses 1 and 2) are concerned. The question now is whether the award was beyond the jurisdiction of the Local Industrial Authority constituted by Mr. Connell, in view of the

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limitation or definition of the powers of the Authority by regs. 16 and 17 above quoted.

Mr. Connell was appointed a Local Industrial Authority by the Minister under s. 33 (1) of the *Coal Production (War-time) Act*. Section 34 (1) (*c*) provides that, subject to the Act, a Local Industrial Authority may settle any local industrial dispute or matter or part thereof referred to him by the Central Industrial Authority for settlement. A dispute in relation to the matters dealt with by clauses 1 and 2 was so referred to Mr. Connell. A Local Industrial Authority has power to consider and determine any industrial dispute, and for that purpose has the powers of the Commonwealth Court of Conciliation and Arbitration, and an award made by the authority is binding upon the parties to the dispute (ss. 35, 31, 32).

Section 40 of the Act provides that a decision of the Local Industrial Authority shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court on any account whatever. This section is similar in terms to s. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. It has been held in the case of the *Arbitration Act* that this provision does not deprive the High Court of the jurisdiction conferred upon it by the Commonwealth Constitution, s. 75 (v.), to grant prohibition against an officer of the Commonwealth. No Commonwealth statute can deprive the Court of a power conferred on it by the Constitution: See the *Tramways Case* [*No.* 1] (1), which has been applied on many occasions. Mr. Connell, appointed by the Minister under s. 33 of the *Coal Production (War-time) Act*, is an officer of the Commonwealth, and accordingly there is jurisdiction in this Court to grant a writ of prohibition if a proper case is made out.

The Local Industrial Authority is plainly not a court. It is not concerned with the determination in accordance with law of rights or duties arising under the law. The function of the Authority is to formulate rules for future conduct in industrial matters. Further, the Authority is not constituted by a person holding office with the life tenure required by the Constitution, s. 72, in the case of all courts created by the Commonwealth Parliament (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd* (2)). It cannot be said, in the present case, that the Authority is a *court* which has power conclusively to determine a question upon the answer to which its jurisdiction depends: See *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Pty. Ltd.* (3)—a case in which it was

(1) (1914) 18 C.L.R. 54.
(2) (1918) 25 C.L.R. 434.
(3) (1907) 5 C.L.R. 33.

held that a *court* of limited statutory jurisdiction itself had power to determine a question upon the answer to which its jurisdiction depended.

Prohibition may be directed to persons, bodies or tribunals other than courts if they perform quasi-judicial functions. Upon this basis it has long been the practice of the High Court to grant a writ of prohibition against the Commonwealth Court of Conciliation and Arbitration in relation to its awards, if they are beyond its jurisdiction, though the awards are not made in the performance of judicial functions in the strict sense of the term: See *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1), and particularly the reference to the history of this subject in the judgment of *Starke* J. (2)—See also *R.* v. *Electricity Commissioners* (3), where *Atkin* L.J. said: "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Upon an application for a writ of prohibition the Court does not consider the merits of the case. It does not ask whether the order made was right or wrong. Where the application is founded on alleged want of jurisdiction it considers only whether the challenged order (or in this case the award) exceeds the powers conferred upon the authority which made it.

In the present case the powers of the Industrial Authority are derived from the *Coal Production (War-time) Act* as limited by the *Economic Organization Regulations*. Regulation 16 provides in general terms that an Industrial Authority shall not alter the rate of remuneration applicable to any employment on 10th February 1942. If that provision stood by itself it would operate to limit the powers of the authority by preventing any alteration whatever of rates applicable on the date mentioned. But reg. 17 limits the prohibition contained in reg. 16 by permitting an authority to alter such rates with the approval of the Minister "if the Industrial Authority is satisfied that the rates of remuneration in respect of which the alteration is sought are anomalous." The subject matter with which the Industrial Authority deals is, *inter alia*, rates of remuneration. There is power to deal with this subject matter in respect of rates of remuneration which existed on the specified date only if the authority is satisfied that the rates in question are anomalous. Unless this condition is fulfilled, the authority cannot act—it is a condition of

(1) (1924) 34 C.L.R. 482. (2) (1924) 34 C.L.R., at pp. 551 et seq.
(3) (1924) 1 K.B. 171, at p. 205.

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jurisdiction. It is argued that in this case Mr. Connell was satisfied that the rates were anomalous and that, as the regulation commits to him the forming of an opinion upon this matter, the condition of jurisdiction is fulfilled, and that there is nothing more to be said.

It is not possible, however, to determine the case upon this easy and simple ground. It is necessary to ascertain what is meant by the provision that the Industrial Authority must be satisfied that the rates are anomalous. In *Reid* v. *Sinderberry* (the *Man Power Case*) (1) my brother *McTiernan* and I said : " When the powers of a legislative authority are limited by law the opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority, unless, indeed, the power was conferred by the law creating the power . . . in terms which provided that the opinion of the authority should be so decisive." In the present case the powers of an Industrial Authority are limited by law, and the opinion of the Authority, not that a particular exercise of its powers is within the law, but that a certain condition, namely the existence of an anomaly, is fulfilled, is made decisive. But, as we proceeded to say in the *Man Power Case* (2) with reference to a provision in the *National Security Act* that the Governor-General might make such regulations as appear to him to be necessary for certain purposes—" A regulation, though complying in terms with the section as being necessary for defence purposes in the opinion of the Governor-General, could nevertheless not be held to be valid if it was shown that the Governor-General could not reasonably be of opinion that the regulation was necessary or expedient for such purposes " (3). Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power. Thus, in the case of certain provisions in the *Income Tax Assessment Act* which make the opinion of the Commissioner of Taxation a condition of the imposition of liability upon taxpayers, it has been held that the opinion referred to is an opinion which is neither arbitrary nor extravagant, and which does not take into account considerations which, upon the true construction of the statute, are

(1) (1944) 68 C.L.R. 504, at p. 511. (2) (1944) 68 C.L.R. 504.
(3) (1944) 68 C.L.R., at p. 512.

irrelevant. In *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (1) *Gavan Duffy* C.J. and *Starke* J., referring to a provision in the *Income Tax Assessment Act* which provided that a certain deduction from assessable income could not be made unless the Commissioner was satisfied of particular facts, said: "It is the Commissioner that must be satisfied, not this Court; but he must act 'according to the rules of reason and justice, not according to private opinion . . .; according to law, and not humour': he must not act in a vague or fanciful manner, but legally and regularly (*Sharp* v. *Wakefield* (2))" (3). Reference was made to the same principle in *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (4). In that case the Court considered a statutory provision which provided that the taxable income of a company should be assessed upon a certain basis by the Commissioner if the profits of the company could not, in the opinion of the Commissioner, be otherwise satisfactorily determined. It was there said by *Rich* and *Dixon* JJ. that, though the correctness of the opinion of the Commissioner was not examinable, the validity of the exercise of his discretion was examinable, and that if, for example, he exercised his discretion "upon irrelevant or inadmissible grounds" it might be set aside (5). See also *Commissioner of Taxes* (*Q.*) v. *Ford Motor Co. of Australia Pty. Ltd.* (6).

A recent illustration of the application of this principle in prohibition proceedings is to be found in the case mentioned by my brother *Williams* in his reasons for judgment (*Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (7)). In that case the Privy Council considered a section in the following terms:— "Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary" (8). The Board was of opinion that particular buildings were unfit for human habitation. But the Privy Council held that the evidence showed that the Board had adopted a completely wrong test of unfitness for human habitation, and had therefore misinterpreted the ordinance under which they acted. It was accordingly held that the Board had adopted "a wrong and inadmissible test" in making a declaration of unfitness, that they were acting beyond their powers and

(1) (1932) 47 C.L.R. 621.
(2) (1891) A.C. 173, at p. 179.
(3) (1932) 47 C.L.R., at p. 632.
(4) (1935) 53 C.L.R. 534.
(5) (1935) 53 C.L.R., at p. 555.
(6) (1942) 66 C.L.R., at p. 274.
(7) (1937) A.C. 898.
(8) (1937) A.C., at p. 906.

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that prohibition should issue. (It may be added that in that case (1), as in *R.* v. *Electricity Commissioners* (2), the decision of the statutory body had to be submitted to a further authority before it became effective, but it was held in both cases that this fact was no bar to the issue of the writ.)

It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he is to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorized to deal. It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

It is therefore necessary to consider what reg. 17 means when it requires an Industrial Authority, before it alters existing rates of remuneration to which the regulation applies, to be " satisfied that the rates of remuneration . . . are anomalous."

The word " anomalous " is defined in the *Oxford English Dictionary* as " unconformable to the common order, deviating from rule, irregular, abnormal." It can readily be understood why a general regulation intended to prevent alterations in rates of wages—" freezing " or " pegging " wages at fixed points—should be subject to an exception which would make it possible to correct anomalies. The correction of anomalies is a process of removing exceptions or of altering them so as to fit them into a general rule, scheme or system. If there is an exception or departure from such an established system for which there is no reason, then such an exception is an irregularity which can fairly be described as an anomaly. If, for example, there are slips and errors and internal inconsistencies in an industrial award they constitute anomalies. But a claim for the alteration

(1) (1937) A.C. 898. (2) (1924) 1 K.B. 171.

of a rate of wages deliberately adopted and based upon distinctions clearly stated, after considering and rejecting claims for a rate founded upon some other basis, cannot be regarded as a claim for the correction of an anomaly. Such a claim is simply a claim for the establishment of a new rule.

Some of the rates of wages applicable on 10th February 1942 may be such that there are reasons for altering them. But if evidence that there are reasons for altering certain rates of wages were regarded as evidence of an anomaly, the result would be that reg. 16 would in effect have no operation and that the exception with respect to anomalous rates contained in reg. 17 would swallow the rule contained in reg. 17. The position would be the same as if reg. 16 had not been made, because any rates could then be altered for cause shown. Claims for a change in rates of remuneration, whether made by employers or employees, are normally based upon a contention that the existing rates are for some reason unfair or wrong. But action merely upon this basis is excluded by reg. 16. Unless, in addition, it is shown that the rates in question are incongruous with an existing rule, it cannot be said that the existence of an anomaly is established.

I proceed therefore to examine the facts with reference to clauses 1 and 2 of the award. Clause 1 provides for extra payment where shiftmen are called upon to erect cross timbers at a height of sixteen feet or more to make a place safe for working; and clause 2 gives a right to extra pay where shiftmen are called upon to erect props over seventeen feet in length. It is clear upon the evidence of the prosecutors, such evidence not being challenged in any way by the respondents, that, before the award in question was made, extra payment was provided, not for shiftmen generally working in high places, but only for shiftmen in certain mines who were timbering or erecting props in places where falls had occurred. In places where no fall had occurred it was within the normal course of the duties of shiftmen to timber at any height and to erect props of any required length without extra payment. It was not disputed that a decision of the Central Reference Board made on 28th April 1942 accurately stated the position in relation to these matters up to that time :—" The Board has come to the conclusion that there is no justification for fixing special rates for high places generally; but that there is justification for extra payments in relation to certain high falls. The Board can find no justification for interfering with existing customs and decisions in this regard." So also in a decision given by Mr. Connell on 20th March 1944 he said : " In all cases determined by the Board extra payments, where conceded,

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have been confined to shiftmen where they are called upon to timber and make safe falls of roof above a height of 16 feet."

The claim of the Federation was that the extra payment should be extended to all cases where shiftmen work at a height exceeding fourteen feet. The claim was supported by evidence which showed that there had been a dispute of long standing as to extra payment for working in high places, and that (as already stated) up to the time of hearing before the Industrial Authority, the claim for a uniform extra payment for working in high places had been consistently refused, but that claims for working in high places after falls had occurred had been recognized in some agreements and in some awards in the case of some mines. The Federation claimed that a new and uniform provision for all work in high places should be substituted for the limited rule theretofore obtaining. The Federation relied upon evidence that a higher degree of skill was required in working in high places, whether in cross timbering, or in erecting props, and that working in high places was in general more dangerous and imposed more strain upon the worker than working in other places. These matters could properly be taken into account by the Industrial Authority if its powers were not limited by the Regulations. But the Regulations exclude any consideration of them unless the rates are anomalous.

The Federation therefore simply asked for a new rule to be substituted for an existing rule. It is, as I have said, evident that the difference of opinion upon this matter was of long standing, and that a special rule was expressly adopted applicable only to places where high falls had occurred. A claim for the introduction of a new rule cannot, in my opinion, be regarded as a claim for the correction of an anomaly. I repeat that if the provision relating to anomalous rates of remuneration contained in reg. 17 were so interpreted it would mean that the provisions of reg. 16 would be deprived of most, if not all, practical effect. The opinion of Mr. Connell that the rule as to extra payment for working in high places should be altered by making it independent of the occurrence of falls was not an opinion that existing rates of remuneration were anomalous, but was only an opinion that those rates should, for reasons accepted by him as satisfactory, be altered. Such an opinion is not the opinion which is required by reg. 17 as a condition of the exercise of the power of the Industrial Authority.

It is contended, however, that the Court should not grant a writ of prohibition because s. 31 (2) of the *Coal Production (War-time) Act*, which is applicable to a Local Industrial Authority by virtue of s. 35, provides that in exercising his powers under the Act the

Authority " shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform his mind on any matter in such manner as he thinks just." It was argued that this provision excluded any consideration of the question whether or not there was evidence upon which the Authority could be satisfied that rates were anomalous. In other words, the contention was that the effect of this section was to remove any control whatever over the Authority by means of the writ of prohibition, and reference was made to the well-known authority of *Moses* v. *Parker* (1). It is sufficient to say that a similar provision appears in the *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 25, but that this provision has been held not to prevent the issue of a writ of prohibition by the High Court: See the *Tramways Case* [*No.* 1] (2)—See also *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3) and *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No.* 4 *Ltd.* (4).

A point raised by the prosecutors was that what was called the " record " (the reference by the Central Industrial Authority and the award of the Local Industrial Authority) did not affirmatively show jurisdiction in the Local Industrial Authority upon its face by expressly stating that the Authority was satisfied that the rates of remuneration in question were anomalous. It was argued that the Court should apply the rule which was stated in the following words in *Taylor* v. *Clemson* (5): " Where a court of limited jurisdiction, limited either in point of place or of subject matter, assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction." In my opinion there is no reason for applying so strict a rule to an Industrial Authority. The Local Industrial Authority is not bound by any particular rules of procedure, and there is no " record " in the sense in which that word was used in connection with proceedings at common law. Indeed, in England it has been recognized that prohibition may go to a County Court for want of jurisdiction, though there is no record, strictly so called, in a County Court (*Farquharson* v. *Morgan* (6) )—See also *Yirrell* v. *Yirrell* (7). Accordingly, while it is doubtless very desirable that an Industrial Authority exercising a statutory power should state the basis upon which it acts in some formal and readily ascertainable manner, I am unable

(1) (1896) A.C. 245.
(2) (1914) 18 C.L.R. 54, particularly at pp. 71, 72.
(3) (1925) 35 C.L.R. 422, at p. 438.
(4) (1943) 67 C.L.R. 25, at p. 36.
(5) (1844) 11 Cl. & F. 610, at p. 640 [8 E.R. 1233, at p. 1245].
(6) (1894) 1 Q.B. 552, at p. 563.
(7) (1939) 62 C.L.R. 287.

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to see that there is any ground for requiring, in the case of such an authority, the extreme precision which was characteristic of the common law in England in the earlier part of the 19th century.

For the reasons previously stated, however, I am of opinion that the order should be made absolute in respect of clauses 1, 2 and 3 of the award.

RICH J. I have had the opportunity of reading the judgment of my brother *Williams* and as I agree with it I cannot usefully add anything to his reasons. But with regard to costs, as this case "approximates in its character to ordinary litigation," I am of opinion that the respondent Federation should pay the costs: Cf. *Australian Timber Workers' Union* v. *Sydney and Suburban Timber Merchants' Association* (1); *Melbourne and Metropolitan Tramways Board* v. *Municipal Officers' Association of Australia* (2); *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (3).

STARKE J. The Court has already decided in this case that Industrial Authorities are prohibited, except in certain cases, from altering rates of remuneration applicable to employment on 10th February 1942: See *National Security* (*Economic Organization*) *Regulations*, reg. 16. It is now argued that an award made on 15th June 1944 by James Connell, a Local Industrial Authority appointed pursuant to the provisions of the *Coal Production* (*War-time*) *Act* 1944, is excepted from that prohibition by reason of the provisions of reg. 17 of the *Economic Organization Regulations*, which, so far as material, are as follows:—

"(1) Notwithstanding anything contained in this Part, an Industrial Authority may, by any award, order or determination, alter any rate of remuneration . . .

(*b*) with the approval of the Minister, if the Industrial Authority is satisfied that the rates of remuneration in respect of which the alteration is sought are anomalous."

The Industrial Authority must be satisfied that the rates of remuneration are anomalous. But he must be so satisfied upon a proper construction of that regulation and not upon his own arbitrary, capricious and mistaken opinion of its meaning. An anomaly, according to the ordinary meaning of the word, is an irregularity or deviation from the ordinary rule. And the *Economic Organization Regulations* contemplate some irregularity or deviation in rates of remuneration for the like work. Like must be compared with like

(1) (1935) 53 C.L.R. 665, at p. 677. (2) (1944) 68 C.L.R. 628.
(3) *Ante*, at p. 299.

before it can be asserted that there is any irregularity or deviation from the ordinary rule. It is beyond doubt on the evidence in the present case that the rate of remuneration for shiftmen on the northern coal-fields of New South Wales covered working in "high places," as they are called. But special rates were fixed in certain exceptional cases in respect of "falls in high places," to use the industrial phrase. It may be that these special cases departed from the ordinary rule and were anomalous, but the ordinary rule was as stated. Thus in 1942 the Central Reference Board (Coal Mining Industry) stated that it had come to the conclusion that there was no justification for fixing special rates for high places generally but that there was justification for extra payments in relation to certain high falls and that it could find no justification for interfering with existing customs and decisions in this regard. Notwithstanding this pronouncement, the miners' union nevertheless put forward the following claim before Mr. James Connell, the Local Industrial Authority appointed under the Act already mentioned: "Shiftmen working or timbering in high places shall be paid an additional allowance as follows when called upon to work in places of certain heights." (A schedule of heights and rates followed.) The meaning of the claim was thus explained by the union representative to Mr. Connell: "Mr. Chairman, the position so far as this matter is concerned is simply this: that we have now quite a lot of high work at the mines and we have nothing set down on a graduated scale in regard to method of payment; further than that, we have . . . decisions of this Board . . . that payment should be made at certain heights where falls take place. Now, we are submitting that a graduated scale of payment should be set down as claimed: that it should cover shiftmen timbering at those heights irrespective of whether the heights are created by fall or by any other means. We have never been able to understand why a man working in a fall say at twenty feet in height should be paid a certain amount of money and another man working in the same height where the coal is shot down for some reason is receiving no consideration above his ordinary rate. It has caused quite a lot of disputes in the district and we think it is time that something of a uniform character was set down covering the whole thing on a district basis." It is plain from the claim and this statement that the union was desirous of altering the ordinary rate of remuneration on the northern coal-fields of New South Wales in respect of work in high places to another, a higher, uniform and graduated rate of remuneration. It was not claiming that different rates of remuneration were being paid for the like work, but that uniform rates should

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be paid for work in high places whether there were or were not "falls." It was attempting in a sense to convert the exceptional or, if one will, "the anomalous cases" of "falls in high places" into the ordinary and general rule of the industry on the northern coal-fields. But this is not claiming an alteration in rates of remuneration because of any anomaly but for the purpose of altering the ordinary rate of remuneration into another, and, from the point of view of the union, a more satisfactory rate. The award of Mr. Connell makes it plain that he adopted the erroneous view of the union, for his award prescribes:—"At Collieries in the Maitland and North-West Districts of New South Wales (with the exception of Pelton Colliery) the following shall apply:—

1. Where shiftmen are called upon to erect cross timbers at a height of 16 feet or more to make such place safe for working whilst so occupied on such work the shiftmen shall in addition to the recognized shift rate of wages be paid four shillings (4s.) per shift during the time they are necessarily occupied on such work.

2. Where shiftmen are called upon to erect props 17 feet in length and up to 20 feet they shall be paid one shilling (1s.) per shift extra. Over 20 feet in length up to 24 feet, two shillings (2s.) per shift extra. Over 24 feet and more in length three shillings (3s.) per shift extra."

Clause 3 relates to a mobile coal-loader operating on a fall and is admittedly bad. Clause 4 was not challenged. The clauses 1 and 2 of the award were approved by the Minister. But the award did not, for the reasons already given, alter rates of remuneration that were anomalous, but displaced the current and ruling rates of remuneration for shiftmen working in high places, and substituted others based upon higher uniform and graduated rates. It is a bad award, and the approval of the Minister cannot and does not make a bad award valid and effective.

It was next contended on the part of the union and the Commonwealth that prohibition does not lie in this case. The argument cannot be sustained. The Constitution provides for the issue of writs of prohibition against an officer of the Commonwealth (s. 75), and subjects cannot be deprived of this constitutional right by provisions such as are enacted in s. 40 of the *Coal Production (Wartime) Act* 1944 (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1); *Tramways Case* [*No.* 1] (2)). Again, it is the settled law of this Court that an Industrial Authority such as Mr. James Connell is an officer of the Commonwealth within

(1) (1910) 11 C.L.R. 1. (2) (1914) 18 C.L.R. 54.

the meaning of s. 75 of the Constitution (*R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1); *R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (2)). Further, that the jurisdiction or authority conferred upon Mr. Connell as an Industrial Authority attracts the remedy of prohibition if he exceeds his jurisdiction or authority: See cases *supra*. But it was argued that he had not exceeded his authority or jurisdiction, because the *Economic Organization Regulations* confer upon him authority to determine the construction of the Regulations, and therefore whether rates of remuneration are or are not anomalous. That depends upon the terms of the Regulations themselves. The Industrial Authority, it is provided, must be satisfied (See *Economic Organization Regulations*, reg. 17 (1) (*b*)), and he is empowered to act according to equity and good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and is not bound by any rules of evidence, but can inform his mind on any matter in such manner as he thinks just: See *Coal Production* (*War-time*) *Act* 1944, ss. 31 (2) and 35.

But we must examine all the provisions of the *Coal Production* (*War-time*) *Act* 1944 conferring authority and jurisdiction upon a Local Industrial Authority such as Mr. James Connell. Subject to the Act a Local Industrial Authority may settle any local industrial dispute likely to affect the amicable relations of employers in the coal-mining industry and their employees, members of the miners' union. The Local Authority has power to settle any local industrial dispute or matter referred to him by the Central Industrial Authority for settlement. And authority is conferred upon the Local Authority to determine any industrial dispute or matter of which it has cognizance and for that purpose it has in addition to any powers conferred by the Act the powers of the Commonwealth Court of Conciliation and Arbitration, and any award or order made is binding upon the parties to the dispute and must be filed in the Court and is enforceable as if it were an award of the Court: See Act, ss. 34 (1), 35, 31 and 32. The cases decided by this Court under the *Commonwealth Conciliation and Arbitration Act* make it clear that the existence of an industrial dispute is a condition of jurisdiction which the Industrial Authority has no authority conclusively to determine though it would, no doubt, in many cases, make a preliminary investigation for the purpose of ascertaining that it was "not overstepping the bounds which Parliament had laid down for it" (*Federated Engine-Drivers and Firemen's Association of*

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

(2) (1943) 68 C.L.R. 51, at pp. 58, 59.

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*A/asia* v. *Broken Hill Pty. Co. Ltd.* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (2); *Caledonian Collieries Ltd.* v. *A/asian Coal and Shale Employees' Federation* [*No.* 1] (3)). That was, and is now, I presume, the ordinary procedure of the Commonwealth Court of Conciliation and Arbitration. The provisions of the *Coal Production* (*War-time*) *Act* 1944 conferring jurisdiction upon Local Industrial Authorities are in line with the provisions of the *Commonwealth Conciliation and Arbitration Act* conferring jurisdiction upon the Commonwealth Court of Conciliation and Arbitration, and the construction given by the Court to the one Act is applicable to and should be adopted in so far as jurisdiction is conferred upon Local Industrial Authorities by the *Coal Production* (*War-time*) *Act* 1944. The effect of reg. 16 of the *Economic Organization Regulations* is to withdraw from Industrial Authorities such as Local Industrial Authorities some of their jurisdiction or authority to settle industrial disputes, that is, the authority to alter rates of wages applicable to employment on 10th February 1942, but reg. 17 restores it subject to the approval of the Minister if the Industrial Authority is satisfied that the rates of remuneration in respect of which an alteration is sought are anomalous. But all this is bound up with the jurisdiction and authority of the Local Industrial Authority and therefore with the condition of its jurisdiction which, as already mentioned, the Industrial Authority has no authority conclusively to determine. And the Industrial Authority cannot give itself jurisdiction by an erroneous determination of a fact upon which its jurisdiction must be founded or upon its own arbitrary, capricious or mistaken opinion of the meaning of the *Economic Organization Regulations*. The provision that the Industrial Authority is to act according to equity and good conscience, &c., is but a procedural provision, as has already been decided in this Court, which has not the effect of precluding the application of legal principles (*Tramways Case* [*No.* 1] (4); *Peacock* v. *Newtown Marrickville & General Co-operative Building Society No.* 4 *Ltd.* (5)).

Counsel for the Commonwealth suggested that regs. 16 and 17 of the *Economic Organization Regulations* had nothing to do with the jurisdiction and authority of Industrial Authorities but merely prescribed a rule of conduct which those Authorities must observe. Prohibiting an Authority, however, from doing something within its jurisdiction except in a particular case affects and limits its

(1) (1911) 12 C.L.R. 398, at pp. 453-455.
(2) (1909) 8 C.L.R. 419.
(3) (1930) 42 C.L.R. 527.
(4) (1914) 18 C.L.R., at p. 72.
(5) (1943) 67 C.L.R., at pp. 36, 46.

authority and jurisdiction in a manner that it cannot lawfully exceed.

An argument on the part of the prosecutors that the award was bad because it did not disclose jurisdiction on its face is untenable. The rule of the common law that determinations of inferior tribunals should show jurisdiction upon their face cannot reasonably be applied to the determinations of industrial tribunals which are conducted "without regard to legal forms and technicalities" and which legislative bodies often provide "shall be framed in such manner as to best express the decision of the Court . . . and to avoid unnecessary technicality": See *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 28.

Finally, I desire to add that if the *Coal Production (War-time) Act* 1944 and the *Economic Organization Regulations* confer upon Industrial Authorities authority conclusively to determine their own jurisdiction, then the question whether such legislation impinges upon the judicial power of the Commonwealth would require consideration.

The rule nisi for prohibition should be absolute in respect of clauses 1, 2 and 3 of the award pronounced on 15th June 1944 by Mr. James Connell as a Local Industrial Authority.

McTiernan J. The prosecutors apply for a writ of prohibition to prohibit the respondents from further proceeding on part of an award made by the respondent, Mr. Connell, who is a Local Industrial Authority appointed under the *Coal Production (War-time) Act* 1944: the award increases the rate of pay of certain members of the respondent union. The award was made upon a "matter" which the Central Industrial Authority, appointed under the above-mentioned Act, referred, in pursuance of s. 34 (1), to Mr. Connell. The writ is sought to prohibit him and the union from further proceeding on clauses 1, 2 and 3 of the award. Each of these clauses alters rates of pay which are pegged, unless an Industrial Authority is satisfied that any rate is anomalous, by reg. 16 of the *National Security (Economic Organization) Regulations*. Mr. Connell submitted clauses 1 and 2 to the Minister for his approval and the Minister approved, pursuant to reg. 17 of the above-mentioned Regulations, of these two clauses. Clause 3, which exceeded the terms of the reference, was not submitted for the Minister's approval and the Minister has not approved of it.

Section 35 of the above-mentioned Act makes s. 32 (1) of the Act applicable to the award of a Local Industrial Authority. This sub-section provides that any award or order made by the Central

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Industrial Authority shall be binding on the parties: and that it shall be filed in the Commonwealth Court of Conciliation and Arbitration, and that it shall thereupon have effect in all respects and be enforceable as if it were an award of that Court. Before this application was made the award which is now in question was filed in the Court of Conciliation and Arbitration in conformity with these provisions.

It is clear that a Local Industrial Authority is not vested with any power to enforce its awards and there is no suggestion that Mr. Connell has attempted to usurp any power to enforce this award.

Section 35 and s. 32 (1) do not invest a Local Industrial Authority with power which is of a judicial nature: See *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1).

This application for the writ of prohibition is founded on s. 75 (v.) of the Constitution of the Commonwealth. The substantial ground upon which the application is made is that the rates of pay to which clauses 1, 2 and 3 apply were not anomalous within the meaning of reg. 17 of the *National Security (Economic Organization) Regulations* and that clauses 1, 2 and 3 are therefore beyond Mr. Connell's jurisdiction.

In *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (2), an application for a writ of prohibition against the chairman of a special tribunal appointed for the coal-mining industry was made, as in the present case, after the tribunal had made its award. There the tribunal was constituted under the *Industrial Peace Act* 1920: and s. 17 of that Act provided that any award of the tribunal should be binding on the parties and enforced as an award of the Court of Conciliation and Arbitration. There was a sharp difference of opinion among the Justices who heard the application, whether the writ of prohibition would go to prohibit the tribunal after it had completed its award. The Commonwealth and the Miners' Federation in that case opposed the application of the company upon the ground that in as much as the award had been made when the application for the writ was launched, it was then too late for the High Court to interfere by granting a writ of prohibition against the tribunal's further proceeding on the award, the tribunal being then *functus officio*. *Knox* C.J., *Gavan Duffy* J. and *Starke* J. were of opinion that it was not too late to grant a writ of prohibition after the special tribunal had completed its award and that the writ should go.

*Knox* C.J. and *Gavan Duffy* J. said: "So long, at any rate, as a judgment or order made without jurisdiction remains in force so as to impose liabilities upon an individual, prohibition will lie to

(1) *Ante*, at p. 185. (2) (1920) 28 C.L.R. 456.

correct the excess of jurisdiction " (1). After citing cases to support this view *Knox* C.J. and *Gavan Duffy* J. used these words : " Now, assuming this so-called award to remain in force, it imposes on every person engaged in the coke industry in New South Wales who employs therein a member of the respondent Federation the obligation of complying with the terms of the award, and this obligation is to continue until the award is rescinded or varied by the Special Tribunal " (2). They discounted the consideration that the tribunal had no power to enforce the award, but attached importance to the provision of the Act making an award binding on the parties and enforceable as an award of the Arbitration Court in other courts. Their Honours added : " On principle, it appears to us quite irrelevant whether the enforcement of the order made without jurisdiction is left in the hands of the court which made that order or is committed to some other tribunal. No doubt the test usually applied in cases decided in England for the purposes of determining whether the operation of the order complained of has been exhausted is to inquire whether the court which made the order can proceed to enforce its performance, but probably the reason for this is that in those cases the order, if enforceable at all, would be enforceable in the court which made the order. So far as we can ascertain, no case has been brought before the courts in England in which the tribunal which made the order had thereby completely performed its function, the enforcement of the order, when made, being taken out of the hands of that tribunal and committed to another tribunal of a judicial or quasi-judicial character " (2). *Starke* J., who reached the same conclusion as *Knox* C.J. and *Gavan Duffy* J., said : " In the present case the award of Mr. Hibble has not been executed. It is, to use the words of *Lush* J. in *Serjeant* v. *Dale* (3), ' still in operation,' and if not stayed it may lead to further proceedings, if not before the Special Tribunal, at all events before other tribunals. The provisions of the award itself purport to reserve power to the usurping authority to vary and rescind it " (4). *Isaacs*, *Higgins* and *Rich* JJ. were of the opinion that the application for the writ of prohibition—it was a writ to prohibit the tribunal from further proceeding upon its award—should be refused. *Isaacs* and *Rich* JJ. relied upon *Chabot* v. *Morpeth* (5), which their Honours go into (6), and *Higgins* J. referred to *Re Poe* (7). These cases are not elsewhere referred to in the report of the case except in argument. *Higgins* J. said : " I concur with my brother *Isaacs* in his opinion

(1) (1920) 28 C.L.R., at p. 463.
(2) (1920) 28 C.L.R., at p. 464.
(3) (1877) 2 Q.B.D. 558, at p. 568.
(4) (1920) 28 C.L.R., at p. 493.
(5) (1848) 15 Q.B. 446.
(6) (1920) 28 C.L.R., at pp. 485, 486.
(7) (1833) 5 B. & Ad. 681 [110 E.R. 942].

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that prohibition will not lie against a court or tribunal unless something remains for it to do. Prohibition is against future acts; and the claim here is, actually and appropriately, for a prohibition against 'further proceeding upon the award.' What further proceeding is contemplated here by the tribunal? What proceeding is even possible? In the case of courts which can execute their judgments, a writ of prohibition may be claimed at any time before the execution is complete, but not afterwards" (1).

Mr. Connell was, at the time he made the award the subject of the present case, an Industrial Authority for the purposes of regs. 16 and 17, by reason of his appointment as a Local Industrial Authority under the *Coal Production (War-time) Act* 1944: and his power to make an award altering any rate of pay to which the regulations applied was governed by them. An award altering any such rate does not by its own force impose a liability on the employers to pay according to its terms. The Minister's approval of the award is necessary to make it binding.

In *Hibble's Case* (2) the award, if within jurisdiction, would have imposed liability upon the employers. But in the present case, the question whether the employers should be bound according to the tenor of Mr. Connell's award to the extent to which it purports to alter pegged rates of pay, is one of high policy to be settled by purely executive decision and action.

Another distinction between the present award and that in *Hibble's Case* (2) is that the Connell award does not reserve any power to the Local Industrial Authority to vary or rescind it: See *Hibble's Case* (3).

The present application is for a writ of prohibition prohibiting Mr. Connell from further proceeding on his award. It seems to me that there is a question whether the considerations upon which it was held in *Hibble's Case* (2) that prohibition should go, apply to the present case for the reason that political and executive action are necessary to make Mr. Connell's award binding on anybody: and there is a further question whether the decision of the present case should be affected by the considerations that Mr. Connell has completed the award, that its enforcement is not in his hands, and that no further proceedings on it by him are possible or contemplated: it does not seem that Mr. Connell has any power in respect of the award, after making it, similar to the power which the tribunal in *Hibble's Case* (2) could exercise in relation to its award after making it.

In the case of *Re Clifford and O'Sullivan* (4) some statements of principle were made which afford guidance in the consideration

(1) (1920) 28 C.L.R., at p. 489.
(2) (1920) 28 C.L.R. 456.
(3) (1920) 28 C.L.R., at p. 493.
(4) (1921) 2 A.C. 570.

of these questions. Viscount *Cave* said: "A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail" (1). *Chabot* v. *Lord Morpeth* (2) and *Re Poe* (3), which are cited by *Isaacs*, *Higgins* and *Rich* JJ. to support their opinions in *Hibble's Case* (4), were cited by Viscount *Cave* as authoritative decisions. In the same case Lord *Sumner* said: "My Lords, I think there is another difficulty in the appellants' way, which ought to be mentioned. So far as the evidence shows the officers who constituted the military court are now completely *functi officio* and, as a tribunal, are definitely dispersed, so far as this case is concerned. There is no material to support the surmise that they might be called upon to reconsider either their decision or their sentence. True, judgment, though given, is not yet executed, but the execution is not in the hands of these officers or of any one acting under their directions or authority" (5).

In the case of *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (6) (the *Shipping Labour Bureau Case*) an application was made for prohibition against the Commonwealth Court of Conciliation and Arbitration after award. The Waterside Workers' Federation founded their opposition to the application on the principles contained in the above statements of Viscount *Cave* and Lord *Sumner*. The majority, *Knox* C.J., *Gavan Duffy* and *Starke* JJ., held that the distinctions between the powers of the Court of Arbitration and the military tribunal were such that the case of *Re Clifford and O'Sullivan* (7) was not in conflict with the cases in which the High Court had issued prohibition to the Court of Arbitration after award.

*Isaacs* and *Rich* JJ., who were the only other members of the Court, dissented. They observed that the cases before *Alexander's Case* (8) rested upon the supposition that the Court of Arbitration was in the position of any other court having jurisdiction to enforce its orders. Their Honours declared that *Alexander's Case* (8) had dissipated the view that "the one tribunal was both arbitral and judicial in the strict sense."

*Knox* C.J. and *Gavan Duffy* J. drew a distinction between the Commonwealth Court of Conciliation and Arbitration which made the award there in question and the military tribunal against which

(1) (1921) 2 A.C., at p. 584.
(2) (1848) 15 Q.B. 446.
(3) (1833) 5 B. & Ad. 681 [110 E.R. 942].
(4) (1920) 28 C.L.R. 456.
(5) (1921) 2 A.C., at p. 591.
(6) (1924) 34 C.L.R. 482.
(7) (1921) 2 A.C. 570.
(8) (1918) 25 C.L.R. 434.

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the House of Lords decided that prohibition would not lie. Their Honours used these words : " There is no analogy whatever between such a ' tribunal ' and a permanant institution such as the Commonwealth Court of Conciliation and Arbitration, or between the advice given by the so-called military court to the commanding officer and an award of the Court of Arbitration conferring rights and imposing obligations which can be enforced by proceedings in recognized courts of law. Nor was there, in that case, any power in the ' tribunal ' to reconsider its decision or its sentence, while the Court of Arbitration is expressly authorized by s. 38 (*o*) to vary its awards and to reopen any question. Moreover, the real ground of the decision of the House of Lords was that the officers who were said to constitute the tribunal ' did not purport to act as a court in any legal sense ' (per Viscount *Cave* (1) ). That this was the real ground of the decision, appears clearly from the speech of Lord *Shaw* (2). The only express reference to the objection that the application was too late, except that made by Viscount *Cave*, is contained in the speech of Lord *Sumner*, who apparently attached some weight to the consideration that the ' tribunal ' had no power to reconsider its decision or alter its sentence (3) " (4). *Starke* J. said : " But, in the case of the Arbitration Court, established under the Federal law, its award is subsisting and operative, and the proceeding in which it issues remains pending in the court. Any question can be reopened, and any award or order can be varied (s. 38 (*o*) and s. 39). Nothing in *Clifford's Case* (5), however, throws any light upon the proper application of the well-known and long-established legal principle mentioned therein to tribunals lawfully established as courts with arbitral functions and statutory authority " (6).

Mr. Connell was clothed with the powers of an Industrial Authority for the purposes of reg. 17 by virtue of his appointment as a Local Industrial Authority under the *Coal Production (War-time) Act* 1944. An examination of this Act shows, I think, that, although a Local Industrial Authority is vested with some arbitral authority, it is of an order different from the powers of the Commonwealth Court of Conciliation and Arbitration. A Local Industrial Authority is an officer of the Commonwealth Coal Commissioner (s. 33). The Act provides that a Local Industrial Authority may exercise his power within such limits as to locality or otherwise as are specified by the Commissioner (s. 33). If a Local Industrial Authority has in any circumstances, by the combined effect of ss. 31 and 35 of the Act,

(1) (1921) 2 A.C., at p. 584.
(2) (1921) 2 A.C., at p. 585.
(3) (1921) 2 A.C., at p. 591.
(4) (1924) 34 C.L.R., at pp. 497, 498.
(5) (1921) 2 A.C. 570.
(6) (1924) 34 C.L.R., at p. 556.

the power, which is vested in the Commonwealth Court of Conciliation and Arbitration by s. 38 (*o*) of its own statute, to vary its awards and reopen any question, it is not a power which the Local Industrial Authority is free to exercise according to its own judgment in the same way as the Court of Arbitration is free to exercise its powers under s. 38 (*o*). The Local Industrial Authority is not master in his own household as he is an officer of the Commonwealth Coal Commissioner and subject to his authority. In so far as the reason for the conclusion that prohibition lies after an award, if it is beyond jurisdiction, prohibiting the Court from further proceeding on the award, depends upon the power of the Court to vary its awards and to reopen any question (the effect of this power being that the matter remains pending in the Court after the award is made, and the Court is not then *functus officio*), this reason is not, in my opinion, available here. A Local Industrial Authority is, by the present Act, subordinate to the Coal Commissioner, and it is not entirely a matter for the Local Industrial Authority to determine whether any matter should be reopened. But even if a Local Industrial Authority has jurisdiction to reopen an award made upon a matter, beyond the scope of reg. 17, referred to him, as the present matter was, by the Central Industrial Authority, I think that he could not exercise that power in relation to any matter covered by an award to which the Minister gave his approval under reg. 17 unless the Local Industrial Authority obtained a fresh cognizance of the matter. It is not in my judgment a tenable view that such a matter remains pending before a Local Industrial Authority after the Minister has approved or disapproved of his award. It seems to me that on these grounds the award in the present case can be distinguished from the award in *Hibble's Case* (1) and that in the *Waterside Workers' Case* (2). The grant of a writ of prohibition after award in the present case cannot in my opinion be supported by any reasons involving the view that at the time the application for the writ was made, Mr. Connell had power to vary his award under reg. 17 or to re-open the matter of the award.

It has already been observed that Mr. Connell was bound by regs. 16 and 17 of the *National Security* (*Economic Organization*) *Regulations*. Regulation 16 imposes a fetter on an Industrial Authority in the exercise of its statutory powers to alter rates of wages. A Local Industrial Authority is subject to this regulation and reg. 17. This regulation, to which reg. 16 is subject, confers power upon an Industrial Authority with the approval of the Minister to alter the rates

(1) (1920) 28 C.L.R. 456. (2) (1924) 34 C.L.R. 482.

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applicable to any employment on 10th February 1942 if the Industrial Authority is satisfied that those rates are anomalous. The Minister may in his discretion approve or reject the alteration proposed by the Industrial Authority. The Minister's action is purely administrative. It is clear that the alteration proposed by the Industrial Authority is not binding on anybody unless the Minister gives his approval.

When a Local Industrial Authority is exercising the powers conferred upon him by reg. 17 he is, in my view, exercising functions approximating to those assigned to the Board, against which the Court refused prohibition in *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1), rather than to the arbitral functions of the Commonwealth Court of Conciliation and Arbitration.

The statements which have been quoted from the reasons of the majority in *Hibble's Case* (2) and the *Waterside Workers' Federation Case* (3) regarding the continuing operation of the awards which were in question in those cases were made in relation to awards depending only upon quasi-judicial powers. It is a very material distinction in the present case that the Minister's approval under reg. 17 was necessary to make the award now challenged binding at all, and that the award takes effect by virtue of purely executive action, or at least by virtue of the combined powers of a Local Industrial Authority and the administrative and political powers of the Minister. Upon this ground the part of the award that has been approved of by the Minister has a juridical character different from that of the awards which were the occasions for the applications for writs of prohibition in *Hibble's Case* (2) and the *Waterside Workers' Case* (3) and the line of cases to which they belong.

It is not the law that prohibition does not lie against a quasi-judicial body merely because its determinations are subject to approval or confirmation (*R.* v. *Electricity Commissioners* (4); *Estate & Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (5) ). But, it is to be observed, that in the latter case, for example, the declaration of the respondents had not been approved by the Governor in Council. They were held to have quasi-judicial power; and the question whether they as a Board were *functus officio*, arose for decision.

I think that the principle that Mr. Connell was *functus officio* after the award was approved by the Minister and filed in the Commonwealth Court of Conciliation and Arbitration should be applied here:

(1) (1923) 32 C.L.R. 518.
(2) (1920) 28 C.L.R. 456.
(3) (1924) 34 C.L.R. 482.
(4) (1924) 1 K.B. 171.
(5) (1937) A.C. 898.

and that the considerations upon which it was held in *Hibble's Case* (1) and the *Waterside Workers' Case* (2) that prohibition would go after award against the special tribunal in the former case and the Commonwealth Arbitration Court in the latter case do not apply here. For this reason I think that the application would fail so far as regards clauses 1, 2 and 3. It should fail also so far as clauses 1 and 2 are concerned for the reason that they impose liability by virtue of ministerial action, not by virtue of purely judicial or quasi-judicial authority; and, so far as regards clause 3, for the reason that it does not impose liability on anybody; the Minister's approval of this clause was not sought or given: the award has been filed in the Court of Arbitration and it is not suggested that anybody contemplates submitting it to the Minister for his approval. If the award is not a lawful exercise of the powers conferred upon Mr. Connell the prosecutors' remedy is not by way of prohibition against him.

In this view it is unnecessary for me to deal with the question of the limits of the jurisdiction conferred by reg. 17. But as the question has been so fully argued I express my opinion on it.

It is to be noticed in the first place that an appeal does not lie against Mr. Connell's award (*Coal Production (War-time) Act* 1944, s. 40), and if prohibition is appropriate it can go only if Mr. Connell had no jurisdiction to make the award. Is it a fact preliminary to the exercise of the power conferred upon an Industrial Authority by reg. 17 that the pegged rate is anomalous? If the anomalous character of the rate is a condition of the power then an Industrial Authority could not be held to have kept within the limits of its jurisdiction if it altered a rate which the Authority was satisfied was anomalous, but which this Court decided was not anomalous. On the other hand, is the meaning and effect of the regulation that the condition of jurisdiction is not that the rate is anomalous, but that the Industrial Authority is satisfied that it is anomalous? In that view the only question for the Court would be whether the Industrial Authority was satisfied that the rate was anomalous: it could not be held that the Industrial Authority exceeded its jurisdiction by altering a rate if the Industrial Authority was satisfied that the rate was anomalous, but this Court thought that the Industrial Authority was wrong in its conclusion.

The question which arises is one of construction and the object of construction is to ascertain the intention of the law-maker. That intention is to be gathered from the words which the law-maker uses. In my opinion the intention exhibited by the regulation is to give an

(1) (1920) 28 C.L.R. 456. (2) (1924) 34 C.L.R. 482.

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Industrial Authority jurisdiction to decide whether any pegged rate is anomalous, and, subject to the Minister's approval, to alter the rate if it is satisfied that the rate is anomalous. This construction is in accordance with the language used. Further, it was within the ordinary course of these tribunals coming within the definition of Industrial Authority in the Regulations to satisfy themselves whether anomalies existed in workers' rates of pay and to eliminate them if they thought fit to do so : and it can be presumed that the Executive would consider that an Industrial Authority is a more appropriate authority than a superior court of general jurisdiction to decide whether any rate of pay pegged by reg. 16 is anomalous. However, it is in accordance with the presumption which ought to be applied to the construction of such a regulation that the Executive intended by the words it has used that the Industrial Authority should be satisfied according to law. Accordingly, if it appears to the Court that this standard has not been observed it would be the duty of the Court to find that any satisfaction expressed by the Industrial Authority was insufficient in law and that a condition precedent to its jurisdiction had not been fulfilled. This standard involves that the Industrial Authority should direct itself in accordance with the proper meaning in the context of the word " anomalous " : and the conclusion that an Industrial Authority was not satisfied according to law that the rates which it altered were anomalous, may be apparent from any expression of the considerations by which it was moved, or, if this is absent, the conclusion may be necessarily justified by the circumstances of the case and the finding made by the Industrial Authority. But where the Industrial Authority is duly satisfied that a rate of remuneration is anomalous it is not for this Court in prohibition proceedings to hold that the condition necessary to jurisdiction was not fulfilled, even if the Court thought there was no anomaly, but the Industrial Authority was satisfied that there was.

The ordinary meaning of anomalous is irregular or deviating from a rule and it has this meaning in reg. 17. The question then is: Was Mr. Connell duly satisfied according to law that the rate of remuneration payable on 10th February 1942 to shiftmen who were called upon to do the work described in clauses 1 and 2 of the award was anomalous ? The work described in the first clause is the erection of cross timbers at a height of sixteen feet or more to make such place safe for working : and the work described in the second clause is the erection of props of lengths beginning at seventeen feet and going upwards. It is apparent from Mr. Connell's letter to the Minister, seeking approval to these clauses of the award, that

Mr. Connell decided that he was satisfied that the pegged rate of wages for workers doing these particular jobs was anomalous. The pegged rates of remuneration for shiftmen are contained in an award. That states: "The Board has come to the conclusion that there is no justification for fixing special rates for high places generally; but that there is justification for extra payments in relation to certain high falls."

There is in my opinion nothing to show that Mr. Connell could not have been duly satisfied that the rates which he altered by clauses 1 and 2 were anomalous. The evidence I think confirmed the supposition that he was duly satisfied that those rates were anomalous.

The evidence given by the mine-workers could, I think, have reasonably satisfied a fair-minded arbitrator that the work described in clauses 1 and 2 involves substantially the same risks and strain and had practically the same incidents as the work to which the "extra payment in relation to high places" was applicable; that the pegged rates for the work described in those clauses were disparate in relation to the pegged rate for the work carrying the extra payment; and that he could have been reasonably satisfied that the pegged rates for the work described in clauses 1 and 2 deviated from a rule, which it would be quite legitimate to apply, that there should be a fair proportion between the rates of pay applicable to workers engaged in practically the same field and incurring substantially the same risks, and it was therefore fair and reasonable to say that such pegged rates were anomalous.

I agree that there is no rule of law that when a decision of the Local Industrial Authority is challenged in a court which has jurisdiction to issue prohibition against him a technically drawn record of proceedings should be forthcoming which shows upon its face that he had jurisdiction to give the decision.

In my opinion the order nisi should be discharged.

WILLIAMS J. This is an application by five colliery companies operating in the Maitland and North-West districts of New South Wales to make absolute a rule nisi to show cause why a writ of prohibition should not issue directed to the respondent James Connell and the Australasian Coal and Shale Employees' Federation prohibiting them from further proceeding upon clauses 1, 2 and 3 of the award order and determination made by Connell on 15th June 1944. These clauses provide that "at Collieries in the Maitland and North-West Districts of New South Wales (with the exception of Pelton Colliery) the following shall apply:—

1. Where shiftmen are called upon to erect cross timbers at a height of 16 feet or more to make such place safe for working

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whilst so occupied on such work the shiftmen shall in addition to the recognized shift rate of wages be paid four shillings (4s.) per shift during the time they are necessarily occupied on such work.

2. Where shiftmen are called upon to erect props 17 feet in length and up to 20 feet they shall be paid one shilling (1s.) per shift extra. Over 20 feet in length up to 24 feet, two shillings (2s.) per shift extra. Over 24 feet and more in length three shillings (3s.) per shift extra.

3. Where a mobile loader operates on a fall each member of the crew shall be paid a consideration payment of two shillings (2s.) per shift in addition to the recognized shift rate of wage during the time they are so occupied."

The respondent Connell is a Local Industrial Authority appointed under the provisions of the *Coal Production* (*War-time*) *Act* 1944, Part V., Div. 2, and the award that has been challenged was made by him in the purported exercise of the powers conferred upon him by s. 34 of that Act and in particular of that conferred by s. 34 (1) (*c*), to settle any local industrial dispute or matter or part thereof referred to him by the Central Industrial Authority for settlement.

Seven grounds are referred to in the order nisi but of these I need only set out grounds (1), (2) and (5).

(1) That clauses 1, 2 and 3 of the above award were made unlawfully because they were in breach of reg. 16 of the *National Security* (*Economic Organization*) *Regulations* and were not justified by reg. 17 of those Regulations; (2) That these clauses were made in excess of jurisdiction; and (5) That there was no ground on which Connell could be satisfied that the rates of remuneration in respect of which he purported to make the alterations provided for by the award were anomalous.

The first ground has already been disposed of as a preliminary point to the extent that it has been decided that the Industrial Authorities set up under Part V. of the Act are bound by regs. 16 and 17 of the *National Security* (*Economic Organization*) *Regulations*. The questions that still remain for decision may be compendiously stated as follows:—1. Whether there was any evidence upon which Connell could be satisfied within the meaning of reg. 17 (1) (*b*) of the *Economic Organization Regulations* that the rates of remuneration in respect of which the alterations were sought were anomalous; and 2. If there was no such evidence, whether the existence of an anomaly in fact was required to give him authority to make the award so that the award was made in excess of jurisdiction or whether his finding that there was an anomaly was simply an erroneous conclusion upon a fact committed to his jurisdiction to be adjudicated upon in the course of the inquiry.

The material facts are, shortly stated, that, on 10th February 1942, the date mentioned in reg. 16 of the *Economic Organization Regulations*, the rates of pay for shiftmen first and second class in the northern district of New South Wales were fixed and paid on the basis that it was part of their normal duties to work in high places so that no extra rate was allowed on that account except that in certain collieries an extra payment was made to shiftmen for certain work in high places where a high fall of coal or stone from the roof had occurred. The claim made by the employees as amended pursuant to which the award was made was that shiftmen should be paid additional allowances when called upon to work in any places above certain heights.

On 15th June Connell made the award already mentioned. On the same date he applied to the Minister for Labour and National Service to approve the award in accordance with reg. 17 (1) (*b*) of the *Economic Organization Regulations*. On 24th June the Minister approved of the alterations provided for by the award in the case of shiftmen.

In view of the decision on the preliminary point it is now conceded that clause 3 of the award, which relates to mobile coal-loaders, cannot be maintained, because in their case the Minister did not approve of the alteration.

Mr. *Kitto* contended that in order to determine whether the award was made in excess of jurisdiction, the Court is only entitled to look at the amended claim and the award; and that, since it does not appear on the face of these documents that the alterations were sought and made to cure an anomaly, the record on its face shows a want of jurisdiction. But I think that the question whether a lay body like the present in exercising quasi-judicial functions, especially where it is expressly authorized to proceed in the manner provided by s. 31 (2) of the Act, has exceeded its jurisdiction must be determined as one of substance and not of technicality, and that the way in which the Privy Council approached a similar problem in *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (1) is ample authority to show that in examining the proceedings of such authorities in order to ascertain whether they have exceeded their jurisdiction, a superior court is entitled to look at the whole transcript including the evidence and the reasons, if any, which the authority has given for making the award. From the transcript in the present case it is apparent, to my mind, that it was claimed and found that it was anomalous that extra pay should be awarded to shiftmen who worked in high places where a fall had occurred while no extra pay was awarded to shiftmen who worked in similar places

(1) (1937) A.C. 898.

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where no fall had occurred, there being evidence that in both cases the work involved extra danger, exertion, and wear and tear on the nervous system. But this evidence is not, in my opinion, evidence of an anomaly within the proper meaning to be attributed to that word in reg. 17 (1) (*b*). The dictionaries give as meanings of "anomaly" unevenness and inequality of condition, exceptional conditions or circumstances, a deviation from the common rule. The purpose of reg. 16 was plainly, subject to certain express and limited exceptions, to "peg" wages at the rates existing on 10th February 1942. One exception, embodied in reg. 17 (1) (*b*), was that an Industrial Authority might alter any rate of remuneration, with the approval of the Minister, if satisfied that the rate of remuneration in respect of which the alteration was sought was anomalous. On 10th February 1942 it was a recognized condition of employment that shiftmen did not receive extra pay, with one exception, for working in high places. There would only have been an anomaly, therefore, if, in the case of the collieries owned by the prosecutors, shiftmen were not receiving extra remuneration for working where there had been a high fall, so that to award extra rates to shiftmen in these collieries for doing work that had always been included in the work to be rewarded at ordinary rates would be not to cure an anomaly but to create one. This does not mean, of course, that the anomalies included in reg. 17 (1) (*b*) are necessarily confined to those which existed on 10th February 1942. An anomaly could be created by change of circumstances after that date, as, for instance, by the introduction of new methods of working a mine creating extra hazards, or because workmen who were working in an area that had become dangerous through enemy action were still receiving the same remuneration as workmen who were doing the same work in a safe area, but the evidence in the present case given in support of clauses 1 and 2 of the award does not disclose any circumstances which have altered the general conditions with respect to shiftmen which existed in the coal-mining industry in the Maitland and North-West districts on 10th February 1942. The evidence, therefore, did not, in my opinion, justify a conclusion by Connell that the rate of remuneration in respect of which the alteration was sought was anomalous.

The remaining question is whether, there being no anomaly in fact, the award was made in excess of jurisdiction. It was contended that Connell derived his jurisdiction from the *Coal Production (War-time) Act*, and that, in the exercise of this jurisdiction, the provisions of the *Economic Organization Regulations* were simply part of the general law, as to the true effect of which he could fall into error in the same way as in the case of other matters which he had to take

into account in hearing the claim and making or refusing an award. We were referred to the case of *R.* v. *Nat Bell Liquors Ltd.* (1). In that case Lord *Sumner*, in delivering the judgment of the Privy Council, cited the well-known statement by *Coleridge* J. speaking for the Court of Exchequer in *Bunbury* v. *Fuller* (2) :— "No court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior court" (3).

In the present case reg. 16 of the *Economic Organization Regulations* placed a clear limitation upon the jurisdiction of every Industrial Authority. It deprived those Authorities of jurisdiction in settling a dispute to alter any rate of remuneration existing on 10th February 1942. Regulation 17 (1) (*b*) then engrafted an express exception upon that limitation by empowering Industrial Authorities with the approval of the Minister to alter the rate of remuneration where they were satisfied that the existing rate was anomalous. The existence of this satisfaction was therefore made an essential condition of jurisdiction to alter the rate of remuneration. In the present case the claim was for an increase in the rate of remuneration payable on 10th February 1942 to shiftmen employed on work above certain heights in the prosecutors' mines. The merits of that claim could only be gone into if Connell was satisfied that there was an anomaly. His satisfaction on that point was therefore an essential preliminary to his jurisdiction to hear and determine the claim. If the regulation had simply stated that an Industrial Authority could alter the rate of remuneration if an anomaly existed, the jurisdiction of the superior court to examine whether there was evidence on which Connell could have held that there was an anomaly would, I think, be established, but the question still remains whether the provision that it is the Industrial Authority that must be satisfied can make any difference. On this question the circumstances are very similar to those with which the Privy Council had to deal in the case of *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (4). There the respondent Trust was empowered by an ordinance, whenever it appeared to the Trust that within its administrative area any

(1) (1922) 2 A.C. 128.
(2) (1853) 9 Ex. 111, at p. 140 [156 E.R. 47, at p. 60].
(3) (1922) 2 A.C., at p. 158.
(4) (1937) A.C. 898.

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building which was used or was intended or was likely to be used as a dwelling place was of such a construction or was in such a condition as to be unfit for human habitation, by resolution to declare such building to be insanitary. The Trust in purported exercise of this power made a declaration that a house belonging to the appellant was insanitary within the meaning of the ordinance. Lord *Maugham*, in delivering the judgment of the Privy Council, pointed out that the Trust in condemning the house had acted perfectly honestly but had applied a different test to that which was open to it under the ordinance, or in other words had applied a wrong and inadmissible test so that it was acting beyond its powers and the declaration was unenforceable (1). Applying the reasoning of their Lordships, *mutatis mutandis*, to the present case it appears to me that Connell, whose good faith is not challenged, adopted a wrong view of the meaning of anomaly in reg. 17 (1) (*b*), and that, if he had adopted its true meaning, there was no evidence on which he could have been satisfied that an anomaly existed. He therefore adopted a wrong and inadmissible test and acted beyond his powers, so that clauses 1 and 2 of the award are void and unenforceable. The case is to my mind indistinguishable in principle from the recent decision of this Court in *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (2), in which it was held that the Women's Employment Board could not, by placing a wrong construction upon the meaning of the words "work which, immediately prior to the outbreak of the present war, was not performed in Australia by any person" in reg. 6 (1) (*c*) of the *Women's Employment Regulations*, give itself a jurisdiction which it would not have had upon the true construction of the expression: See also *Church* v. *Inclosure Commissioners* (3); *R.* v. *Income Tax Commissioners for City of London* (4).

For these reasons I would make the order absolute.

*Order absolute. Costs of prosecutors to be paid by respondent Federation.*

Solicitors for the prosecutors, *Sparke & Helmore*, Newcastle, by *Gill, Oxlade & Broad.*

Solicitors for the respondent Federation, *W. C. Taylor & Scott.*

Solicitor for the respondent Connell and for the Commonwealth (intervening), *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1937) A.C., at pp. 913, 917.
(2) *Ante*, at p. 299.
(3) (1862) 11 C.B. (N.S.) 664 [142 E.R. 956].
(4) (1904) 91 L.T. 94.