[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

HICKMAN AND OTHERS;

EX PARTE FOX AND ANOTHER

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EX PARTE CLINTON AND OTHERS.

H. C. OF A. 1945.

SYDNEY, *Aug.* 7; *Sept.* 5.

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

National Security—Coal mining industry—Local Reference Board—Ambit of jurisdiction—Validity of order—Order based on erroneous finding that matter within coal mining industry—Provisions prohibiting appeals, &c.—Prohibition—The Constitution (63 & 64 *Vict. c.* 12), *s.* 75 (v.)—*National Security* (*Coal Mining Industry Employment*) *Regulations* (*S.R.* 1941 *No.* 25—1944 *No.* 48), *regs.* 2, 4, 14 (1) (*a*), 17.

Regulation 2 of the *National Security* (*Coal Mining Industry Employment*) *Regulations* provides that the Regulations "shall apply to industrial matters relating to the Coal Mining Industry." Regulation 14 (1) (*a*) provides that, subject to the Regulations, a Local Reference Board shall have power to settle disputes as to any local matter likely to affect the amicable relations of employers and employees in the coal mining industry. By reg. 4 "dispute" and "local matter" are also associated with the coal mining industry. Regulation 17 provides that the decision of a Local Reference Board "shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever."

Held that under the Regulations the authority of a Local Reference Board is limited to the coal mining industry. Prohibition lies, under s. 75 (v.) of the Constitution, in respect of a decision of a Board based on an erroneous finding that the matter was within the ambit of that industry.

Effect of provisions of the general nature of reg. 17 considered.

ORDERS NISI for prohibition.

Ex parte Fox and Another.—An application was made to the High Court by Stanley Fox and his wife Millicent Daisy Fox, hereinafter referred to as the prosecutors, who carry on business in partnership under the firm name of S. & M. Fox at Chullora, New South Wales, as haulage contractors, automotive engineers, builders and joiners, for a writ of prohibition directed to Frederick Charles Hickman, chairman, and William Leslie Rodgers, Henry Charles Morton and T. Herron, members of a Local (Mechanics) Reference Board (Southern District, New South Wales), constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*, and the Federated Mining Mechanics Association of Australasia (New South Wales Branch), prohibiting them and each of them from proceeding further upon an order made on 1st May 1945 by the Board.

The Board's order was made under reg. 14 (1) (*a*) upon an application made on behalf of the Federated Mining Mechanics Association of Australasia (New South Wales Branch), an industrial union of employees, for the determination of a dispute existing in respect to the application of the award known as the consolidated "Mechanics Award," C.R.B.251, to members of the Association employed as lorry drivers. The order was in the following terms:—"The . . . Board . . . doth hereby decide that S. and M. Fox are engaged in the coal mining industry and that they are required subject to the awards to grant to their employees engaged and employed as lorry drivers the minimum rates of wage and the working conditions prescribed by awards known as the Mechanics (Coal Mining Industry) Awards in force from time to time."

The Central Reference Board constituted under the same regulations had ordered that an award known as the Consolidated Mechanics Award should be a common rule for the coal mining industry in the State of New South Wales. The effect of the Local Reference Board's decision was to declare that that award applied to the prosecutors in respect of lorry drivers employed by them. The effect of regs. 9 and 15 was to make this decision, if valid, "binding on the parties."

At the hearing before the Local Reference Board, the prosecutors claimed that they were not employers in the coal mining industry, and that their employees in respect of whom the application had been made, namely lorry drivers, who were members of the Federated Mining Mechanics Association of Australasia, were not employees in the coal mining industry.

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According to an affidavit made by Stanley Fox and read before the Board, the firm of S. & M. Fox carried on business at 81 Chiswick Road, Chullora, New South Wales. The partnership was formed on 1st July 1941 and since that date had carried on business as haulage contractors, automotive engineers, builders and joiners. The haulage section of the firm's business consists of carting coal, coke, firewood, timber, blue metal, sand, ashes and rubbish. For this purpose, the firm operated a fleet of approximately twenty-four motor lorries all of which were serviced and maintained at the firm's premises at Chullora. At the commencement of the partnership, the firm contracted with William Fox, brother of Stanley Fox, and the owner of the Wollondilly Extended Colliery situate in the Burragorang Valley, N.S.W., some fifty or sixty miles from Chullora, to carry screened coal at agreed rates from bins at the said colliery to (*a*) Camden railway station, and (*b*) customers of the colliery owner in the Sydney metropolitan area. That contract was still subsisting. Neither of the prosecutors had any financial interest in the colliery. The prosecutors employed about twenty-three lorry drivers of whom, at a date immediately prior to the application made to the Board, according to the prosecutors, thirteen were engaged in carting coal exclusively, eight were carting coal on some days and other materials on some days, and two were engaged exclusively in carting materials other than coal. The respondents did not dispute that some of the lorry drivers carted materials other than coal but alleged that more lorry drivers were engaged upon carting coal than was admitted by the prosecutors. There was no evidence that any of the lorry drivers were limited by the terms of their engagement to the carting of coal. The evidence was that they were simply employed as lorry drivers to cart materials for the firm as directed from time to time.

Ex parte Clinton and Others.—An application for a writ of prohibition was similarly made by John William Clinton, William Clinton, John Ernest Clinton, Thomas Barrass and Joseph Scott, trading together in partnership under the firm name of Clinton Coal Carrying Co., directed to Frederick Charles Hickman, chairman, and E. R. Slade, B. P. Sassall, H. C. Morton and C. W. Laing, members of a Local (Mechanics) Reference Board (Southern District, New South Wales), and the Federated Mining Mechanics Association of Australasia, New South Wales Branch, prohibiting them and each of them from proceeding further upon an order made by the Board, on the application of the Association, on 10th May 1945, under reg. 14 (1) (*a*) of the *National Security* (*Coal Mining Industry*

Employment) *Regulations*, in which the Board decided that the members of the partnership, the prosecutors herein, were engaged in the coal mining industry and that they and each of them were required subject to the awards to grant to such of their employees who were engaged and employed as lorry drivers carting coal the minimum rates of wage and the working conditions prescribed for lorry drivers by the awards known as the Mechanics (Coal Mining Industry) Awards in force from time to time.

Evidence before the Board showed that the partnership was engaged in the business of carrying coal, cattle, lime, metal, sleepers, shale and other commodities. Under a contract with Clinton's Nattai Collieries Pty. Ltd., a company which owned and operated the Nattai-Bulli Colliery situated at Burragorang Valley, N.S.W., the partnership and others carted the daily output of the colliery from the colliery by motor trucks to the depot of the partnership at Narellan, some twenty-three miles from the colliery. When the coal arrived at the depot, it was dealt with by the partnership according to instructions given daily by Joseph Scott, coal agent, the selling agent for the colliery company. It was loaded into railway trucks in some cases in the condition in which it arrived, and in other cases after being graded was then despatched by rail to consignees nominated by Scott. In some instances, coal was not taken from the colliery to the depot but was driven direct to consignees at Liverpool and other places in and around the Sydney metropolitan area. In carrying out its contract with the colliery company, the partnership employed approximately twenty truck drivers to drive trucks, owned and maintained by the partnership, between the colliery and the depot. Under instructions from the partnership, all but a few of the truck drivers did not enter the colliery premises but, as instructed, parked their empty trucks at a place outside those premises at which place the trucks were taken over by employees of the colliery company, driven by those employees to coal bins, loaded and then driven back to the said place outside the colliery premises where they were handed over to the truck drivers. The truck drivers were not exclusively engaged in carting coal from the colliery to the depot but at various times each of them was employed carting cattle, lime, metal, sleepers, shale and other commodities. All the persons engaged in despatching or grading coal from the depot at Narellan were employees of the partnership. The partnership under contract with the colliery company received from that company the sum of sixpence per ton on all coal passing through the depot for the service rendered to the company in grading.

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In addition to the truck drivers employed by the partnership, five other drivers owning their own trucks were constantly engaged by the colliery company, on conditions similar to the conditions applying to the partnership truck drivers, to cart coal from the colliery to the depot and elsewhere under contract with the colliery company.

Rich J., upon each application, made an order nisi for a writ of prohibition on the grounds :—(1) that the prosecutors were not at any relevant time engaged in the coal mining industry; (2) that none of the prosecutors' employees who were engaged and employed as lorry drivers by the prosecutors was engaged in the coal mining industry; and, in the case of S. & M. Fox, (3) that such of the prosecutors' lorry drivers as were not engaged and employed by the prosecutors in the carting of coal were not engaged in the coal mining industry.

Ex parte S. & M. Fox.—A. R. Taylor K.C. (with him *Ashburner*), for the prosecutors. Neither the prosecutors nor any of their employees come within the scope of the Consolidated Mechanics Award, which, by virtue of reg. 6 of the *National Security* (*Industrial Peace*) *Regulations* and regs. 8 and 15 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, was made a common rule in respect of the coal mining industry. The facts show that neither the prosecutors nor any of their employees are engaged in the coal mining industry. The prosecutors are not employers in the coal mining industry but are employers in the transport industry. The distinction between the two industries is not adversely affected by the fact that they are carried on in close association one with the other; they nevertheless remain separate enterprises (*R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (1)). In that case, there were present some features which, not being present in this case, make this case a stronger case, namely in the *National Oil Pty. Ltd.'s Case* (2), (i) the same employer carried on both processes, which is not the position in this case; (ii) it was recognized on the facts before the Court that the extraction of shale oil was the real object of the mining operations; (iii) it appeared that both operations were carried out at the same place at the mine or the mine property; and (iv) both operations were part of a continuous and connected process. In this case, the prosecutors are general haulage contractors who employ lorry drivers and are quite outside the coal mining industry. The terms of the lorry drivers' employment are quite general; the drivers may be called upon to transport

(1) (1943) 68 C.L.R. 51, at pp. 56-60, 65. (2) (1943) 68 C.L.R. 51.

anything from any one place to any other place within reason and they are not employed solely to transport coal: their employers are not otherwise engaged in the coal mining industry, they do not mine for coal, and they employ other lorry drivers who do not transport coal as part of their regular employment. Where employers have employees some of whom transport one class of commodity and others who transport an entirely different class of commodity, they are engaged in the transport industry and not in the industry associated with the particular commodity which they happen to be transporting at a particular time.

Barwick K.C. (with him *Maguire*), for the respondent Federated Mining Mechanics Association of Australasia. The matter under consideration is "coal mining industry" and not "coal mining." Emphasis must be placed on the word "industry." It is not a terminus of the coal mining industry to deposit coal on the ground at the pit top. The coal mining industry, as commonly understood, includes the removal of the coal. The industrial qualification of an employee is ascertained by what he does exclusively or predominantly. If his functions are varied, the matter of his classification is a question of fact and degree. An employer with a substantial number of employees who are, on that approach, engaged in a particular industry, is an employer in that industry because he has employees whose proper industrial classifications are in that industry. An employee need not be engaged exclusively in the industry to come within the scope of the award. Classification depends upon the usage in the particular industry. The usage in the coal mining industry is for the colliery proprietor, himself or some person on his behalf, to remove the coal from the pit top to public conveyance, that is rail-head. The relevant award has a classification for motor lorry drivers. Lorry drivers as employed by the prosecutors are admitted to industrial unions covering the coal mining industry. The great majority of the prosecutors' lorry drivers is engaged in the coal mining industry, therefore it follows that the prosecutors are engaged in the coal mining industry, their business being to carry coal for the colliery proprietor to the public conveyance. The dispute before the Board was whether the common rule award applied to members of this respondent Association employed as lorry drivers. Consideration of that dispute necessarily involved the consideration of the question whether their employers, the prosecutors, were engaged in the coal mining industry (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1)). All that the Board did was to determine that the

(1) (1944) 69 C.L.R. 185.

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prosecutors were persons engaged in the coal mining industry. That is the only operative decision. On its proper construction, the remainder of the order is merely a consequential statement. The prosecutors are not " ordered " or " directed " by the order to grant the award rates and conditions to the employees concerned, they are merely " required " to do so. The order does not create any rights. In the circumstances, there is nothing to prohibit. Upon their proper construction, and assuming the words in the order to be a direction by the Board, they are only a direction as to employing lorry drivers who are engaged in the coal mining industry. The statement that the prosecutors are engaged in the coal mining industry is not a statement that they are exclusively or predominantly engaged in that industry. The reference in the order to lorry drivers is to be limited to lorry drivers in the coal mining industry, that is, in the relevant circumstances, those carrying coal. The carrying of coal from pit-head to rail-head by a substantial number of their employees does involve the prosecutors' being engaged in the coal mining industry.

A. R. Taylor K.C., in reply. The Board could only have jurisdiction under reg. 14 (1) (*a*) to deal with the dispute. The dispute was whether the prosecutors were engaged in the coal mining industry and were bound by the common rule. The Board determined those questions in the affirmative. The facts show that the transportation of coal from the pit-head had not been done by or on behalf of the colliery proprietor but has been done exclusively by the transport industry. The order could have been made, and a further order can be made, under s. 38 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The order is not only an existing and continuing order imposing obligations, it is one that may be varied from time to time (*R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1)).

Cur. adv. vult.

Ex parte Clinton and Others.—*A. R. Taylor* K.C. (with him *Monahan*), for the prosecutors. There are two differences between this case and *Fox's Case*. The first is that the requirement as to grant of pay and conditions prescribed by the Mechanics (Coal Mining Industry) Awards is limited to such of their employees as are engaged and employed as lorry drivers carting coal, and the second is that some other employees, not lorry drivers, of the prosecutors screen the coal. The material fact is that none of the

(1) (1920) 28 C.L.R. 456, at pp. 463, 464, 492, 493.

prosecutors' lorry drivers takes part in the screening of the coal, nor are any of those lorry drivers engaged in the coal mining industry. In any event, the screening of the coal is not so intrinsically bound up with coal mining that it forms part of the coal mining industry. Notwithstanding those two differences, the prosecutors are not engaged in the coal mining industry.

Barwick K.C. (with him *Maguire*), for the respondent Association. As a matter of usage, the coal mining industry does three things: (i) it wins coal, (ii) it screens coal, and (iii) it moves the coal from the pit-head to a public conveyance or other point of disposal. The facts show that the object of the partnership is to carry coal, and that it does so almost exclusively as a business. Also that, in addition to carrying coal, employees of the partnership screen coal on behalf of the colliery proprietor and thus assist in preparing the coal for the market. It follows that the partnership is engaged in the coal mining industry and that its employees come within the scope of the award.

Cur. adv. vult.

Sept. 5.

The following written judgments were delivered:—

LATHAM C.J. *Ex parte Fox and Another.*—Return of order nisi for a writ of prohibition directed to the chairman and members of a Local Reference Board constituted under the *National Security (Coal Mining Industry Employment) Regulations*, Statutory Rules 1941 No. 25 as subsequently amended. The prosecutors are Stanley Fox and Millicent Daisy Fox, who carry on business under the firm name of S. & M. Fox at Chullora, New South Wales, as haulage contractors, automotive engineers, builders and joiners. The order made by the Local Reference Board was in the following form:— "The . . . Board . . . doth hereby decide that S. and M. Fox are engaged in the Coal Mining Industry and that they are required subject to the awards to grant to their employees engaged and employed as lorry drivers the minimum rates of wage and the working conditions prescribed by awards known as the Mechanics (Coal Mining Industry) Awards in force from time to time." The Central Reference Board constituted under the same Regulations had ordered that an award known as the Consolidated Mechanics' Award should be a common rule for the coal mining industry in the State of New South Wales. The effect of the decision of the Local Reference Board was to declare that that award applied to the prosecutors in respect of lorry drivers employed by them. The

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effect of regs. 15 and 9 is to make this decision, if valid, "binding on the parties."

The order of the Local Reference Board was made upon an application made on behalf of the Federated Mining Mechanics' Association of Australasia, an industrial union of employees. The Board acted under reg. 14 (1) (*a*), which provides that, subject to the Regulations, a Local Reference Board shall have power to settle disputes as to any local matters likely to affect the amicable relations of employers and employees in the coal mining industry. Regulation 2 provides that the Regulations "shall apply to industrial matters in relation to the Coal Mining Industry." These provisions are, in my opinion, plainly provisions which prescribe, and, in prescribing, limit, the jurisdiction of the Board. An authority with a limited jurisdiction cannot give itself jurisdiction by a wrong determination as to the existence of a fact upon which its jurisdiction depends, or by placing a wrong construction upon a statute upon which its jurisdiction depends, unless by a valid provision the authority is given power to act upon its own opinion in relation to the existence of the fact or in relation to the construction of the statute. This principle has frequently been applied in the case of the Arbitration Court, and has also been applied in the case of other industrial authorities: See e.g. *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (1) and *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (2). The jurisdiction of this Court which is invoked by the prosecutors depends upon s. 75 (v.) of the Commonwealth Constitution, which provides that the Court shall have original jurisdiction in all matters, *inter alia*, in which a writ of prohibition is sought against an officer of the Commonwealth. The members of the Board appointed under the Regulations are officers of the Commonwealth. Prima facie, therefore, the Court has jurisdiction to grant a writ of prohibition against them if they exceed their jurisdiction. Regulation 17 provides, *inter alia*, that a decision of a Local Reference Board "shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever." Such a provision, it is settled, cannot exclude the jurisdiction conferred upon this Court by s. 75 (v.) of the Constitution: See *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (3). That provision (s. 75 (v.)) is not limited to the grant of prohibition upon constitutional grounds. It extends also to the

(1) (1944) 69 C.L.R. 299.
(2) (1944) 69 C.L.R. 407, particularly per *Starke* J. at pp. 438-440.
(3) (1910) 11 C.L.R. 1.

grant of prohibition on grounds independent of the Constitution and relating only to the statutory powers of a Commonwealth officer. In my opinion, it should not be held that the effect of reg. 17 is to extend the jurisdiction of a Local Reference Board beyond the coal mining industry. Such a provision cannot, in my opinion, fairly be construed as declaring an intention of Parliament that a Board constituted under the Regulations should have jurisdiction to make decisions in matters which have no relation to the coal mining industry. Such a construction would give no effect to the provisions already quoted from reg. 14 (1) (*a*) and reg. 2. If reg. 17 were construed so as to give an unlimited jurisdiction to the Board to make any order whatever in relation to any person whatever in respect of any matter whatever (whether industrial or not industrial), the validity of the Regulations would obviously be open to question. In my opinion, therefore, the Regulations, including reg. 17, should be construed as limited in their operation to the coal mining industry, and the powers of a Local Reference Board should be interpreted accordingly.

When the matter came before the Local Reference Board, the prosecutors objected that they were not employers in the coal mining industry, and that their employees in respect of whom the application was made, namely lorry drivers, who were members of the applicant union, were not employees in the coal mining industry: See reg. 14 (1) (*a*).

The evidence shows that the applicants are haulage contractors who employ about twenty-three lorry drivers. Of these lorry drivers, at a date immediately prior to the application made to the Board, according to the prosecutors, some thirteen were engaged in carting coal exclusively, eight were carting coal on some days and other materials on some days, and two were exclusively carting other materials than coal. According to the respondents, the number of lorry drivers carrying coal was greater, but it was not disputed that some lorry drivers carried materials other than coal. There is no evidence that any lorry drivers were limited by the terms of their engagement to the carrying of coal. The evidence is that they were simply employed as lorry drivers to carry materials for the firm as directed from time to time. The firm had contracted with the owner of the Wollondilly Extended Colliery to carry coal at agreed rates, but all the lorry drivers were employed by the firm, and not by the owner of the colliery. They carried the coal either to the railway station at Camden or to customers of the colliery at Sydney.

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The order nisi was granted upon the grounds that the applicants were not engaged in the coal mining industry, that none of their lorry drivers were engaged in that industry, and, alternatively, that such of the lorry drivers as were not engaged in the carting of coal were not engaged in the coal mining industry. The last-mentioned ground depends upon the interpretation of the decision of the Board, which in terms applies to the employees of the firm "engaged and employed as lorry drivers", and therefore apparently to all their lorry drivers, whether they carry coal or not. In the view which I take of the case, however, it is unnecessary to consider what is the true construction of the decision in this respect.

The question which arises is whether the employing firm and their employees employed as lorry drivers are persons engaged in the coal mining industry.

The fact that a person is engaged in carrying coal does not show that he is engaged in the coal mining industry. A coal merchant or carrier may deal in or with coal without it being possible to suggest that he was engaged in the industry of mining coal. It may be added that a man employed by a colliery owner to drive a lorry for the purposes of the colliery could be engaged in the coal mining industry though he never carried any coal. These examples are sufficient to show that the mere fact of coal-carrying is not in itself decisive of the question whether the carrier is engaged in the coal mining industry.

The term "industry" is not a precise technical term. One industry sometimes overlaps into another industry. In my opinion, no absolute rule can be laid down for determining the limits of a particular industry. The question whether a particular industrial operation belongs to one industry rather than another cannot be decided merely by considering the nature of that operation itself. For example, a clerk may be employed in the boot-making industry, the coal industry, the transport industry, or almost any industry. The problems associated with the overlapping of craft and industrial unions are well known, and have to be carefully considered by industrial authorities when they are determining the terms of their awards. In my opinion, all the circumstances of each case must be taken into account. If coal is taken in skips by employees of colliery owners from the pit top to a place of storage on the colliery, such work would be work in the coal mining industry. Similarly, examples are given in affidavits filed on behalf of the respondents of railways, owned and controlled by proprietors of collieries and operated by employees of such proprietors, upon which coal is conveyed considerable distances to railway sidings or wharves.

Such transport of coal may be regarded as falling within the coal mining industry. In the present case, however, the lorry drivers who carry coal are employed as lorry drivers generally, and not as carriers of coal, and they are not employed by the colliery proprietors. They are employed by persons who carry on the business of carriers, and who do not in any real sense belong to the coal mining industry. The fact that some lorry drivers belong to unions to which coal mining employees belong is a circumstance of little weight. Competition for members between unions is not unknown. The fact upon which the respondents rely is that the lorry drivers carry coal and carry it from a colliery. But lorry drivers employed by the prosecutors carry firewood, timber, blue metal and other materials. In my opinion, it would not be in accordance with the ordinary meaning of the term " industry " to say that the firm was therefore also engaged in the firewood industry, the timber industry, or the industry of producing blue metal, even if the carting were done from a forest, mill or a quarry. In my opinion, the whole of the evidence shows that the employers and employees concerned are not engaged in the coal mining industry, and that therefore the decision of the Local Reference Board was made without jurisdiction.

The order nisi should be made absolute.

Ex parte Clinton and Others.—In this case, it is shown that lorry drivers employed by a carrying firm, and not by the colliery proprietor, carry coal from a colliery to a depot. They also carry at times other commodities, such as cattle, lime, sleepers, &c. The coal is graded at the depot by employees of the carrying firm, the firm being paid sixpence per ton by the colliery company for the grading. In my opinion, this case is, in the material particulars, indistinguishable from that of *R.* v. *Hickman* ; *Ex parte Fox.* The operations of carrying coal performed by such employees are not such as to justify the conclusion that they and their employers are, in respect of such operations, engaged in the coal mining industry.

The order nisi should be made absolute.

RICH J. *Ex parte Fox and Another.*—This is an application to make absolute a rule nisi for a writ of prohibition to prohibit a Local Reference Board constituted under Part III. of the *National Security (Coal Mining Industry Employment) Regulations* from proceeding further upon an order made on 1st May last. The Board decided that the employer firm and the employees concerned were engaged in the coal mining industry and accordingly were bound by the awards known as the Mechanics' (Coal Mining Industry) Awards.

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The jurisdiction of this Court derives from s. 75 (v.) of the Constitution—the members of the Board being officers of the Commonwealth. The exercise of this jurisdiction is not affected by the provisions of reg. 17 of the Regulations—provisions similar to those contained in s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. And an order will be made if it appears that the Board is acting in excess of jurisdiction (*R.* v. *Legislative Committee of the Church Assembly*; *Ex parte Haynes-Smith* (1)). The same principle has hitherto been applied in this Court when orders or awards have been made in excess of jurisdiction purporting to bind the parties and to impose continuous liabilities. It remains, therefore, to consider whether the Board's decision is beyond power. Regulation 14 (1) (*a*) empowers a Local Reference Board "to settle disputes as to any local matters likely to affect the amicable relations of employers and employees in the Coal Mining Industry." And "dispute" and "local matter" are also associated with the "Coal Mining Industry" (reg. 4). This industry is well known, but no evidence was forthcoming to designate the aggregate of objects that may be included under this industry. And in the absence of such evidence the facts, which have been stated in the judgment of the Chief Justice, do not show that the employers and their employee lorry drivers are persons engaged in the coal mining industry. The employers were carrying on the business of carriers and the drivers were not employed as carriers of coal in such industry, but in their general capacity of lorry drivers. It follows that the decision of the Board was made without jurisdiction and is void.

The order nisi should be made absolute with costs against the Federated Mining Mechanics' Association.

Ex parte Clinton and Others.—The facts in this case do not differ in any material respect from those in *R.* v. *Hickman*; *Ex parte Fox*. Accordingly, I think that the decision of the Board that the employer firm and its employee drivers were engaged in the coal mining industry was not justified. The decision or order of the Board was made without jurisdiction and is void.

The order nisi should be made absolute with costs to be paid by the Federated Mining Association.

STARKE J. *Ex parte Fox and Another.—Ex parte Clinton and Others.*—Rules nisi for prohibition calling upon the members of a Local Reference Board constituted under the *National Security (Coal Mining Industry Employment) Regulations* and others to show

(1) (1928) 1 K.B. 411, at p. 414.

cause why writs of prohibition should not issue prohibiting them from proceeding further upon orders of the Board made in *Fox's Case* on 1st May 1945 deciding that S. and M. Fox are engaged in the coal mining industry and that they are required, subject to the awards, to grant to their employees engaged and employed as lorry drivers the minimum rate of wages and the working conditions prescribed by awards known as the Mechanics (Coal Mining Industry) Awards in force from time to time, and in *Clinton's Case* on the 10th May 1945, deciding that the partnership firm Clinton's Coal Carrying Co. are engaged in the coal mining industry, and that they and each member of the partnership are required, subject to the awards, to grant to each of their employees who are engaged and employed as lorry drivers carting coal the minimum rate of wages and working conditions prescribed for lorry drivers by the awards already mentioned.

The rules are founded upon s. 75 of the Constitution (*R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (1)), and prohibition goes wherever officers of the Commonwealth, having legal authority to determine questions affecting the right of subjects and having the duty to act judicially, act in excess of their legal authority (*R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee Co.* (1920), *Ltd.* (2); *R.* v. *Powell*; *Ex parte Marquis of Camden* (3); *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (4)).

The *National Security* (*Coal Mining Industry Employment*) *Regulations* provide that the Regulations shall apply to industrial matters in relation to the coal mining industry, and by reg. 14 a Local Reference Board has power to settle disputes as to any local matters likely to affect the amicable relation of employers and employees in the coal mining industry.

A Local Reference Board made the orders already mentioned pursuant to these Regulations. But it is plain that the Board could not give itself authority over industrial matters having no relation to the coal mining industry. The Board has authority to settle disputes in the coal mining industry. Jurisdictional facts are examinable in this Court on proceedings in prohibition, for instance the existence of facts necessary to give the Board authority to exercise the functions it has assumed (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (5)).

Now the Board has decided that the prosecutors are engaged in the coal mining industry and are required to grant to their employees

(1) (1943) 68 C.L.R., at p. 55.
(2) (1924) 1 K.B. 171, at p. 205.
(3) (1925) 1 K.B. 641, at p. 649.
(4) (1920) 28 C.L.R. 456.
(5) (1909) 8 C.L.R. 419, at pp. 453, 454.

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engaged as lorry drivers carting coal the minimum rate of wages prescribed by the Mechanics (Coal Mining Industry) Awards. But the question whether the prosecutors are engaged in the coal mining industry, which is not a technical expression, but a popular description, without any definite or clear limits (*R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (1)), is, in truth, one of fact, depending in the main upon industrial usages and practices upon which the evidence in this case is very meagre. The prosecutors, S. & M. Fox, were in fact carriers operating lorries for the cartage of coal, coke, firewood, timber and other materials. Coal was carted for the colliery proprietor from the Wollondilly Colliery to the rail head or to customers in Sydney under contract at agreed rates. It is clear, I think, on these facts that S. & M. Fox were not engaged in any way whatever in the coal mining industry, but in the carrying or transport industry. Consequently the order or decision of the Board in relation to S. & M. Fox was made without the necessary authority and is bad.

The prosecutors, Clinton Coal Carrying Co., were also a carrying company operating lorries for the cartage of coal and other commodities.

The daily output of the Nattai Bulli Colliery was carted for the colliery proprietor from the colliery under contract at agreed rates some twenty-three miles to the depot of the carrying company at Narellan, where the bulk of it appears to have been screened by the carrying company, and a charge made for the services thus rendered, and thence the coal was loaded on to trucks, or otherwise delivered as directed by the colliery company.

But these screening operations, though normally carried out in the coal mining industry, do not alter the character of the prosecutors' industry, which is carrying or transporting commodities, and attach the prosecutors to the coal mining industry.

The order or decision of the Board in relation to the Clinton Carrying Co. is also without authority and bad.

The rules nisi should be made absolute.

DIXON J. *Ex parte Fox and Another.—Ex parte Clinton and Others.*—These are two orders nisi for prerogative writs of prohibition directed to the chairman and members of a Local Reference Board established under the *National Security* (*Coal Mining Industry Employment*) *Regulations*. The writs are sought to prohibit the Local Reference Board from proceeding further upon so-called orders made by the Board on 1st May 1945 and 10th May 1945.

(1) (1943) 68 C.L.R., at p. 57.

It is not easy to say to which of the precise authorities conferred on the Board by the Regulations these orders are to be referred. They purport, however, to decide the question whether the respective prosecutors are engaged in the coal mining industry and are required to afford to their employees the minimum wages and conditions prescribed by certain awards in that industry.

Under reg. 14, a Local Reference Board has power, among other things, to settle disputes as to any local matters likely to affect the amicable relations of employers and employees in the coal mining industry. I think it is to this power that we should refer the Board's decisions. In the interpretation of the regulation, there are some definitions which must be taken into account. The expression " local matter " is defined by reg. 4 to mean any matter howsoever arising which specially affects employees in the coal mining industry employed in the locality in respect of which a Local Reference Board is established. The word " dispute " by itself is not defined, but " industrial dispute " is defined to include any dispute and any threatened, impending or probable dispute as to industrial matters in relation to the coal mining industry. It will therefore be seen that the power of the Board relates to what is vaguely described as the coal mining industry.

The prosecutors are carrying contractors and their vehicles and employees are engaged in carrying coal from mine heads to various points, including railway stations and sidings. It is not necessary for me to restate the facts ; it is sufficient to say that the question has arisen whether awards governing certain employees, including lorry drivers, in the coal mining industry apply to the employees of the prosecutors so engaged. That question depends upon a proper understanding and application of the indefinite description " coal mining industry." The Regulations as a whole purport to deal only with that industry, and for that reason, as well as because of the foregoing definitions, the prima facie authority of the Local Reference Board does not go beyond the settlement of questions arising in that industry.

The question raised is one which, it might be thought, would turn upon the common understanding, among people concerned with the coal industry and particularly with industrial matters, of the manner in which the words " coal mining industry " are ordinarily applied. It may be that no such common understanding of the expression exists. If, however, the application of the words is established by usage, you would expect to find it evidenced by awards, determinations, reports and other papers dealing with the industrial side of coal mining. But we have not been referred to any such

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documents. On the contrary, we have been left to ascertain as best we may what is the denotation of the very indefinite expression "coal mining industry." It is, I think, unfortunate that it has become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court of law must rest. As it is, however, the question must be decided upon such considerations. Applying them, I am of opinion that the operations of the employers, who are the prosecutors in this application, do not fall within the natural meaning of the expression "coal mining industry."

This conclusion is contrary to that adopted by the Local Reference Board and expressed in the decisions now in question. The decisions were given by the Local Reference Board, assuming to act under its powers, and we are called upon to say whether they are conclusive of the question. In other words, are the decisions under the Regulations valid and effective to bind the parties? If the Regulations give them validity, they cannot be the subject of a writ of prohibition.

The jurisdiction of this Court under s. 75 (v.) of the Constitution is invoked upon the footing that the Board are officers of the Commonwealth and are persons to whom a writ of prohibition lies. Regulation 17 provides that a decision of a Local Reference Board shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever. The presence of this provision in the Regulations makes it necessary to say whether and to what extent it is ineffectual to protect the decision of the Board from invalidation. In the first place, it is clear that such a provision cannot, under the Constitution, affect the jurisdiction of this Court to grant a writ of prohibition against officers of the Commonwealth when the legal situation requires that remedy. But a writ of prohibition is a remedy that lies only to restrain persons acting judicially from exceeding their power or authority. It is therefore necessary to ascertain before issuing a writ whether the persons or body against which it is sought are acting in excess of their powers; and that means whether their determination, when made, would be void. The Board derives its power from Regulations of which reg. 17 forms a part, and that regulation must be taken into account in ascertaining what are the true limits of the authority of the Board, and whether its decision is void.

The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions

where there is a unitary constitution, the interpretation of provisions of the general nature of reg. 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

The matter has been expressed in somewhat different ways. In *Baxter* v. *New South Wales Clickers' Association* (1), *O'Connor* J. said that such a provision should be construed as freeing the court or authority from the control or supervision of the superior court in all cases where the proceedings of the former show on the face of them that they have relation to the subject matter over which the statute has given it jurisdiction (2). *Isaacs* J. treated the same provision as excluding prohibition in relation to any decision so long as the power of the judicial authority is exercised bona fide for the purpose for which it is conferred (3).

In *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (4), *Latham* C.J., in speaking of this very regulation said that it did not profess to give validity to an invalid award and proceeded:—"Further, if a pretended award were so completely beyond any possible jurisdiction that it could not reasonably be said to be 'an award' other questions would come up for consideration—such questions as were considered in *Baxter* v. *N.S.W. Clickers' Association* (1)" (5). *Starke* J. said:—"In my opinion, reg. 17 excludes any appeal whatever from any award or order of the Conciliation Commissioner in relation to industrial disputes referred to him under s. 16 of the *Industrial Peace Regulations*. Effect can only be given to reg. 17 by treating the words, award, order or determination, as meaning acts in fact done by the tribunal in the supposed exercise of the powers entrusted to it. To confine the meaning of those words to acts done lawfully and within the jurisdiction of the tribunal ignores the clear, distinct and unmistakable intent of the regulation. Prohibition at common law was the appropriate remedy for restraining inferior courts from exceeding their jurisdiction,

(1) (1909) 10 C.L.R. 114.
(2) (1909) 10 C.L.R., at p. 148.
(3) (1909) 10 C.L.R., at p. 162.
(4) (1942) 66 C.L.R. 161.
(5) (1942) 66 C.L.R., at p. 177.

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and yet this remedy is withdrawn by the regulation: See *Baxter's Case* (1); *Morgan* v. *Rylands Bros. (Australia) Ltd.* (2); *Clancy* v. *Butchers' Shop Employees Union* (3); *Colonial Bank of Australasia* v. *Willan* (4)" (5).

It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution. The relevant subject matter in the present case is naval and military defence. It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition. But where the legislature confers authority subject to limitations, and at the same time enacts such a clause as is contained in reg. 17, it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity. In my opinion, the application of these principles to the Regulations means that any decision given by a Local Reference Board which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid.

In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them. Further, if there is an opposition between the Constitution and any such provision, it should be resolved by adopting any interpretation of the provision that is fairly open.

In speaking of s. 31 of the *Commonwealth Conciliation and Arbitration Act*, *Isaacs* and *Rich* JJ., in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (6), expressed views to the effect that s. 31, although leaving it to the ordinary courts to apply any appropriate remedy to an excess of jurisdiction by the Arbitration Court before it made an order or award, meant that once the order or award was made that instrument then should be regarded as within jurisdiction, provided that it did not exceed the limits of the Constitution or, presumably, deal with matters to which the Arbitration Court was an entire stranger. Possibly this view may

(1) (1909) 10 C.L.R. 114.
(2) (1927) 39 C.L.R. 517.
(3) (1904) 1 C.L.R. 181.
(4) (1874) L.R. 5 P.C. 417.
(5) (1942) 66 C.L.R., at p. 182.
(6) (1924) 34 C.L.R. 482, at p. 520.

go too far, but, having expressed it, their Honours proceeded to say that the jurisdiction given by s. 75 (v.) of the Constitution continues to exist " but it needs a proper case for its exercise. Such a case exists wherever Parliament evinces its intention that curial action shall bind only when certain conditions are satisfied " (1). They point out that, if in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding they are not observed, what is done is not to be challenged, there then arises a contradiction, and effect must be given to the whole legislative instrument by a process of reconciliation.

In my opinion, these general principles are sound and are not at variance with what was actually decided in the case of *Gilchrist, Watt & Sanderson* (2). Accordingly, I think that under the *Coal Mining Industry Employment Regulations* the decisions of a Reference Board should not be considered invalid if they do not upon their face exceed the Board's authority and if they do amount to a bona fide attempt to exercise the powers of the Board and relate to the subject matter of the Regulations. This view, however, leaves the question whether the decision now impeached really does bear on its face an appearance of an exercise of the power bestowed, or whether from its very nature it is an attempt to go beyond that power. This question depends upon an examination not merely of the decisions, but of the character of a Local Reference Board.

A Local Reference Board performs functions limited to an assigned locality and defined or specified either by the Commonwealth Coal Commissioner or the Chairman of the Central Reference Board. Within these limitations, Local Boards' powers extend to the matters set out in reg. 14 of the *Coal Mining Industry Employment Regulations*. These powers are concerned entirely with the settlement of disputes. They do not include any authority to decide either the limits of the local Board's own jurisdiction or the extent of the application or operation of the conception involved in the expression " coal mining industry." Regulation 15 gives to a Local Reference Board the authorities, so far as applicable, conferred upon the Central Reference Board by, among other regulations, reg. 8. Regulation 8 gives to the Central Reference Board, for the purposes of considering industrial disputes or matters of which it has cognizance, the powers which, by the *Commonwealth Conciliation and Arbitration Act* or the *National Security* (*Industrial Peace*) *Regulations*, or by the Act as applied and construed by those Regulations, are expressed to be given to the Court or the Chief Judge with respect to industrial

(1) (1924) 34 C.L.R., at p. 526. (2) (1924) 34 C.L.R. 482.

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disputes of which the Court has cognizance. This presumably carries the power of interpretation conferred upon the Court by s. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act*, as well as other ancillary powers given by that section.

What the Local Reference Board appears to me to have done in these matters is to make a declaratory judgment concerning, not merely the meaning expressed by or lying behind the awards, but the extent of their actual operation. Further, the question so decided concerning their actual operation was not dependent upon their meaning or intended meaning, but upon the extent of the operation of the *Coal Mining Industry Employment Regulations* and the consequent authority of the Central Reference Board. Moreover, as I read them, from the very face of the orders made it appears that this was the question which the Reference Board assumed to decide.

Now, I think that it is plain that the *Coal Mining Industry Employment Regulations* do not mean to give either to the Central Reference Board or to the Local Reference Board any power whatever to determine the ambit of the expression " coal mining industry " or the extent of their own jurisdiction as governed by that expression. It would be unconstitutional for the Regulations to attempt to give to either Board any judicial power, and, although that is not a decisive consideration, it is a guide to the real meaning of such provisions as reg. 8 and reg. 14. On the face of those regulations it is clear enough that the words " in the coal mining industry " are words of final limitation upon the powers, duties and functions of the Boards.

I therefore think that the orders under consideration undertake to decide a matter the determination or control of which is completely outside the authority of a Local Board. I do not mean to say that the Board may not, for the purpose of determining its own action, " decide " in the sense of forming an opinion upon the meaning and application of the words " coal mining industry." It must make up its mind whether this or that particular function on the borders of the coal mining industry does or does not fall within the conception. But it is not able to make a decision binding on the parties within the meaning of reg. 9, because that is the very matter which governs the extent of the operation of reg. 9, among other regulations. I am therefore of opinion that the orders are not matters which fall within the principles I have attempted to explain —principles which have a protective operation upon the action of Boards acting irregularly or outside their formal authority.

It was contended, however, that the decisions, or declarations, as I prefer to call them, contained in the orders under consideration do not assume to impose any continuing liabilities upon the employers named therein, and that they fall outside the principles upon which this Court acts in deciding whether a writ of prohibition may be issued in respect of a judicial act. Those principles were settled by the judgments of *Knox* C.J., *Duffy* J. and *Starke* J. in the case of *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1). The Court in that case was evenly divided. But the Court has since applied those principles in the decision of a number of cases: See *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (2) and also *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (3); *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (4), though there no formal order had been drawn up and perhaps that remained to be done. These decisions, I think, rest upon the view expressed by *Starke* J., as follows:—"It" (the award) "is, to use the words of *Lush* J. in *Serjeant* v. *Dale* (5), 'still in operation', and if not stayed it may lead to further proceedings, if not before the Special Tribunal, at all events before other tribunals" (6). It is open to question how far this view is consistent with the statement made by Lord *Maugham* for the Privy Council in *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (7), where his Lordship says:—"On the other hand, there must remain something to which prohibition can apply, some act which the respondents if not prohibited may do in excess of their jurisdiction, including any act, not merely ministerial, which may be done by them in carrying into effect any quasi-judicial order which they have wrongly made." But, although this statement was made after a full argument on the very point, including the citation of the chief authorities relied upon in the *Hibble Case* (1), it is in strictness an *obiter dictum*; for their Lordships decided in the particular case that prohibition lay.

I think that the Court should, until the matter is authoritatively determined by the Privy Council, continue to apply the principles settled in the *Hibble Case* (1). The orders or declarations made by the Board in the present case appear to me to fall within them. It is true that nothing remains for the Local Reference Board to do, except perhaps rescind them or vary them, which involves separate proceedings, but they do assume to bind the parties, and thus to bring into operation upon the employers awards which would otherwise not affect their liabilities. Those awards have a continuing

(1) (1920) 28 C.L.R. 456.
(2) (1944) 69 C.L.R. 407.
(3) (1944) 68 C.L.R. 485.
(4) (1944) 69 C.L.R. 299.
(5) (1877) 2 Q.B.D. 558, at p. 568.
(6) (1920) 28 C.L.R., at p. 493.
(7) (1937) A.C. 898, at pp. 917, 918.

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effect or operation within the meaning of the principle upon which this Court has acted. I, therefore, think that the writs of prohibition should issue.

The orders nisi should be made absolute.

McTIERNAN J. *Ex parte Fox and Another.*—This application for a writ of prohibition is made under s. 75 of the Constitution. The writ sought is to prohibit the respondents and each of them from further proceeding upon an order or award of a Local Reference Board constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*. The respondents include the members of the Board and an association of employees upon whose application the order or award was made.

The writ of prohibition is a " preventive " rather than a "corrective " remedy and it is not directed against parties, but to the court itself : See *The Practice of the Crown Office*, by *Short & Mellor*, 2nd ed. (1908), pp. 70, 71. The members of the Board are officers of the Commonwealth and in making the order or award the subject of this application they purported to exercise the quasi-judicial powers vested in a Local Reference Board by the above Regulations. Accordingly, under s. 75 of the Constitution prohibition lies against the members of the Board.

In *R.* v. *Hibble* (1), *Knox* C.J. and *Gavan Duffy* J. said : " In our opinion, so long, at any rate, as a judgment or order made without jurisdiction remains in force so as to impose liabilities upon an individual, prohibition will lie to correct the excess of jurisdiction." An order or award of a Local Reference Board is made binding by regs. 9 and 15. It would follow from the above-mentioned principle that prohibition lies to prohibit the members of the Board from further proceeding upon the order or award now in question if it were made without jurisdiction.

Regulation 17, however, provides that a decision of a Local Reference Board shall not be subject to prohibition in any court on any account whatever. This regulation also forbids such other remedies as appeal, mandamus or injunction. It would not, of course, bar the remedy of prohibition under s. 75 of the Constitution in the case where a tribunal made any award or order which travelled outside the constitutional powers of the Commonwealth. Further, it is in accordance with the interpretation which the Court has placed upon statutory provisions similar to reg. 17 to say that, if upon the true construction of the present Regulations they confer powers upon a Local Reference Board to make an award or order

(1) (1920) 28 C.L.R., at p. 463.

in respect of the coal mining industry and no other industry, reg. 17 is not a bar to an application for prohibiton in a case where such Board has made an award or order which is within the constitutional powers of the Commonwealth but prescribes rates of pay or conditions of employment to be observed in an industry other than coal mining. It is clear that the intention of the Regulations is that the Central Reference Board or any Local Reference Board should confine the exercise of the powers which the Regulations vest in it to the coal mining industry.

The next question is whether under the Regulations it is part of the jurisdiction of a Local Reference Board to decide whether or not a branch of employment in respect of which the Board is asked to make an award, order or determination is within the coal mining industry. If the decision of that question is part of the jurisdiction vested in the Board, its decision thereon cannot be reviewed by way of an application for a writ of prohibition directed to the Board. I think that the decision of the question whether this preliminary fact exists is not entrusted by the Regulations to the Board. The Board may inquire into it but its decision whether the fact exists or not is not binding on the parties : Compare *Amalgamated Society of Carpenters and Joiners, Australian District* v. *Haberfield Pty. Ltd.* (1). It is a question for this Court to decide in the present proceedings whether the employment, which the order or award of the Local Reference Board purports to draw within the operation of the Federal awards, mentioned in the Board's order or award, is in fact employment within the coal mining industry. There is no criterion laid down by the Regulations for determining that question. The framers of the Regulations may have intended that the expression "coal mining industry" should include any employment which according to business usage was understood to be part of that industry : or they may have intended it to cover only such employment as was in fact directly connected with the winning of coal. There is no evidence which would justify a finding that according to business usage the applicants' motor lorry drivers are employed in the coal mining industry; and, after examining the evidence showing the relation between their employment and the winning of coal, the conclusion which I reach is that their employment is in connection with a service separate from the industry of winning coal.

The order or award which is the subject of this application is therefore beyond the jurisdiction of this Local Reference Board. The order nisi should be made absolute. It has become the established practice of this Court in a case such as the present one to

(1) (1907) 5 C.L.R. 33.

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order a party who appears to oppose an order nisi for prohibition and fails, to pay costs to the successful applicant.

I think the order should be made absolute with costs against the respondent association.

Ex parte Clinton and Others.—This case is, in my opinion, indistinguishable from *R.* v. *Hickman and Others*; *Ex parte Fox and Another*. For the reasons which I have given in that case and which are applicable to the present case, I think that the order nisi should be made absolute with costs against the respondent association.

In each case: *Order nisi absolute. Costs of the prosecutors to be paid by the respondent Federated Mining Mechanics Association of Australasia.*

Solicitors for the prosecutors in *Ex parte Fox and Another*, *Clayton, Utz & Co.*

Solicitor for the prosecutors in *Ex parte Clinton and Others*, *E. R. Lorton.*

Solicitors for the respondent Federated Mining Mechanics Association of Australasia, *Braye & Malcomson.*

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

J. B.