[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

FOSTER AND OTHERS;

Ex parte CROWN CRYSTAL GLASS PROPRIETARY LIMITED.

(Nos. 43 and 51 of 1945.)

AUSTRALIAN GLASS WORKERS' UNION . . Applicant;

AND

CROWN CRYSTAL GLASS PROPRIETARY LIMITED . . . . . } Respondent.

H. C. of A. 1945.

Sydney, *Aug.* 9, 20-22.

Melbourne, *Oct.* 22.

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

Women's Employment—Jurisdiction under Regulations—"Work . . . which . . . was performed by males at any time since the outbreak of the present war"—Condition fulfilled where substantial employment of males—Women's Employment Regulations (Women's Employment Act 1942, *Schedule—S.R.* 1944 *No.* 179), *reg.* 6 (1) (*b*).

Industrial Law—Women's employment—Industrial peace—Validity of order under Industrial Peace Regulations relating to employment of women—Term of order dependent on decision of High Court as to construction of regulations—Whether general jurisdiction under Industrial Peace Regulations ousted by special jurisdiction under Women's Employment Regulations—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *ss.* 28, 38 (*b*), 40A—*Women's Employment Regulations (Women's Employment Act* 1942, *Schedule—S.R.* 1944 *No.* 179)—*National Security (Industrial Peace) Regulations (S.R.* 1940 *No.* 290—1945 *No.* 60), *regs.* 3, 10, 17.

Regulation 6 (1) (*b*) of the *Women's Employment Regulations* provides:—"Where an employer proposes to employ, is employing, or has at any time

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

since the second day of March, 1942, employed, females on work— . . . (*b*) which, within the establishment of that employer, was performed by males at any time since the outbreak of the present war . . . the employer shall . . . forthwith make application to the Court for a decision in accordance with this regulation."

Held that the words in the regulation, "work . . . which . . . was performed by males", means a class of work which was mainly performed by males.

An order of a Judge of the Commonwealth Court of Conciliation and Arbitration purporting to be made under the *National Security* (*Industrial Peace*) *Regulations* directed all females employed by a company to return to work upon terms and conditions, as to remuneration and otherwise, specified in the order.

Held, by *Dixon* and *Williams* JJ., that orders having the same operation and effect as those which the Court constituted under the *Women's Employment Regulations* is empowered to make cannot be made by the Court when conditions prescribed by those Regulations are not performed or fulfilled. *Per Latham* C.J.: The *Women's Employment Regulations* do not prevent the Commonwealth Court of Conciliation and Arbitration from making an award in respect of females as to whom there is power to make an order under the Regulations except in so far as the award is inconsistent with the order.

Paragraph IV. of the order provided that it should come into operation as from 5th July 1945 and should continue in force until the High Court decided that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in a judgment of the same Judge of the Commonwealth Court of Conciliation and Arbitration in earlier proceedings under the *Women's Employment Regulations* was in error.

Held, by the whole Court, that par. IV. of the order contravened s. 28 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, which provides that an award of the Court shall continue in force for a period to be specified in the award not exceeding five years from the date upon which the award comes into force.

ORDERS NISI for prohibition and CASE STATED by Judge *Foster*, a Judge of the Commonwealth Court of Conciliation and Arbitration.

On 11th September 1944 an application was made by the Australian Glass Workers' Union under reg. 7B of the *Women's Employment Regulations* to the Women's Employment Board constituted thereunder to determine the rates of payment to be made to and the hours and conditions to be observed in respect of certain female employees employed by Crown Crystal Glass Pty. Ltd. on certain work specified in the application. The work in respect of which the application was made was described therein and was specified under numerous classifications and it was claimed that the work was work specified

in pars. (*a*), (*b*) or (*c*) of sub-reg. (1) of reg. 6 of the Regulations, but the application did not specify in respect of any particular classification of the work by which of the clauses it was claimed to be covered.

Prior to the hearing of the application the Regulations were amended by Statutory Rules 1944 No. 149 whereby the Commonwealth Court of Conciliation and Arbitration constituted by a Judge of that Court designated by the Chief Judge of the Court for the purpose of the *Women's Employment Regulations* was substituted for the Women's Employment Board.

The application came on for hearing before Judge *Foster*, the Judge so designated. During the hearing it became necessary to determine whether certain of the work specified in the application was work specified in reg. 6 (1) (*b*) of the Regulations. It was contended on behalf of the applicant union that on the true construction of reg. 6 (1) (*b*) it was competent for the Court to make a decision in respect of work specified therein if it were established that at any time since the outbreak of the war the said work in the establishment of the respondent company had been performed by males but not necessarily exclusively. On behalf of the respondent company it was contended that on the true construction of the sub-regulation it was not competent for the Court to make a decision in respect of such work unless it were established that at any time since the outbreak of the war the said work in the establishment of the respondent company had been performed exclusively by males. On 17th May 1945 Judge *Foster* made a determination which was expressed to be made in respect of work covered by the application in respect of females covered thereby and included within the jurisdiction conferred by the Regulations. In his reasons for judgment his Honour expressed the view that if work had always been done by females, but if even one male was brought into and employed upon the work during the relevant period, the condition of reg. 6 (1) (*b*) of the Regulations would be satisfied.

On 26th June the company obtained an order nisi for prohibition in respect of that decision.

While the order nisi was pending, an application by summons was made by the general secretary of the Australian Glass Workers' Union for the consideration of the effect of the *National Security* (*Economic Organization*) *Regulations*, and Judge *Foster* set aside his decision or determination of 17th May. The date borne by the written and signed decision setting aside the previous decision was 20th July 1945. But on 4th July his Honour orally stated his intention of treating the previous decision as a nullity and setting it aside.

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

On 20th June the women employed at the establishment of the respondent company had struck work and both the company and the union had thereupon given a notification under reg. 10 of the *National Security (Industrial Peace) Regulations* of the existence of an industrial matter which might lead to the occurrence of a strike or other interruption of work. Upon these notifications Judge *Foster*, on 5th July, made an order, intituled "In the matter of the *National Security (Industrial Peace) Regulations*" and reciting the notifications given by the company and the union, containing the following directions:—

I. That all female employees of Crown Crystal Glass Pty. Ltd. shall return to work . . . upon the following terms and conditions:—

(*a*) that the rates of remuneration to be paid to adult females—

(1) who are performing work usually performed by males;

(2) are performing work which in the establishment of the respondent company was performed by any males at any time since the outbreak of the present war

shall be that prescribed by the appropriate classifications in the schedule attached hereto;

(*b*) that the rate of remuneration for junior females included in the classifications (1) and (2) above shall be the same as that paid to junior males doing substantially similar work;

(*c*) that the hours and conditions of work for all females shall be the same as before the stoppage.

II. That the said company shall re-open its works and re-commence operations and shall offer employment to females returning to work upon the terms and conditions above mentioned.

III. That the Deputy Industrial Registrar of this Court shall constitute a Committee of Reference as prescribed by reg. 5c of the *Women's Employment Regulations* which Committee shall determine—

(*a*) what females if any are employed on work described in pars. (*a*) (1) and (2) above;

(*b*) the classification of the work on which such female is employed

and upon such determination the said company shall pay to such females the appropriate rate as aforesaid.

IV. This order shall come into operation as from 5th July 1945 and shall continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment of 17th May 1945 is in error.

The schedule mentioned in par. I (*a*) of the order repeated the classifications of work and rates of remuneration set out in the decision which was declared to be a nullity.

On 19th July the company obtained an order nisi for prohibition in respect of Judge *Foster's* order of 5th July on the grounds, *inter alia* :—

(1) That his Honour had no jurisdiction to make the order.

(2) That it was not competent for his Honour exercising jurisdiction under the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and the *National Security* (*Industrial Peace*) *Regulations* to found jurisdiction to make an order under the said Act and Regulations by treating as a nullity an existing decision made by him under the provisions of the *Women's Employment Regulations*.

(3) That the jurisdiction of the Commonwealth Court of Conciliation and Arbitration under the provisions of the *Commonwealth Conciliation and Arbitration Act* and the *National Security* (*Industrial Peace*) *Regulations* does not extend to enable the said Court to exercise jurisdiction under the *Women's Employment Regulations*.

The applications to make absolute the two orders nisi for prohibition came on to be heard together. It became apparent shortly after the argument was begun that a decision in these proceedings would not necessarily determine whether the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* by Judge *Foster* was correct. Accordingly the hearing was adjourned and, upon the suggestion of the High Court, an application was made to Judge *Foster* to state a case for the opinion of the High Court.

In pursuance of this application Judge *Foster* stated a case wherein he set out his determination of the meaning of reg. 6 (1) (*b*). The following questions were submitted for the determination of the High Court :—

1. Whether his Honour's interpretation of clause (*b*) of sub-reg. (1) of reg. 6 of the *Women's Employment Regulations* was correct.

2. If the answer to the first question was in the negative, what was the true interpretation of the clause ?

The applications to make absolute the two orders nisi for prohibition and the case stated were heard together.

Regulation 6 (1) (*b*) of the *Women's Employment Regulations* provides :—" Where an employer proposes to employ, is employing, or has at any time since the second day of March, 1942, employed, females on work— . . . (*b*) which, within the establishment of that employer, was performed by males at any time since the outbreak of the present war . . . the employer shall . . . forthwith make application to the Court for a decision in accordance with this regulation."

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Regulation 3 of the *National Security* (*Industrial Peace*) *Regulations* provides that, subject to the Regulations, the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and the Regulations shall be construed as if the provisions of the Regulations were incorporated in the Act as amendments thereof.

Section 28 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 directs that an award of the Court shall continue in force for a period to be specified in the award not exceeding five years from the date upon which the award comes into force.

Further facts and other provisions of relevant Regulations and of the *Commonwealth Conciliation and Arbitration Act* are contained in the judgments hereunder.

Ferguson K.C. (with him *Emerton*), for Crown Crystal Glass Pty. Ltd., the prosecutor in the prohibition proceedings and the respondent in the original proceeding before Judge *Foster*. It is of assistance in the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* to look at the history of reg. 6. [He referred to the *National Security* (*Employment of Women*) *Regulations*, Statutory Rules 1942 No. 146, promulgated under the *National Security Act* 1939-1940, and the amendments thereof by Statutory Rules 1942 Nos. 236 and 294; the *Women's Employment Regulations* contained in the Schedule to the *Women's Employment Act* 1942 and the amendments to the Regulations by Statutory Rules 1942 No. 548 and 1943 No. 92.] As originally framed the Regulations dealt with the substitution of females for males in industry. Work of the nature referred to in the present reg. 6 (1) (*b*) was first included in the Regulations by Statutory Rules 1942 No. 294 and in that form it was clear that the work prior to the employment of women had to be performed exclusively by males. When the regulation-making authority desired to indicate that the work was not exclusively done by males, it said so: See reg. 6 (1) (*a*), work which is "usually" performed by males. Apart from history, in its context the natural meaning of par. (*b*) is that the work included is work performed by males exclusively. The *Economic Organization Regulations* do not apply to any application for any increase or alteration of wages under the *Women's Employment Act* because the Court as constituted under the *Women's Employment Regulations* is not an "Industrial Authority" as defined by the *Economic Organization Regulations*. The second order of Judge *Foster* cannot be justified under the *Women's Employment Regulations*, though made by the Judge designated to deal with applications under those Regulations, because it was not made in respect of any application made under

the Regulations and the decisions required by reg. 6 (4) and (5) were not made. The learned Judge purported to act under reg. 10 of the *Industrial Peace Regulations*, but in order to act thereunder it was necessary, by virtue of the *Economic Organization Regulations* to find an anomaly; in order to find an anomaly it was necessary for him to consider matters which were only relevant to an application under the *Women's Employment Regulations* and which could only be dealt with by a Judge administering the *Women's Employment Regulations*. The Judge could not, sitting as a Judge of the Arbitration Court, make an order on the ground that there was an anomaly by reason of the fact that the women were entitled to benefits under the *Women's Employment Regulations*. There is a tribunal set up under the *Women's Employment Regulations* to determine what women are entitled to the benefit of the Regulations and that is the only tribunal that can deal with that matter. There is no power in the *Industrial Peace Regulations* to constitute a Committee of Reference in the form constituted by the Judge.

Miller K.C. (with him *A. K. Steven*), for the Australian Glass Workers' Union, the respondent in the prohibition proceedings and the applicant in the original proceedings before Judge *Foster*. The condition prescribed by reg. 6 (1) (*b*) of the *Women's Employment Regulations* is satisfied if work has been performed by some males. It is not necessary that the work should be performed solely by males, though it would include that position. As long as there is some substantial employment of males the condition is satisfied. It is sufficient to give jurisdiction under reg. 6 (1) (*a*) that the work is usually performed by males: it would be a strange position if, in order to give jurisdiction under reg. 6 (1) (*b*), the court had to find that the work had been done exclusively by males. As to the meaning of "work" in reg. 6 (1) (*a*), see *Re The Women's Employment Act* 1942; *Ex parte Metal Trades Employers Association* (1). Judge *Foster* had power, under regs. 10 and 17 of the *Industrial Peace Regulations*, to make clause III. of the second order. In making the second order Judge *Foster* was not precluded from dealing with women and their rates of remuneration, which ordinarily would be covered by a decision under the *Women's Employment Regulations*.

Barwick K.C. (with him *Dignam* and *McKeon*), for the Commonwealth Court of Conciliation and Arbitration and Judge *Foster*. The general policy of the *Women's Employment Regulations* was to provide

(1) (1943) 49 C.A.R. 365, at p. 369.

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

a scheme to establish rates of remuneration for women substituted. The Regulations never undertook to limit the scheme to the precise substitution of a woman for a man in a particular job. The discrimen chosen in reg. 6 (1) (*b*) was this, Was this establishment one into which men made a real entry in this establishment at any relevant time? The Committee of Reference referred to in par. III. of the second order can quite properly be regarded as a Board of Reference under s. 40A of the *Commonwealth Conciliation and Arbitration Act*. If the first order was still extant when the second order was made, reg. 16 of the *National Security* (*Economic Organization*) *Regulations* was not called into play for the reason that the order under reg. 10 was not then varying rates of remuneration, it was repeating as to certain women the rates prescribed by a then extant and valid order under the *Women's Employment Regulations*. If the first order was not extant when the second order was made, or if it was extant and invalid, then in order to invalidate the second order it must be shown that the order under reg. 10 of the *Industrial Peace Regulations* did increase rates of remuneration, because otherwise the prohibition in reg. 16 of the *Economic Organization Regulations* is not called in, and it must be shown that there was no rational ground for the opinion that there was an anomaly. In the case of women entitled to the benefit of the *Women's Employment Regulations* the rate of remuneration was always subject to alteration by the Women's Employment Board, or later the designated Judge, and the power given to the Board or the designated Judge was a power to make the remuneration retrospective to March 1942: the rate "applicable to that employment," within the meaning of reg. 16 of the *Economic Organization Regulations*, is not the rate paid in March 1942, but is such sum as the Women's Employment Board would fix. In the circumstances of the case the second order, under the *Industrial Peace Regulations*, which in effect ordered the women back to work and pending any resolution of the rights and wrongs of the order ordered the company to pay specific women specific sums of money, did not impinge in any way on the jurisdiction under the *Women's Employment Regulations*. There is an additional reason for saying that the question of anomaly did not arise: there was an earlier order under the *Women's Employment Act* which was subject to prohibition in the High Court in the case of *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (1); subsequently Statutory Rules 1944 No. 149 set up the earlier decisions as from October 1944, but subject to any rights obtained under judgments. The order under reg. 10 of the *Industrial Peace Regulations* did not increase

(1) (1944) 69 C.L.R. 299.

rates, it again repeated them. The order has a period specified in it as required by s. 28 of the *Commonwealth Conciliation and Arbitration Act*: the situation when the order was made was that there had been the earlier order under the *Women's Employment Regulations* and a rule nisi had been obtained to raise the very question of construction. The order did appoint a point of time which could be rendered finite. In *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1) an order was made apparently by the Full Arbitration Court and an award was made until further order, and no objection seems to have been taken in the case to the form of the award. This order was not subject to s. 28 of the *Commonwealth Conciliation and Arbitration Act* because it was not an award within the meaning of that section. The order did not resolve a dispute, it ordered females back to work and directed the employer to pay specified women specified sums.

Ferguson K.C., in reply. In determining the policy of the legislature for the purpose of construing a regulation the history is most important. In making the second order Judge *Foster*, sitting under the *Industrial Peace Regulations*, could not find that there was an anomaly because there had been no award under the *Women's Employment Regulations*. Under s. 40A of the *Commonwealth Conciliation and Arbitration Act* the Judge must appoint the whole Committee or give power to someone else to appoint the Committee: he cannot appoint a member and give power to appoint others.

Cur. adv. vult.

Oct. 22.

The following written judgments were delivered:—

LATHAM C.J. On 17th May 1945 his Honour Judge *Foster* (acting as a judge of the Commonwealth Court of Conciliation and Arbitration designated under Statutory Rules 1944 No. 149 to discharge the functions previously performed by the Women's Employment Board), made a decision under the *Women's Employment Regulations*, reg. 7B, with reference to work performed by women in the establishment of Crown Crystal Glass Pty. Ltd.

On 26th June the company obtained an order nisi for prohibition in respect of that decision upon various grounds.

On 4th July, at the instance of the respondent union, the learned Judge took into consideration the effect of the *National Security (Economic Organization) Regulations* in relation to his decision. Regulation 16 of those Regulations provides, with certain exceptions,

(1) (1928) 41 C.L.R. 402.

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Latham C.J.

that an "Industrial Authority" shall not include in any award, &c., any provision altering, in respect of any employment, the rate of remuneration applicable to that employment on 10th February 1942. Regulation 18 of those Regulations, as amended and re-enacted by Statutory Rules 1945 No. 11, provides, however, that rates of remuneration may be altered in the case of an anomaly, but that in such a case a particular procedure prescribed by the regulation must be followed. That procedure had not been observed and his Honour was of opinion that his decision was therefore of no force or effect and accordingly declared that it was a nullity. The learned Judge was evidently of opinion that when he discharged the functions of the Women's Employment Board he was an "Industrial Authority" within the meaning of reg. 16 of the *Economic Organization Regulations*. It would appear that his Honour was in error in taking this view, because "Industrial Authority" is defined by reg. 4 as meaning certain tribunals and other Federal authorities constituted for the purpose of "hearing and determining industrial disputes" and making awards or orders in settlement thereof. But jurisdiction under the *Women's Employment Regulations* is independent of the existence of any industrial dispute, and therefore neither the Board nor his Honour was an industrial authority to which reg. 16 of the *Economic Organization Regulations* applied. But whether the decision of his Honour that those Regulations did apply to his previous decision was right or wrong, he exercised the power conferred upon him by reg. 8 (*d*) of the *Women's Employment Regulations* and set aside his decision as a nullity, that is, as ineffective *ab initio*. This decision binds the parties. The decision, whether valid or not, no longer exists and must be regarded as never having existed.

Accordingly, in the case of the decision which was set aside as a nullity, there is nothing to prohibit and the order nisi should be discharged But as the company, in effect, succeeds, as the result of steps taken by the respondent union after the order nisi was made, it should, in my opinion, have the costs of the proceedings in relation to that order nisi.

On 20th June women employed at the establishment of the company struck work and both the company and the union gave a notification under reg. 10 of the *Industrial Peace Regulations* of the existence of an industrial matter which might lead to the occurrence of a strike or other interruption of work. Upon these notifications the learned Judge, on 5th July, made an order directing all the females employed by the company to return to work, upon the following terms and conditions:—

"I. (*a*) that the rates of remuneration to be paid to adult females—

(1) who are performing work usually performed by males;

(2) are performing work which in the establishment of the respondent company was performed by any males at any time since the outbreak of the present war

shall be that prescribed by the appropriate classifications in the schedule attached hereto;

(*b*) that the rate of remuneration for junior females included in the classifications (1) and (2) above shall be the same as that paid to junior males doing substantially similar work;

(*c*) that the hours and conditions of work for all females shall be as before the stoppage."

The order continued in the following terms:—

"II. That the said company shall re-open its works and re-commence operations and shall offer employment to females returning to work upon the terms and conditions above mentioned.

III. That the Deputy Industrial Registrar of this Court shall constitute a Committee of Reference as prescribed by reg. 5c of the *Women's Employment Regulations*, which Committee shall determine—

(*a*) what females (if any) are employed on work described in pars. (*a*) (1) and (2) above;

(*b*) the classification of the work on which such female is employed

and upon such determination the said company shall pay to such females the appropriate rate as aforesaid.

IV. This order shall come into operation as from 5th July 1945 and shall continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment delivered on 17th May 1945 is in error."

The order is intituled "In the matter of the *Industrial Peace Regulations*" and it recites the notifications given under reg. 10 by the company and by the union, which were referred to the Court by the Deputy Industrial Registrar. The terms of the order, however, are evidently based upon the *Women's Employment Regulations*, and the schedule mentioned in par. I (*a*) of the order repeats the classifications of work and rates of remuneration set out in the decision which had been declared to be a nullity. Thus, in effect, the order which was declared to be a nullity when made under the *Women's Employment Regulations* has been re-made under the *Industrial Peace Regulations*.

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD. Latham C.J.

On 19th July the company obtained an order nisi for prohibition in relation to this order upon various grounds. Paragraph IV. of the order provides that it should continue in force until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment delivered on 17th May 1945 is in error. It became apparent upon the argument upon the return of the order nisi that a decision in those proceedings would not necessarily determine whether the interpretation of reg. 6 (1) (*b*) by the learned Judge was or was not in error.

Accordingly, upon the suggestion of the Court, an application was made to his Honour Judge *Foster* to state a case under the *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 31. A case was stated which submitted two questions for the decision of this Court—

" (1) Whether my interpretation of the said clause (*b*) of sub-reg. (1) of reg. 6 of the said Regulations is correct.

(2) If the answer to the first question is in the negative, what is the true interpretation of the said clause ? "

Regulation 6 (1) (*b*) is as follows :—

> " Where an employer proposes to employ, is employing, or has at any time since the second day of March, 1942, employed, females on work—
>
> (*a*) . . . .
>
> (*b*) which, within the establishment of that employer, was performed by males at any time since the outbreak of the present war ; or
>
> (*c*) . . . .
>
> the employer shall, unless an application in relation to that employment has already been made . . . or a decision in respect of that work is in force, forthwith make application to the Board " (that is, the Women's Employment Board) " for a decision in accordance with this regulation."

As already stated, his Honour Judge *Foster* now performs the functions of the Women's Employment Board.

In his reasons for judgment, delivered on 17th May, his Honour said :—" The view I have formed of reg. 6 (1) (*b*) is that the regulation covers a case where work has been performed by both males and females at any time since the war in the establishment of the employer whatever the respective numbers of them may be."

Later in his judgment, his Honour said :—" This problem has not arisen for the first time now, as may be quite well understood. It faced the Women's Employment Board right through its work and we had many cases where the problem for the Board to determine was whether the Board would assume jurisdiction in certain

cases where the employment of males in the establishment of the employer was not real or substantial, in particular such a case arose where the only employment of males was where a male was employed to instruct and teach the females. The Board then said that that was not a real employment; there was not a substantial employment of males and the jurisdiction of the Board was not invoked. I then, and I would now, refused to exercise any jurisdiction based upon that position."

The respondent union contended for the view expressed by his Honour in the first of the quotations made, namely, that if any work had during the relevant period been performed by both males and females, even if only by one male, sub-reg. (1) (*b*) of reg. 6 applied. Upon this view, if work had always been done by females, but even one male was then brought into and employed upon the work, the condition of the sub-regulation would be satisfied. In spite of the reference to the necessity for substantial employment contained in the second quotation made from the learned Judge's reasons, I regard this as the view which his Honour adopted. In the first quotation made, the learned Judge plainly said that the respective numbers of males and females were immaterial, and in the order made on 5th July his Honour adopted the words of the sub-regulation with an addition which indicated his Honour's view of the true meaning of the sub-regulation. The order, in par. I (*a*) (2), refers to " work which in the establishment of the respondent company was performed by any males at any time since the outbreak of the present war." The insertion of the word " any " before the word " males " indicates the interpretation which his Honour gave to the sub-regulation.

On the other hand, it was contended for the company that the sub-regulation applied only where work was exclusively performed by males—so that, if the work had at any time within the relevant period been performed in the particular establishment even by only one female, it would not fall within the sub-regulation. In supporting this argument Mr. *Ferguson* referred to the history of the sub-regulation in the various forms in which it has appeared from time to time. In my opinion, the reference to previous forms of the sub-regulation does not assist the Court in interpreting the actual words of the sub-regulation as it stands at the present time. I am unable to agree that it is proper to go so far as to introduce by construction into the sub-regulation some such word as " exclusively " or " solely " before the words " performed by males."

The sub-regulation is not precise in terms and it is not possible to interpret it with complete satisfaction. But, in my opinion, in

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Latham C.J.

order to bring work within the sub-regulation, it is sufficient, but necessary, that the work in question was work which had at some time during the relevant period been performed by males in the sense that it could fairly be described as male work rather than female work. It is evident that the Regulations, in the many forms which they have adopted from time to time, have throughout been dealing with the difficulties created by introducing female labour into what has been a usual sphere of male employment, or what had been male employment in a particular establishment, or into work which had not previously been performed by any person in Australia: See reg. 6 (1) (*a*), (*b*) and (*c*).

Accordingly, I am of opinion that the regulation is intended to deal with the case of the introduction of females into what would fairly and naturally be described as men's work; that is, into a class of work which previously had been mainly performed by males.

I am therefore of opinion that the questions asked in the case should be answered as follows:—

(1) No.

(2) Clause (*b*) of sub-reg. (1) of reg. 6 of the *Women's Employment Regulations* refers to work which, within the establishment of the employer concerned, was mainly performed by males at some time since the outbreak of the war referred to in the regulation.

I now proceed to consider the second order nisi for prohibition relating to the order made by his Honour Judge *Foster* on 5th July.

The order, though purporting to deal with a situation for which it might be thought that the *Women's Employment Regulations* provide, cannot be supported under those Regulations, because reg. 6 (4) requires as a pre-requisite to any such order that the decisions therein specified should be made, originally by the Board, and now by the designated Judge. These decisions are:—(*a*) whether the work specified in the application is work specified in sub-reg. (1) of reg. 6; and (*b*) if so, whether females may be employed or continue to be employed on the work.

It is only if the Judge makes these decisions that he can decide with respect to hours, special conditions, rates of remuneration, &c. (see reg. 6 (5), (6) and (7)). The decisions required by sub-reg. (4) have not been made in the present case and for this reason the order cannot be supported under the *Women's Employment Regulations*.

It is argued, however, that the order was validly made (as it purports to be made) under the *Industrial Peace Regulations*. Reference has already been made to reg. 10 of those Regulations, providing for notification of industrial troubles and reference thereof to the Court. Under reg. 10 (2) the Court is required to hear and determine

the matter in like manner as if it were an industrial dispute. It is under this power that the learned Judge made the award in determination of the industrial matter on 5th July.

It is contended for the company that the *Women's Employment Regulations* provide an exhaustive code for dealing with all cases of women's employment to which they are applicable. This argument is supported by reference to reg. 6, which I have already quoted. This regulation required that an employer, in the circumstances described in sub-reg. (1) (*a*), (*b*) or (*c*), shall make an application to the Board, and sub-reg. (4) requires that the Board shall make the decisions (*a*) and (*b*) to which reference has already been made, and subsequent regulations require that the Board shall decide with respect to hours of employment, rates of remuneration, &c. But this argument, though it shows what ought to happen when the conditions specified in reg. 6 are fulfilled, does not show that, if an application is not in fact made under reg. 6 (1) and followed by a decision under reg. 6 (4), awards, &c., of other authorities are necessarily inoperative in relation to any women's employment in respect of which such an application might have been made and such a decision might have been given.

Notwithstanding the apparently imperative provisions of the Regulations, it can hardly be doubted that the Board might determine to make no order altering existing conditions, and in that case existing conditions, whether settled by an industrial award or otherwise, would continue to apply. Regulation 10 of the *Women's Employment Regulations* shows that the jurisdiction of the *Women's* Employment Board (and now of the designated Judge) is not exclusive in relation to matters with which the regulation deals. Regulation 10 is in the following terms :—

> " 10. During the currency of any decision no provision of any award, order or determination made by an Industrial Authority dealing with the subject-matter dealt with by the decision and inconsistent with the decision, and no decision or determination of any authority of the Commonwealth or a State with respect to female employees of the Commonwealth or State inconsistent with the decision, shall be effective. "

This regulation provides only that awards, &c., of other industrial authorities dealing with women's employment which have been the subject of a decision by the Board or the Judge shall cease to be effective so far as they are inconsistent with that decision. The regulation, therefore, assumes that awards, &c., other than the decisions of the Board will continue to be applicable to women who have been made subject to a decision of the Board, provided

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Latham C.J.

only that those awards are not inconsistent with such a decision. The provision would be quite unnecessary unless awards of other authorities than those of the Women's Employment Board were valid and effective in relation to women falling within the jurisdiction of the Board. Regulation 10 is similar to s. 30 of the *Commonwealth Conciliation and Arbitration Act*, which provides that a Federal award shall prevail over State awards, &c., and that the latter shall, to the extent of the inconsistency, be invalid. It has never been thought that this provision excludes the jurisdiction of State authorities in respect of matters which might have been dealt with but which have not, in fact, been dealt with by the Arbitration Court. Accordingly, I am unable to accept the contention that the jurisdiction of the Women's Employment Board (or of the designated Judge) is exclusive in all cases in which it could be exercised and that for this reason the order made under the *Industrial Peace Regulations* is bad.

But there is another objection to the order of 5th July which, in my opinion, is fatal.

The *Industrial Peace Regulations*, reg. 3, provide that the Regulations shall be construed as if they were incorporated in the *Commonwealth Conciliation and Arbitration Act* as amendments thereof. The Act, therefore, applies to awards made in settlement of industrial disputes under reg. 10 (2). Section 28 of the Act provides that the award of the Court "shall . . . continue in force for a period to be specified in the award not exceeding five years from the date upon which the award comes into force." The award made by the learned Judge provides in par. IV. that it shall come into operation "as from 5th July 1945 and shall continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment delivered on 17th May 1945 is in error."

The Commonwealth Court of Conciliation and Arbitration cannot impose upon the High Court by such a provision as that quoted any duty to give a decision upon the question whether the view of the Arbitration Court upon a particular question is right or wrong. The High Court might never give a decision upon the question. In that event the award would (unless set aside) last indefinitely and therefore for a period exceeding five years. The possibility, in the case of any award, that it may be set aside, does not make it unnecessary to comply with s. 28. A period cannot be said to be "specified" when it is described by reference to a definite commencing date but when no certain point of time is named for its termination. The point of time at which an award terminates is not "specified"

when it is defined only by reference to a contingency which may never happen. Thus, in my opinion, the award of 5th July, being made as in settlement of a dispute under Industrial Peace reg. 10 (2), must be regarded as an award of the Court, and is invalid because it does not specify a period during which it is to continue in force.

Other grounds of objection to the award were argued, but in my opinion the award is invalid upon the ground which I have stated and it is unnecessary for me, therefore, to consider the further grounds.

Accordingly, in my opinion, the second order nisi should be made absolute and the respondent union should pay the costs of both orders nisi. Neither party succeeded in the contention which it submitted in the case stated, and I think that there should be no order as to the costs thereof.

RICH J. Three matters are comprised in the applications now under review. The first is an order nisi for a prohibition to prohibit the respondents from proceeding with a decision on 17th May 1945 by his Honour Judge *Foster* purporting to exercise the authority conferred by the *Women's Employment Regulations*. As, however, his Honour pursuant to reg. 8 set his decision aside, this writ of prohibition becomes otiose. His Honour then proceeded to give the decision against which the second writ of prohibition is directed. It is formulated as an order of the Commonwealth Court of Conciliation and Arbitration and is intituled in the matter of the *National Security* (*Industrial Peace*) *Regulations*. There had been industrial disturbances and the Registrar had referred the matter to the Court. His Honour the Judge made the order under reg. 10 (2). The order prescribed (*inter alia*) rates to be paid "to adult females who are performing work usually performed by males or are performing work which in the establishment of the respondent company was performed by any males at any time since the outbreak of the present war." The order is in terms of reg. 6 (1) (*a*) and (*b*), except that in the second limb the word "any" is interpolated. The order also provided that it should come into operation as from 5th July 1945 and should "continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment delivered on 17th May 1945 is in error." This provision prompted this Court to request that a case should be stated in which his Honour's interpretation of reg. 6 (1) (*b*) might be tested. A case was accordingly stated and was heard in these proceedings. I appreciate the difficulty in interpreting words in the clause expressed in such vague terms. I consider that the condition provided by the clause is

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Rich J.

satisfied if it be shown that the class of work is work for the performance of which within the particular establishment males were chiefly employed at any time since the outbreak of war. For this reason I answer the first question in the negative.

The validity of the order of 5th July then remains to be considered. It was not made pursuant to the *Women's Employment Regulations*, because the procedure laid down by reg. 6 was not adopted. No decision was given in terms of reg. 6 (4) (*a*), and thus the basis upon which the jurisdiction under the *Women's Employment Regulations* is founded is non-existent. Nor does it satisfy the provisions of reg. 10 (2) of the *National Security* (*Industrial Peace*) *Regulations*, as it is not framed as an award and does not specify the period during which it shall continue in force. Its determination or cessation is dependent on a decision of this Court that his Honour's interpretation of reg. 6 (1) (*b*) is wrong. Such a decision might never be made. It is without definition or limitation as to time. For these reasons the order cannot be supported.

I would answer question (1) "No," and question (2) that clause 6 (1) (*b*) is referable to a class of work for the performance of which within the particular establishment males were chiefly employed at any time since the outbreak of war. The order nisi as to the order of 5th July 1945 should be made absolute and that as to the order of 17th May 1945 should be discharged.

STARKE J. Rules nisi for prohibition directed to the Commonwealth Court of Conciliation and Arbitration and others and a case stated by a Judge of the Commonwealth Court of Conciliation and Arbitration in an application to that Court made pursuant to reg. 7B of the *Women's Employment Regulations*.

The rule nisi of 26th June 1945 seeks to prohibit an order of the Commonwealth Court of Conciliation and Arbitration made on 17th May 1945, and that of 19th July 1945 to prohibit an order of the Commonwealth Court of Conciliation and Arbitration made on 5th July 1945.

The question raised by the case stated is whether the interpretation placed upon reg. 6 (1) (*b*) of the *Women's Employment Regulations* by a Judge of the Commonwealth Court of Conciliation and Arbitration was correct. This question was stated at the suggestion of this Court because it did not necessarily fall for decision in the prohibition proceedings and it was regarded as of much importance by the parties.

(1) The rule nisi of 26th June 1945 must be discharged because the order of 17th May 1945 was set aside in the Arbitration Court on 5th July 1945 and is no longer in operation. It was treated in the Arbitration Court as a nullity because the provisions of the *Economic*

Organization Regulations had not been observed: See *Women's Employment Act* 1942, and regulations thereunder, as amended by Regulations 1944 No. 149 (which substituted the Court of Conciliation and Arbitration for the Women's Employment Board), and *National Security* (*Economic Organization*) *Regulations* as amended by Regulations 1945 No. 11, regs. 16 and 18. It is unnecessary to inquire whether the view taken in the Arbitration Court was right or wrong, for the *Women's Employment Regulations*, as amended, enabled the Court on the application of any party bound by a decision, or of its own motion, to set aside that decision or any term thereof: See reg. 8.

(2) It will be convenient next to consider the case stated. The regulation 6 (1) (*b*), the subject of the question stated is, so far as material:—

> "Where an employer proposes to employ, is employing, or has at any time since the second day of March, 1942, employed, females on work—
>
> (*b*) which, within the establishment of that employer, was performed by males at any time since the outbreak of the present war;
>
> the employer shall . . . forthwith make application to the Board" (the Court has been substituted (Statutory Rules 1944 No. 149)) "for a decision" (*inter alia*) "whether the work specified in the application is work specified in" reg. 6 (1) "and if so, whether females may be employed or continue to be employed on the work."

The interpretation of reg. 6 (1) (*b*) adopted in the Arbitration Court was as follows:—"The regulation covers a case where work has been performed by both males and females at any time since the war in the establishment of the employer whatever the respective numbers of them may be."

The Australian Glass Workers' Union contends that it is competent for the Court to make a decision in respect of the work specified therein if it be established that at any time since the outbreak of the present war that work had, in the establishment of the employer, been performed by males, but not necessarily exclusively.

That construction does not differ, I think, from the construction adopted by the Court.

On the other hand the employer contends that the work must be performed exclusively by males.

The "work," no doubt, is the description or class of work performed and not the work done on particular jobs. But the sub-regulation does not explicitly require that the work be performed

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD. Starke J.

exclusively by males. Thus, if eighty or ninety per cent of the description or class of work were performed by males, the work is then really substantially and in the main performed by males. And it is not incongruous to describe work so performed, as performed by males, though not wholly or exclusively performed by them. But where then is the line to be drawn? The answer, I think, is that the matter is one of degree, depending on the circumstances of the particular case. The interpretation adopted in the Arbitration Court cannot, I think, be supported. It is not right to say that the question may be resolved irrespective of numbers employed. Rather the inquiry is whether the description or class of work in question was or is performed really, in the main, and substantially by males. That is a question of fact which must depend on the circumstances of the particular case and a comparative estimate of the work performed by males and females. It is not possible further to elucidate the matter; the ultimate decision, within the bounds of reason, is confided to the tribunal established by the Parliament for that purpose.

The question stated in the case should be answered accordingly.

(3) The rule nisi to prohibit the order of 5th July 1945 should be absolute. The rule is founded upon s. 75 of the Constitution and the jurisdiction thereby conferred on this Court cannot, according to the settled law of the Court, be taken away by the provisions such as are found in the *Commonwealth Conciliation and Arbitration Act*, s. 31. We have been referred to a jumble of Acts and regulations affecting this order. On 5th June 1945 the employer gave notice that it intended to apply for prohibition in respect of the order of 17th May. Apparently these proceedings caused unrest among the women benefiting under the provisions of the order of 17th May. On 19th June 1945, notification appears to have been given by the employer of such unrest pursuant to reg. 10 of the *Industrial Peace Regulations*, and on 26th June a strike was notified pursuant also to the regulation. In fact the women ceased work on 20th June and did not resume until 6th July, the day after the order of 5th July, which is attacked. The material parts of that order are:—

"In the Matter of the *National Security* (*Industrial Peace*) *Regulations* and of

CROWN CRYSTAL GLASS PTY. LTD.

and the

AUSTRALIAN GLASS WORKERS UNION N.S.

(Nos. 368 and 381 of 1945)

The above-mentioned industrial matter being before the Court pursuant to notifications under reg. 10 of the *National Security*

(*Industrial Peace*) *Regulations* given by Crown Crystal Glass Pty. Ltd. and the Australian Glass Workers' Union respectively and referred to the Court by the Deputy Industrial Registrar, Sydney, as required by the said Regulations And the said matter coming on before this Court . . . And the Court having informed its mind on the matter in such manner as it thought just This Court doth hereby order as follows :—

I. That all female employees of Crown Crystal Glass Pty. Ltd. shall return to work . . . upon the following terms and conditions :—

(*a*) that the rates of remuneration to be paid to adult females—

(1) who are performing work usually performed by males ;

(2) are performing work which in the establishment of the respondent company was performed by any males at any time since the outbreak of the present war

shall be that prescribed by the appropriate classifications in the schedule attached hereto ;

(*b*) that the rate of remuneration for junior females included in the classifications (1) and (2) above shall be the same as that paid to junior males doing substantially similar work ;

(*c*) that the hours and conditions of work for all females shall be as before the stoppage.

II. That the said company shall re-open its works and re-commence operations and shall offer employment to females returning to work upon the terms and conditions above mentioned.

III. That the Deputy Industrial Registrar of this Court shall constitute a Committee of Reference as prescribed by reg. 5c of the *Women's Employment Regulations* which Committee shall determine—

(*a*) what females if any are employed on work described in pars. (*a*) (1) and (2) above ;

(*b*) the classification of the work on which such female is employed

and upon such determination the said company shall pay to such females the appropriate rate as aforesaid.

IV. This order shall come into operation as from 5th July 1945 and shall continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment delivered on 17th May 1945 is in error."

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD. Starke J.

The interpretation given on 17th May is that referred to in connection with the case stated. On its face the order purports to have been made under the *Industrial Peace Regulations*. It was not and could not have been made under the *Women's Employment Regulations*, for the jurisdictional facts required by those Regulations (reg. 6 (1)) were not proved and the procedure provided by those Regulations was not followed. Moreover, the Judge who made the order said :—" I am invited by the Union to deal with this industrial matter under the powers conferred by the *Industrial Peace Regulations* and there is fear that the existing strike may widely extend. I am of opinion that the circumstances demand that I do so lest greater ill befall." Again, " As to the summons dated 2nd July 1945 taken out by the applicant to bring the decision of the Court under the *Women's Employment Regulations* into conformity with Statutory Rules 1945 No. 11 I adjourn that . . ." Further, " that is all I propose to say about the Order I have made in connection with the application by the Union under the *Industrial Peace Regulations*."

It is true that the Judge in making his order took for his guide the provisions of the *Women's Employment Regulations*, but he did not, nor did he purport to, exercise any of the powers conferred by those Regulations.

So the *Industrial Peace Regulations* must be considered. Under those Regulations, where any organization or employer is aware of the existence of any industrial matter which may lead to the occurrence of a strike . . . or any other interruption of work, he shall forthwith notify, in writing, the Secretary, Department of Labour and National Service . . . and the Registrar or a Deputy Registrar accordingly, and the Registrar or Deputy Registrar, as the case may be, shall refer the matter to the Court, that is, the Commonwealth Court of Conciliation and Arbitration. The Court shall thereupon determine the matter and the Court . . . or Board of Reference, as the case may be, notwithstanding that an industrial dispute affecting the matter does not exist, may hear and determine the matter in like manner as if it were an industrial dispute (reg. 10). In any case where the Court deems it desirable in the interests of industrial peace or national security so to do, it may exercise any jurisdiction under the *Commonwealth Conciliation and Arbitration Act* or these Regulations on its own motion (reg. 11). The Court may, in connection with any industry or part of any industry, appoint a Board of Reference consisting of one or more persons, even though no order or award in relation to an industrial dispute in that industry has been made. The Board of Reference so appointed

shall have such powers of investigation and report in connection with such matters as the Court directs. The Court may direct that any Board so appointed shall hear and determine any industrial matter and the determination of the Board shall, for all the purposes, including the purposes of s. 38 of the *Commonwealth Conciliation and Arbitration Act* be deemed to be an award of the Court (reg. 17).

But the *Commonwealth Conciliation and Arbitration Act* directs in s. 28 that an award of the Court shall be framed in such manner as to best express the decision of the Court and shall, subject to appeal under s. 31A and to any variation . . . continue in force for a period to be specified in the award, not exceeding five years from the date upon which the award comes into force.

And s. 40A of the Act also enables the Court to appoint for the purposes of an award a Board of Reference consisting of one or more persons and assign to the Board various functions. Now I do not stay to inquire whether the *Women's Employment Regulations* is the special law or regulation governing the employment of female labour within its scope to the exclusion of the *Arbitration Act* and the *Industrial Peace Regulations*, or whether the *Economic Organization Regulations*, Part V., as amended by Statutory Rules 1945 No. 11, extend to industrial authorities operating the *Industrial Peace Regulations*, or whether under the *Industrial Peace Regulations* the Court can order employees to work and employers to employ, re-open their works, and re-commence operations, but it may be well to remember that the prohibition of strikes and lockouts in relation to industrial disputes was repealed some time ago : See *Commonwealth Conciliation and Arbitration Act* 1904-1928, Part II., and the amending Act No. 43 of 1930. It is clear I think that the order enabling the Deputy Industrial Registrar to appoint a Committee of Reference as prescribed by reg. 5c of the *Women's Employment Regulations* cannot be supported under the *Industrial Peace Regulations* or the *Arbitration Act* itself, for they do not confer power upon the Court to remit the appointment of a Board or Committee of Reference to the Deputy Industrial Registrar or any other authority. Again, the direction that the order shall continue in force and operation until the High Court decides whether the interpretation put upon reg. 6 (1) (*b*) of the *Women's Employment Regulations* in the Arbitration Court is in error contravenes the provisions of s. 28 of the *Commonwealth Conciliation and Arbitration Act.* It does not specify any period during which the order shall continue in force and a decision of this Court might possibly, though not probably, exceed five years from the date upon which the order comes into force. The order appears to have been intended as an interim order within

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Starke J.

the meaning of the *Commonwealth Conciliation and Arbitration Act*, s. 38 (*b*), because the summons of 2nd July 1945, which was in substance to bring the decision of the Court under the *Women's Employment Regulations* into conformity with the *Economic Organization Regulations* (No. 11 of 1945), was adjourned so that the problems involved might be further and fully discussed. But an interim order or award of the Court can no more contravene the provisions of s. 28 of the *Arbitration Act* than can a final order or award.

Finally I would add that the constitutional validity of the various regulations has not been challenged in these cases though I myself, for reasons which I have given on other occasions, fail to find authority for many of their provisions in the defence power. But I hope that soon this jumble of industrial regulation, *Industrial Peace Regulations*, *Women's Employment Regulations*, *Economic Organization Regulations*, *Coal Mining Industry Employment Regulations* and so forth, will have served their purpose and become unnecessary.

DIXON J. The proceedings before us are a case stated and two orders nisi for prerogative writs of prohibition to prohibit the respondents from further proceedings upon two respective decisions or determinations made by his Honour Judge *Foster*. The first of these determinations was made by his Honour as the Judge of the Court of Conciliation and Arbitration designated by the Chief Judge for the purpose of the *Women's Employment Regulations*. The determination was made on 17th May 1945 in the purported exercise of the authority conferred by those Regulations. The proceeding in which it was made was an application under reg. 7B made by the Australian Glass Workers' Union on 11th September 1944 while the Women's Employment Board still existed. The decision or determination was expressed to be made in respect of work covered by the application in respect of females covered thereby and included within the jurisdiction conferred by the Regulations. The validity of the determination was attacked by the order nisi on a number of grounds which, I think, may be reduced to the objections that upon the facts the conditions stated in reg. 6 (1) were not fulfilled and that the decision of the Court to the contrary under reg. 6 (4) was not in conformity with that sub-regulation.

These objections depended partly on the facts and partly upon the interpretation of reg. 6 (1) and (4).

In particular his Honour Judge *Foster* had placed upon reg. 6 (1) (*b*) an interpretation according to which it would be enough if the work upon which females were, or were to be, employed was work which within the establishment of the employer any male or males had

performed at some time since the outbreak of war. His Honour also took the view that under reg. 6 (4) it was not incumbent upon him to decide more than that the work fell within one or other of the categories stated in pars. (*a*), (*b*) and (*c*) of that sub-regulation and that it was unnecessary for him to say under which of them.

While the order nisi which raised these matters was pending, his Honour set the decision or determination aside, acting under reg. 8 (*d*). His reason for doing so was that, in his view, the amendment made to the *National Security* (*Economic Organization*) *Regulations* by Statutory Rules 1945 No. 11 on 1st February 1945 applied to the Court constituted by the Judge designated for the purpose of the *Women's Employment Regulations* and prevented him from altering, as his determination had done, the rates of remuneration in respect of the employment of the women in question without taking steps under reg. 18, which had not been done. An application by summons, dated 2nd July 1945, was made by the general secretary of the Australian Glass Workers' Union for the consideration of the effect of the *Economic Organization Regulations*, and it was upon this application that his Honour made the order setting aside his previous determination as a nullity.

The power given by reg. 8 to set aside a decision is expressed in general terms and I see no reason why it should not include authority to set aside a decision *ab initio*, and, as that is the course the learned Judge meant to adopt, it should follow, quite independently of the correctness of his reason, about which there is some doubt, that the decision or determination is rescinded so that it is just as if it had never been. There is, therefore, nothing now in respect of which to issue the writ of prohibition sought by the first order nisi even if the grounds of the order nisi were substantiated.

The date borne by the written and signed decision of the learned Judge setting aside his decision of 17th May 1945 is 20th July 1945. But, on 4th July, his Honour had orally stated his intention of treating the previous decision as a nullity and setting it aside. He had then proceeded to give his decision or determination which is the subject of the second order nisi for prohibition. That decision is dated 5th July 1945 and is drawn up in the form of an order of the Commonwealth Court of Conciliation and Arbitration and is entitled in the matter of the *National Security* (*Industrial Peace*) *Regulations*.

On 19th and 29th June 1945 the prosecutor, Crown Crystal Glass Pty. Ltd., had given notifications under reg. 10 (1) of the *National Security* (*Industrial Peace*) *Regulations* of an industrial matter which might lead to a strike or interruption of work and the Registrar had, as required by the regulation, referred the matter to the Court.

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Dixon J.

In fact, on 20th June, female employees of the company who would obtain the benefit of the order of 17th May, if valid, had ceased work. Regulation 10 (2) of the *Industrial Peace Regulations* provides that, upon such a reference, the Court shall hear and determine the industrial matter, that is, unless it causes a Conciliation Commissioner or Board of Reference to do so, and the Court, notwithstanding that an industrial dispute affecting the matter does not exist, may hear and determine the matter as if it were an industrial dispute.

Acting apparently under this power, his Honour Judge *Foster* made the order now in question. By it he ordered the female employees of the company to return to work not later than a specified time on the following day upon terms and conditions which the order proceeded to set out. The conditions referred to prescribed rates of remuneration for adult females and provided that for junior females the rates should be the same as those paid to junior males doing substantially similar work and also that the hours and conditions of work for all females should be the same as before the stoppage. The rates for adult females, both during and after probation, were set out in a schedule of classified work. The same schedule had been used in the decision or determination of 17th May 1945. In the order of 5th July 1945 a different formula was adopted to describe the women governed by the rates prescribed. Instead of describing them as those included within the jurisdiction conferred by the *Women's Employment Regulations*, a description was taken from the language of pars. (*a*) and (*b*) of reg. 6 (1) of those Regulations. The order required that the prescribed rates should be paid "to adult females (1) who are performing work usually performed by males; (2) are performing work which in the establishment of the respondent company was performed by any males at any time since the outbreak of the present war." The language of clause (1) of the foregoing follows par. (*a*) of reg. 6 (1) exactly, but clause (2) departs from par. (*b*) by inserting the word "any" before the word "males." Thus it refers to "work . . . performed by any males." The insertion of the additional word accords with the interpretation which his Honour Judge *Foster* placed upon the regulation. As that interpretation was under challenge in the proceedings for prohibition in respect of the decision or determination of 17th May, the learned Judge made the operation of his new order dependent upon the correctness, in the view of this Court, of that interpretation. Instead of providing, as an award of the Court must under s. 28 (1) of the *Conciliation and Arbitration Act*, for a specified period not exceeding five years, the order contained a clause directing that it should come into operation as from 5th

July 1945 and should "continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in the judgment delivered on 17th May 1945 is in error."

When, during the hearing of the proceedings for prohibition in respect of the order of 5th July, it appeared that the operation of the order was subject to the foregoing condition, it was suggested that it would be convenient if the question of the correctness of the interpretation of reg. 6 (1) (*b*) could be raised by a case stated. His Honour Judge *Foster* then stated a case under s. 31 (2) of the *Conciliation and Arbitration Act* asking two questions, first whether his interpretation of that clause is correct, and, secondly, if the answer is in the negative, what is the true interpretation of the clause. The case stated is now before us and I shall deal at once with these two questions.

Two views were put forward of the meaning of clause (*b*) of sub-reg. (1) of reg. 6. On the side of the employer, it is contended that the clause only applies when a class of work has at some time since the outbreak of war been performed in the given establishment by males exclusively. On the other hand for the respondents, it is contended that, although occasional or temporary performance by a man or men of a class of work may not be enough, yet, if at any relevant time there was any substantial employment by males upon the work, that is if men entered upon the occupation, the clause is satisfied. Though differently expressed, this contention represents the interpretation adopted by the learned Judge.

The interpretation of clause (*b*) is by no means easy. But I think the true meaning of the very indefinite language in which the clause is expressed is represented by neither extreme contended for. To satisfy the condition prescribed by the clause it is not enough that for some appreciable interval of time since the outbreak of war some males, however few, were employed in the performance of the given class of work. On the other hand, to exclude the operation of the condition it is not enough that one female was so employed.

The clause is concerned with changes since the outbreak of war in the sex employed in an industrial establishment for the performance of particular classes of work. "Work" means class of work. The word "perform" is used with reference not to the exceptional use of men but to the regular performance for the time being of a class of work in the establishment. The clause is not dealing with exceptional or isolated instances but with a change in the practice of the shop, factory, &c. It does not speak of usual performance, because it presupposes that there have been changes in the shop or

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Dixon J.

factory or other industrial unit since the outbreak of war and takes as a test the employment of men at any time since then. But what the clause appears to me to be aimed at is alteration since the war began in the way work is treated. If at any time since then it has been treated as male work in a given establishment, then the condition is fulfilled. To treat it as male work it is not necessary that no women shall have been employed at it. But substantially it must have been done by men. Clause (*a*) deals with what is usual in the community. Clause (*b*) is concerned with the particular establishment. The question it propounds is, in effect, whether at some time since the outbreak of war substantially male labour was used for the performance of the particular class of work. The language of the clause is vague and a more precise test cannot be spelled out of it.

I would answer the first question in the case stated No, and the second question that clause (*b*) of reg. 6 (1) refers to a class of work which within the establishment of the employer was substantially performed by males at a time since the outbreak of war.

These answers to the questions in the case stated do not dispose of the matter. For they leave open the question whether the order of 5th July was validly made. In my opinion it was not validly made. It could not derive any force or effect from the *Women's Employment Regulations* because, in making it, the learned Judge did not pursue the course laid down by those Regulations. There was, as I have already stated, an application under reg. 7B before the Court, that dated 11th September 1944. But reg. 7B requires that such an application shall be dealt with as if it were an application under reg. 6. Regulation 6 sets out very definitely the steps the Court must take. The Court must first decide whether the work specified in the application is work specified in reg. 6 (1). The decision of 17th May 1945, now set aside by the learned Judge, did contain a clause deciding the question in the terms of reg. 6 (4) (*a*) but without saying, as perhaps the Regulations intend, to which of the three descriptions mentioned in reg. 6 (1) the work belongs. In reaching the conclusion upon which the decision or finding so expressed is founded, his Honour attached to reg. 6 (1) (*b*) a meaning in which, as I have stated, I find myself unable to agree and it would appear that his conclusion was, or at all events may have been, attributable to his interpretation of the regulation. But, however that may be, the order of 5th July 1945 does not attempt to make or express the finding required by reg. 6 (4) (*a*). His Honour appears to have relied upon the *Industrial Peace Regulations* for authority to make his order and probably for that reason did not consider it necessary

to comply with the requirements of the *Women's Employment Regulations*. But, on the other hand, the order does not comply with one of the requirements which forms a condition of the jurisdiction under the *Industrial Peace Regulations*. It does not purport to be an interim order such as might be made under the combined operation of the *Industrial Peace Regulations* and s. 38 (*b*) of the Act and yet, though apparently final and resting for its efficiency upon reg. 10 (2) of those Regulations, which authorize the Court to hear and determine the matter as if it were an industrial dispute, the order is not drawn up as an award and does not specify a period as required by s. 28. On the contrary, it contains a clause, to which I have already referred, providing that the order shall continue in force until this Court decides that his Honour's interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* is in error. If that question never came before this Court, or if the Court decided that the learned Judge's view of the regulation was correct, the consequence would be that, according to its tenor, the order would continue in force unless and until set aside or terminated.

There is another consideration which goes deeper than the objection I have mentioned to regarding the order as authorized by the *Industrial Peace Regulations*. The order, though not pursuing the course prescribed by the *Women's Employment Regulations*, contains substantial provisions which are expressed to do things of the very kind those Regulations authorize when that course has been followed. Under the existing law, orders having the same operation and effect as those which the Court constituted under the *Women's Employment Regulations* is empowered by them to make cannot be made by the Court when conditions prescribed by those Regulations are not performed or not fulfilled.

Regulation 6 of the *Women's Employment Regulations* gives specific directions which must be followed wherever it applies. Following them results in a decision which, by virtue of reg. 10, necessarily excludes the effective operation of other industrial regulations inconsistent therewith. Where any of the preliminary sets of fact specified by reg. 6 (1) (*a*) (*b*) or (*c*) exists or has existed, then the field is taken by the *Women's Employment Regulations* and, because what may be done and how it may be done is specially and positively stated, it appears to me that it necessarily implies that other powers or procedures may no longer be used in such cases to the same end.

A curious feature of the present case is that while the prosecutor, the company, has contested the application to the facts of the *Women's Employment Regulations*, the Arbitration Court has decided that the facts do bring the matter under the operation of the Regula-

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Dixon J.

tions, though placing upon the Regulations what I think is an erroneous interpretation. If the case is within the operation of the *Women's Employment Regulations*, then I think clearly it must be dealt with under them, and not under the *Industrial Peace Regulations* by an order having the same content as a decision might have under the former Regulations, but without complying with the requirements they lay down. It is upon this footing, however, that the matter has been dealt with in fact. Every provision of the order, apart from the order to the employees to resume work and to the employer to offer employment, is based upon the *Women's Employment Regulations*. In the appointment of the Board of Reference reg. 5c of these Regulations is specifically mentioned and the questions referred are those stated in the Regulations, questions relevant only to the purposes of the *Women's Employment Regulations*. It is true that the direction to constitute the Board is open to the observation or objection that it does not follow reg. 5c precisely. But once it is known that the Deputy Industrial Registrar is a member of the panel, the form of the clause is seen to be but a verbal slip or confusion.

For the foregoing reasons I am of opinion that the validity of the order of 5th July 1945 cannot be supported.

If further investigation by the Court of Conciliation and Arbitration of the facts would have shown that the application fell within the *Women's Employment Regulations* notwithstanding the rejection of the learned Judge's wide interpretation of clause (*b*) of reg. 6 (1), then the result is indeed unfortunate. The Regulations involved in the matter, *Women's Employment, Industrial Peace* and *Economic Organization*, and the *Conciliation and Arbitration Act* together make up a remarkably intricate and complicated pattern and it is not surprising that any attempts to accomplish a result contemplated by one authority under another power should go wrong. Our duty, however, is confined to interpreting the Regulations and applying them as we find them with a view to ascertaining whether the Court has lawfully exercised its powers. If it has not, we cannot do otherwise than hold its order or decision void.

In my opinion the questions in the case stated should be answered (1) No ; (2) Clause (*b*) of reg. 6 (1) refers to a class of work which within the establishment of the employer was substantially performed by males at a time since the outbreak of war.

I think that the order nisi relating to the order, dated 5th July 1945, should be made absolute and the order nisi relating to the decision, dated 17th May 1945, should be discharged.

In cases of this nature I think that no order should be made as to costs.

WILLIAMS J. The short history of these proceedings is that on 26th June 1945 an order nisi was granted to prohibit the respondents from further proceeding upon a decision given on 17th May 1945 by his Honour Judge *Foster*, a member of the Commonwealth Court of Conciliation and Arbitration, in the exercise of his powers under the *Women's Employment Regulations* as the designated Judge in pursuance of Statutory Rules 1944 No. 149 in succession to the Women's Employment Board. Pending the hearing of the application to make the rule absolute the question arose whether his Honour had power to give the decision without complying with reg. 18 of Statutory Rules 1945 No. 11 which amended the *National Security* (*Economic Organization*) *Regulations*. The decision related to women employed by the company. They went out on strike, and the strike was notified to the prescribed authorities under reg. 10 of the *National Security* (*Industrial Peace*) *Regulations* by the company and the secretary of the respondent Union. Further proceedings then took place before his Honour in the course of which he intimated that he had come to the conclusion that the order of 17th May was a nullity because in exercising jurisdiction under the *Women's Employment Regulations* he was subject to the provisions of Statutory Rules 1945 No. 11, and that he intended to set aside the order under the powers conferred upon him by reg. 8 of the *Women's Employment Regulations*, but he did not in fact set aside the order until 20th July.

On 5th July 1945 his Honour made a further order intituled in the matter of the *National Security* (*Industrial Peace*) *Regulations* between the company and the Union in which it was recited that the industrial matter had come before him pursuant to notifications under reg. 10 of the *National Security* (*Industrial Peace*) *Regulations* given by the company and the Union respectively and referred to the Court by the Deputy Industrial Registrar, Sydney, as required by the Regulations. On 19th July 1945 a further order nisi was granted to prohibit the same respondents from further proceeding upon this order.

The applications to make both orders nisi absolute came on for hearing together, but the hearings were adjourned so that his Honour might be able to state a case under s. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 raising the question whether the construction which he had placed on reg. 6 (1) (*b*) of the *Women's Employment Regulations* in his judgment on 17th May was correct.

His Honour having stated a case, the three matters came on for further hearing together, but as his Honour had then set aside his decision of 17th May, the first application was not pressed and it

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Williams J.

is only necessary to deal with the case stated and the application to make the second order absolute.

With respect to the case stated: The contention of the company is that reg. 6 (1) (*b*) of the *Women's Employment Regulations* only operates where the work in a particular establishment has been performed exclusively by males at any time since the outbreak of the present war. In support of this contention we were referred to the previous forms in which the sub-regulation has appeared, but they do not, in my opinion, throw any light on the construction of the sub-regulation in its present form. His Honour's view is that, to use his own words, "it covers a case where work has been performed by both males and females at any time since the war in the establishment of the employer whatever the respective numbers of them may be." I am unable to read the word "exclusively" into the sub-regulation. If within the establishment of an employer at any time since the outbreak of the present war males have been employed upon any particular work in such numbers and for such a period that it can fairly be said, looking at the matter as one of "substance and actuality," that the particular work has been performed by males then it would not matter in my opinion that females were also employed on the same work. I would therefore answer the questions asked in the case stated as proposed in the order.

With respect to the application to make absolute the order nisi granted on 19th July: The position is that in making the order of 5th July his Honour was purporting to exercise jurisdiction conferred upon him, not by the *Women's Employment Regulations*, but by the *Industrial Peace Regulations*. Prior to making the order his Honour formed the opinion that it would be anomalous if women employed by the company on work which fell within reg. 6 (1) (*a*) or 6 (1) (*b*) of the *Women's Employment Regulations* were not receiving the rates to which they would have been entitled under reg. 6 (9) if a decision in their favour had been given under the Regulations, when other women employed in other establishments who were doing work which fell within one of the categories described in reg. 6 (1) in whose favour decisions had been given were receiving such rates. His Honour therefore submitted the statement prescribed by reg. 18 (3) of Statutory Rules 1945 No. 11 to the Acting Chief Judge, who concurred in his Honour's opinion that there was *prima facie* evidence of an anomaly, and being satisfied that it was not opposed to the national interest so to do, made an order authorizing his Honour to proceed and hear the matter of the alteration. His Honour thereupon proceeded to make the order of 5th July. A number of contentions were raised in support of and against the validity of this order.

The only contention with which I find it necessary to deal is that raised by the third ground in the order nisi, namely that the jurisdiction of the Commonwealth Court of Conciliation and Arbitration under the provisions of the *Commonwealth Conciliation and Arbitration Act* and the *National Security (Industrial Peace) Regulations* does not extend to enable that Court to exercise jurisdiction under the *Women's Employment Regulations*. The general nature of the *Industrial Peace Regulations* has been discussed by this Court in *Australian Coal & Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1) and *Pidoto* v. *Victoria* (2). For present purposes it is sufficient to say that the Regulations are to be construed as if they were incorporated in the *Commonwealth Conciliation and Arbitration Act*. Regulation 10 authorizes the Court to hear and determine an industrial matter, and reg. 11 so to do of its own motion. Regulation 17 provides that the Court may, in connection with any industry or part of any industry, appoint a Board of Reference consisting of one or more persons, even though no order or award in relation to an industrial dispute in that industry has been made, and that the Board of Reference so appointed shall have such powers of investigation and report in connection with such matters as the Court directs. Section 40A of the *Commonwealth Conciliation and Arbitration Act* provides that the Court by its award may appoint, or give power to appoint, for the purposes of the award, a Board of Reference consisting of one or more persons; and assign to the Board of Reference the function of determining any matters or things which under the award may require from time to time to be determined by the Board. The order of 5th July, par. I., orders all female employees of the company to return to work upon the following terms and conditions: (*a*) that the rate of remuneration to be paid to adult females (1) who are performing work usually performed by males; (2) are performing work which in the establishment of the company was performed by any males at any time since the outbreak of the present war shall be that prescribed by the appropriate classifications in the Schedule attached thereto. The appropriate classifications in the Schedule include in respect of each class of work a probationary and post-probationary period, the wages prescribed in the latter period being ninety per cent of the male rates. This Schedule is in the same terms as the Schedule to a previous decision of the Women's Employment Board given on 13th July 1944 which was held by this Court to be void in *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (3),

(1) (1942) 66 C.L.R. 161. (2) (1943) 68 C.L.R. 87.
(3) (1944) 69 C.L.R. 299.

H. C. OF A. 1945.

THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD.

Williams J.

and as the Schedule to his Honour's decision on 17th May. Paragraph III. of the order of 5th July provides that the Deputy Industrial Registrar of the Court shall constitute a Committee of Reference as prescribed by reg. 5c of the *Women's Employment Regulations*, which Committee shall determine :—(*a*) what females (if any) are employed on work described in pars. (*a*) (1) and (2) above ; (*b*) the classification of the work on which such female is employed, and that upon such determination the company shall pay to such females the appropriate rate as aforesaid. Paragraph IV. provides that the order shall come into operation as from 5th July 1945, and shall continue in force and operation until the High Court decides that the interpretation of reg. 6 (1) (*b*) of the *Women's Employment Regulations* as indicated in his Honour's judgment delivered on 17th May 1945 is in error. It is apparent, I think, that par. I. (*a*) (2) of the order is a paraphrase of reg. 6 (1) (*b*) of the *Women's Employment Regulations* which embodies his Honour's view of its true meaning, while par. III. of the order is intended to adapt reg. 5c of the *Women's Employment Regulations* to a case where there is no decision under reg. 6 (4) that the work is work which falls within reg. 6 (1) (*a*), (*b*) or (*c*).

The fourth paragraph of the order appears to be based on the assumption that the application to make absolute the order nisi of 26th June would be proceeded with, and that on that application this Court would decide whether his Honour's construction of reg. 6 (1) (*b*) was correct. To make the term of an order dependent upon a determination of this Court upon a point of law or any other matter is obviously objectionable, as the point or other matter might never come before this Court, or if it did, this Court might not find it necessary to determine it. If, in the present case, this Court determines that his Honour's construction was right, then the order would on its face continue for an indefinite period. But it is unnecessary to express a final opinion upon the effect of such a paragraph. Its importance in relation to the third ground in the order nisi is that it supplies a further indication, if any such further indication is required, that the order is intended to give women employed by the company the wages to which they would have been entitled if a decision had been given by the Women's Employment Board, or the designated Judge under the *Women's Employment Regulations*, that the work classified in the Schedule was work which fell within reg. 6 (1) (*a*) or (*b*). Regulation 6 (4) of the *Women's Employment Regulations* requires that the Board (now the designated Judge) shall decide whether the work specified in the application is work specified in sub-reg. (1) of this

regulation; and if so, whether females may be employed or continue to be employed on the work. Regulation 6 (7), (8) and (9) provides that the Board shall decide the rates of payment to be made to females employed on this work, and that it shall, so far as practicable, assess these rates by reference to such factors as it thinks fit, and in particular to the efficiency of females in the performance of the work and any other special factors which may be likely to affect the productivity of their work in relation to that of males, the rate of payment to be made to any adult female to be not less than sixty per cent nor more than 100 per cent of the rate of payment made to adult males employed on work of a substantially similar nature. It is essential, therefore, to the jurisdiction of the Board to fix rates of pay for females engaged on any of the three categories of work specified in reg. 6 (1) that it shall first decide that the females in question are engaged on work which falls within one or more of these categories. In *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (1) it was held that the Board could not give itself jurisdiction by misconstruing the true meaning of reg. 6 (1) (*c*). In the subsequent case of *Toowoomba Foundry Ltd.* v. *The Commonwealth* (2) it was held that the Regulations placed an obligation on the Board to find the facts specified in reg. 6 (4) and that this obligation could not be delegated. Further, the object of enacting the *National Security* (*Female Minimum Rates*) *Regulations*, discussed in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (3), was to enable the Commonwealth Court of Conciliation and Arbitration to adjust the wages of females employed in other industries becoming vitally necessary in the prosecution of the war so as to remove disparities between these wages and the wages of women employed on work described in reg. 6 (1) of the *Women's Employment Regulations*.

All these considerations lead to the conclusion that the *Women's Employment Regulations* provide a specific means of fixing the wages of women doing specific work on a special basis, so that before wages can be awarded to females on this basis there must be a decision of the Board or the designated Judge that complies with their requirements. In the present case the learned Judge had the general jurisdiction of a Judge of the Commonwealth Court of Conciliation and Arbitration and the special jurisdiction conferred upon him as the designated Judge by the *Women's Employment Regulations*. In making the order of 5th July he purported to exercise his general and not his special jurisdiction.

(1) (1944) 69 C.L.R. 299. (2) (1945) A.L.R. 282.
(3) (1944) 69 C.L.R. 476.

H. C. OF A. 1945. THE KING v. FOSTER; EX PARTE CROWN CRYSTAL GLASS PTY. LTD. Williams J.

If the order, although purporting to be made under the *Industrial Peace Regulations*, fulfilled in essentials the requirements of the *Women's Employment Regulations*, it could, in my opinion, be supported as an exercise of jurisdiction under these Regulations (*R.* v. *Bevan*; *Ex parte Elias and Gordon* (1)). But it does not fulfil these essentials. In particular it does not contain a finding by the learned Judge that the work classified in the Schedule is work within the meaning of reg. 6 (1) (*a*) or (*b*). The task of making that finding is delegated to the Board of Reference to be constituted under par. III. of the order. But this is a finding which the designated Judge must make himself and which he cannot delegate. In these circumstances it is unnecessary to discuss whether the appointment of the Committee of Reference, although intended to be a Committee of Reference as prescribed by reg. 5c of the *Women's Employment Regulations*, could be supported as a Board of Reference constituted under reg. 17 of the *Industrial Peace Regulations* or s. 40A of the *Commonwealth Conciliation and Arbitration Act*.

For these reasons I am of opinion that the order of 5th July was made without jurisdiction and that the order nisi of 19th July should be made absolute.

R. v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (*No.* 43 *of* 1945): *Order nisi discharged. Respondent union to pay costs of prosecutor.*

R. v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (*No.* 51 *of* 1945): *Order absolute. Respondent union to pay costs of prosecutor.*

Australian Glass Workers' Union v. *Crown Crystal Glass Co. Pty. Ltd.*: *Question No.* 1 *answered—No. Question No.* 2 *answered—The words in the said regulation "work . . . which . . . was performed by males" means a class of work which was mainly performed by males. Case remitted to Judge Foster. No order as to costs.*

Solicitors for Crown Crystal Glass Co. Pty. Ltd., *J. Stuart Thom & Co.*

Solicitors for Australian Glass Workers' Union, *Sullivan Bros.*

Solicitor for the Commonwealth Court of Conciliation and Arbitration and Judge Foster, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. M.

(1) (1942) 66 C.L.R. 452, at pp. 486, 487.