Foll
FCT v *Reynolds Aust Alumina Ltd* 77 ALR 543
Cited *Federal Firefighters Union, Re* 35 IR 27
Cons *NAAV* v *MIMIA* (2002) 69 ALD 1
Cons *NAAV* v *MIMIA* (2002) 193 ALR 449

[HIGH COURT OF AUSTRALIA.]

THE KING

v.

CENTRAL REFERENCE BOARD AND OTHERS; Ex parte THIESS (REPAIRS) PTY. LTD.

H. C. of A. 1948.

MELBOURNE, *June*, 1-3;

SYDNEY, *Aug.* 16.

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

National Security—Regulations—Coal-mining industry—Central Reference Board—Prohibition—Two companies in same control—One engaged in open-cut coal-mining—Other an engineering company whose principal business was repair of machinery of coal-mining company—Employee of engineering company—Whether engaged in coal-mining industry—The Constitution (63 & 64 *Vict. c.* 12), *s.* 75 (v.)—*National Security* (*Coal Mining Industry Employment*) *Regulations* (*S.R.* 1941 *No.* 25—*S.R.* 1943 *No.* 295), *regs.* 7, 17.

The A Co. conducted open-cut coal-mining operations on land adjacent to which was the engineering shop of the B Co. In the course of its operations the A Co. used earth-moving and excavating machinery; it had its own workshop at the site of its operations, and minor repairs to the machinery were effected there by its own staff. When major repairs were necessary the machinery was sent to the B Co.'s shop. By arrangement between the two companies, the B Co. undertook to carry out all these major repairs, and this formed the greater part of its work, but it also undertook general engineering work. Both the B Co.'s shop and the A Co.'s own workshop were under the supervision of a supervising engineer (not an employee of either company), payment for whose services was allocated between the two companies. Both companies were under the control of one man as governing director. X, who was employed by the B Co. in its shop as a fitter, having been dismissed, a claim that his dismissal was unwarranted came before the Central Reference Board constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*. The Board ordered that X be reinstated in his employment.

Held, by *Latham* C.J., *Rich* and *Starke* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that the Board should be prohibited from further proceeding upon the order. The matter had no relation to the coal-mining industry, because X was not employed in that industry; accordingly, the Board had no jurisdiction over it under the *National Security* (*Coal Mining Industry Employment*) *Regulations*.

R. v. *Hickman*; *Ex parte Fox and Clinton*, (1945) 70 C.L.R. 598, referred to.

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ORDER NISI for Prohibition.

Thiess Bros. Pty. Ltd. was incorporated in New South Wales, and its objects were, *inter alia*, to undertake the work of excavators, road builders, mining and general earth-moving contractors. In pursuance of these objects it operated earth-moving and excavating equipment, including tractors, bulldozers, scoops, carry-alls, rollers and tip trucks. Pursuant to an agreement with the owner of an open-cut coal mine at Muswellbrook (N.S.W.), the company conducted the operations of removing the overburden of soil from the land used as an open cut and excavating the coal beneath the overburden, using its own earth-moving and excavating equipment. This equipment required constant maintenance and repair. The company carried out all running and minor repairs at the site of the operation of the equipment and for this purpose conducted a workshop at the open cut. All employees engaged in this workshop and engaged in the operation of the equipment on the open cut were awarded rates of pay and other conditions prescribed by awards applicable in the coal-mining industry. Until May 1947 the company had the major repair and overhaul of the equipment done by firms in the engineering industry in Sydney and elsewhere. This proved unsatisfactory; it resulted in long delays in the completion of repair, inadequacy of repair and general reduction in the efficiency and operating time of equipment. Accordingly, Thiess Bros. Pty. Ltd. in May 1947 effected an arrangement with another company whereby the latter would undertake all such major repair and overhaul. The other company was Thiess (Repairs) Pty. Ltd., which was incorporated in Queensland and registered in New South Wales as a foreign company. The governing director of each of the companies was Leslie Charles Thiess. On land adjacent to but outside the area of the open cut Thiess (Repairs) Pty. Ltd. (hereinafter called the prosecutor) erected a building and installed therein an engineering shop for the major repair and overhaul of petrol and diesel engines, motor trucks and earth-moving and excavating equipment. The greater part of the prosecutor's work at this shop was provided by Thiess Bros. Pty. Ltd., but it did similar work for other operators and also carried out repairs to road-making and agricultural equipment operated in the district and trucks used by carriers engaged in the carriage of coal from the open cut; and it was taking steps to extend its business as a general repair shop for all classes of earth-moving, transport and agricultural machinery and to establish another engineering shop in Queensland. All work performed in the prosecutor's shop at Muswellbrook was charged at rates and terms standard in the engineering industry and debited

to the operator of the equipment concerned, whether Thiess Bros. Pty. Ltd. or otherwise. All the prosecutor's employees at Muswellbrook, including one Leon Anthony Belmar, who was employed as a fitter, worked solely in its shop and were accorded rates and conditions prescribed by awards applicable in the engineering industry. No employee of Thiess Bros. Pty. Ltd. was engaged in the prosecutor's shop. The prosecutor's shop, however, as well as the work of Thiess Bros. Pty. Ltd., was under the supervision of one O. F. Anderson, supervising engineer for a partnership of Thiess Bros., who devoted part of his time to the supervision of the work of the two companies. On 26th February 1948 the prosecutor's employee, Belmar (above mentioned), was dismissed from his employment. On 3rd March 1948, at a meeting at Newcastle of the Local Reference Board (Maitland District) constituted under the *National Security* (*Coal Mining Industry Employment*) *Regulations*, it was claimed that Belmar's dismissal was "unwarranted and this employee is wrongly dismissed and should be reinstated." Objection being taken to the jurisdiction of the Board, it referred "the matter of jurisdiction . . . to the Central Reference Board for determination." When the matter came before the latter Board objection was again taken to the jurisdiction, but the Board assumed jurisdiction over the whole matter and, on 8th April 1948, ordered and directed that Belmar be reinstated in his employment on and from 26th February 1948 without loss of pay.

The prosecutor obtained from *Starke* J. an order calling upon the Central Reference Board, its chairman and other members, the Federated Mining Mechanics Association of Australasia and the Amalgamated Engineering Union Australian Section (both of which had appeared before the Board) to show cause before the Full Court of the High Court why they should not be prohibited from further proceeding on the order on the grounds (*a*) that the prosecutor was not at any relevant time engaged in the coal-mining industry; (*b*) that Belmar was not at any relevant time employed by the prosecutor in the coal-mining industry. [A further ground, that the only matter referred to the Central Reference Board was a question of jurisdiction, was not relied upon on the return of the order nisi.]

Coppel K.C. (with him *O'Brien*), for the prosecutor. The order which is called in question here was made without jurisdiction because the employee, Belmar, was not employed by the prosecutor in the coal-mining industry. The engineering business carried on by the prosecutor was quite a separate and distinct business from

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the open-cut mining carried on by Thiess Bros. Pty. Ltd. The fact that the two companies were associated is immaterial here. Even if both businesses were owned by one person, they would remain separate businesses, and employees engaged in the engineering business could not be said to be engaged in the coal-mining industry. It is true that that industry does or may include many activities in addition to the mere digging of the coal out of the ground. If coal-mining machinery was repaired *in situ*, it might be said that the work was part of a continuous process which was properly described as coal-mining. This might be so even if the work was done by the employees of an independent contractor; they might be said to be employed in the coal-mining industry. Where, however, machinery is removed for overhaul from the coal mine so that it had ceased for the time being to operate in the process of mining and is sent to an engineering shop, the repair work done on it there cannot be said to be done in the course of the process of mining. Moreover, the distance it is sent cannot affect the matter. Whether the engineering shop is close to the mine, as in this case, or a long distance away, cannot be material. A further point in the present case is that the machinery used in open-cut mining is not distinctively mining machinery. It could be used in road-making or other work which had nothing to do with mining. There is no evidence here of any established usage which would identify the repairing of the machinery with the mining industry, though, no doubt minor repairs would be effected as a matter of course without removal of the machine from the mine. A company such as the prosecutor, carrying on a general engineering business, doing repairs to many kinds of machinery—not merely mining machinery—is not in the coal-mining business. Its employees, who are engaged as fitters in general—not as fitters for coal-mining machinery, but as fitters to do any work that comes into the shop—and in fact work on many kinds of machinery, are not employed in the coal-mining industry even though a large part of their work is done on the machinery from the mine. [He referred to *R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (1); *R.* v. *Hickman*; *Ex parte Clinton and Fox* (2).]

Barwick K.C. (with him *Hooke*), for the chairman of the respondent Board. It is clear that the reason why the prosecutor's engineering shop was established on premises adjacent to the mine was to facilitate the mining operations—to avoid the delay and

(1) (1943) 68 C.L.R. 51, at pp. 56-59, 63, 65.

(2) (1945) 70 C.L.R. 598, at pp. 608, 610, 612-614, 621.

inefficiency which had been caused by having to send the mining machinery long distances for overhaul. That is to say, the reason was a mining reason—a reason connected with the mine, not a reason connected with the engineering business. That being so, it is not material that some outside engineering work was done, as well. If a man by arrangement with the mining company set up his business on or near its premises to do engineering or any other kind of work connected with the mine on the terms that he would do all the work of the kind which the company required, he would be engaged in the coal-mining industry even if he was allowed—so to speak—some right of private practice. The intention was that the prosecutor should do all the work that was needed for the mining company's plant, and that was predominantly its work. This view is put on the basis that the two companies are truly independent of one another. If, however, some closer relationship is needed to support the view submitted, it is to be found in the fact that each company is in substance a one-man company so far as control is concerned, and both are in the control of the one individual. There is also the circumstance that the mining company's own repair shop at the site of its operations and the prosecutor's workshop are under the common supervision of one man. The true conclusion in this case is that both companies were engaged in the coal-mining industry.

Menhennitt, for the Amalgamated Engineering Union Australian Section. On behalf of this respondent the argument which has been put by Mr. *Barwick* is adopted and a further submission is made. It is that, provided this Court is satisfied that the Board has acted in good faith and that the view it has taken as to its powers is one which might reasonably be taken, it will, in prohibition proceedings, treat the order made as not being in excess of the Board's jurisdiction. This results from the grant of power in reg. 7 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, read in conjunction with reg. 17, which provides that orders of the Board shall not be subject to prohibition. The latter regulation, of course, cannot take away the power of this Court under s. 75 (v.) of the Constitution, and the alternative to saying that it has no meaning is to read it as, in effect, extending the Board's jurisdiction to the extent indicated by this submission. When the regulations were made it must have been realized that there would be many activities which would be on the fringe, so to speak, of the coal-mining industry and that great difficulty would be occasioned

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if the Board's powers were to be narrowly restricted. This submission is not inconsistent with any of the decisions of this Court; it finds support in *R.* v. *Hickman*; *Ex parte Fox* (1). [He referred also to *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (2); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson Ltd.* (3); *Baxter* v. *New South Wales Clickers' Association* (4); *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (5); *Colonial Bank of Australasia* v. *Willan* (6).]

The other respondents did not appear.

Coppel, K.C., in reply.

Cur. adv. vult.

Aug. 16.

The following written judgments were delivered:—

LATHAM C.J. This is the return of an order nisi for a writ of prohibition directed to the Chairman and other members of the Central Reference Board. The prosecutor, Thiess (Repairs) Pty. Ltd., is a company which carries on business in engineering repairs at Muswellbrook, New South Wales. Most of its work consists in making major repairs to and overhauling excavating and other mechanical equipment used upon an open-cut coal mine. The Board has made an order that an employee of the applicant company, one L. A. Belmar, be reinstated in his employment as a fitter in the employment of the applicant company on and from 26th February 1948 (the date of the dismissal of Belmar by the company) without loss of pay. It is conceded for the prosecutor that, if the Repairs company employed Belmar in the coal-mining industry, the Central Reference Board had jurisdiction, after his dismissal by that company, to order his reinstatement.

The Central Reference Board was established under the *National Security* (*Coal Mining Industry Employment*) *Regulations*. Regulation 5 provides that: "The Governor-General may appoint a Central Reference Board for the prevention or settlement of any industrial dispute in the Coal Mining Industry." Regulation 7 provides that the Central Reference Board shall have cognizance of certain disputes and other matters—all relating to the coal-mining industry. No point is taken as to the Board not properly having cognizance of the matter of controversy, if that matter falls within the jurisdiction of the Board as an industrial dispute or other

(1) (1945) 70 C.L.R. 598: See pp. 614 et seq.
(2) (1942) 66 C.L.R. 161.
(3) (1924) 34 C.L.R. 482, at p. 526.
(4) (1909) 10 C.L.R. 114, at pp. 132, 140, 148, 161.
(5) (1944) 69 C.L.R. 407.
(6) (1874) L.R. 5 P.C. 417.

matter in the coal-mining industry. It is contended for the prosecutor that, though it is not disputed that the procedural requirements of the regulations have been satisfied, the matter in respect of which the order has been made is not within the jurisdiction of the Board. The grounds upon which the order nisi was granted are (1) that the prosecutor was not at any relevant time engaged in the coal-mining industry; and (2) that the employee Belmar was not at any time employed by the prosecutor in the coal-mining industry. Another ground, based upon a contention that a Local Reference Board had referred to the Central Reference Board only a question as to whether the Local Reference Board had jurisdiction, and not the question as to whether Belmar should be reinstated, was not argued.

It has been decided that the Chairman and other members of the Central Reference Board are "officers of the Commonwealth" within the meaning of s. 75 (v.) of the Commonwealth Constitution, and that therefore the Court, when absence of jurisdiction in the Board is shown, may direct a writ of prohibition against the Chairman and members: *R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (1); *R.* v. *Hickman*; *Ex parte Fox* (2).

Regulation 17 is as follows:—"An award, order or determination of the Central Coal Authority or the Central Reference Board or 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." It was argued for the respondent, the Amalgamated Engineering Union Australian Section, that the effect of this regulation was to give jurisdiction to the Board in any matter which it bona fide believed to be within its jurisdiction unless that belief was plainly and obviously unreasonable. This question has been argued again and again in relation to the Commonwealth Court of Conciliation and Arbitration: see the cases which are collected in *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* (3). In relation to the Central Reference Board itself it was held in *R.* v. *Drake-Brockman* (1) that reg. 17 did not give effect to an invalid order &c. made by the Board. In *R.* v. *Hickman*; *Ex parte Fox* (2) particular attention was given to this matter, and it was held that the Central Reference Board did not have authority to determine by a decision binding upon the parties the meaning of the expression "coal mining industry" or the extent of the jurisdiction of the Board as governed by that expression: see the report (4).

(1) (1943) 68 C.L.R. 51.
(2) (1945) 70 C.L.R. 598.
(3) (1930) 42 C.L.R. 527, at pp. 556, 557.
(4) (1945) 70 C.L.R., at p. 618.

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The effect of a provision such as reg. 17 was considered in the recent case of *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia Ltd.* (1). I quote the following:—"If a legislature gives certain powers and certain powers only to an authority which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all persons, and in respect of all subject matters, and without observance of any conditions which the legislature has attached to the exercise of the powers. Such a provision will operate to prevent prohibition going in cases of procedural deficiencies where the authority whose powers are in question is in substance dealing with the matter in respect of which power is conferred upon it. But if, upon the construction of the legislation as a whole, it appears that the powers conferred upon the authority are exercisable in certain cases, and definitely that they are not exercisable in other cases, and that any attempt to exercise them was intended to be ineffective, then a provision taking away prohibition will not exclude the jurisdiction of this Court under s. 75 (v.) of the Constitution in a case of the latter description: see *R.* v. *Hickman*; *Ex parte Fox* (2)" (3). If the question of jurisdiction were in doubt the Court would decline to interfere with a decision of the tribunal whose authority was in question: see cases cited in *Caledonian Collieries' Case* (4). But it is the duty of this Court in proper proceedings to determine whether a matter with which the Board is dealing or has dealt is within the jurisdiction created by the regulations.

No question arises in the proceedings in this Court as to the merits of the question which arose between the parties, that is, as to whether Belmar should be reinstated or not. The only question which this Court has to consider is whether the order made by the Central Reference Board is an order with respect to an industrial dispute or matter in the coal-mining industry.

"Coal mining industry" is not a technical term: see *R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (5); *R.* v. *Hickman*; *Ex parte Clinton and Fox* (6). It is a question of fact depending upon all the circumstances of the case whether a particular employer or employee is engaged in the coal-mining industry, with the result that an industrial question arising between the employer and the employee or an organization consisting of employees is a dispute or other matter in that industry. The line between industries is in

(1) (1947) 75 C.L.R. 361.
(2) (1945) 70 C.L.R. 598, at pp. 614-617.
(3) (1947) 75 C.L.R., at p. 369.
(4) (1930) 42 C.L.R., at p. 556.
(5) (1943) 68 C.L.R. 51.
(6) (1945) 70 C.L.R. 598.

many cases not clear. One industry may be entirely concerned with the service of another industry, and yet may not be part of that other industry. A laundry company may do work for hotels and restaurants but, to take a case at one end of the line, if the laundry business were conducted by a laundry company completely separate from any of the hotels and restaurants for which it did work (as for other customers) upon ordinary commercial terms, it would not be possible to say that the laundry was part of the hotel industry. A case at the other end of the line would be found where a hotel employed some laundresses on the hotel premises who did work exclusively for the hotel and were completely under the control of their employer. In such a case the laundresses might well be held to be working in the hotel industry.

In the present case the evidence shows that the Muswellbrook Coal Company is a coal-mining company which owns a mining lease upon which an open cut is situated. Heavy earth-moving machinery is used for the purpose of removing the over-burden and getting out the coal. In November 1945 a partnership firm known as Thiess Bros. contracted with the coal company to remove the over-burden and to take out coal. In April 1946 the partnership assigned its agreement to a company incorporated in New South Wales known as Thiess Bros. Pty. Ltd. Since the date mentioned that company has been engaged in removing the over-burden and coal from the open cut. It has not been argued that that company is not engaged in the coal-mining industry. The machinery which the company uses requires constant maintenance and running repairs and also, when it breaks down, major repairs. The running repairs are done at a workshop established by Thiess Bros. Pty. Ltd. alongside the open cut. The men employed in that workshop are part of the labour force actually employed at the open cut, and it appears to be clear that the company and its employees working on the open cut and in that workshop (which is entirely under the control of the company and which is used only for the purpose of running repairs to the machinery used in the mining operations) are all engaged in the coal-mining industry. The employees at the workshop are working under industrial awards made with respect to that industry.

Major repairs and overhaul of equipment were, until May 1947, done by engineering firms or companies in Sydney, Muswellbrook or elsewhere. The prosecutor company, Thiess (Repairs) Pty. Ltd. which was formed in Queensland, was registered in New South Wales as a foreign company on 25th February 1947. This company since May 1947 has, under an arrangement with Thiess Bros. Pty.

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Ltd., undertaken all the major repair and overhaul of the mechanical equipment used by Thiess Bros. Pty. Ltd. The establishment of the Repairs company is about three-quarters of a mile from the mine. The employees are employed by the Repairs company, and not by Thiess Bros. Pty. Ltd. The Repairs company does not work exclusively for Thiess Bros. Pty. Ltd., but does such other work as it can obtain. But over ninety per cent of its work in fact is provided by Thiess Bros. Pty. Ltd. Belmar is employed by the Repairs company. He did not work for Thiess Bros. Pty. Ltd. or for the coal company or on the mine property.

Leslie Charles Thiess is the governing director of both Thiess Bros. Pty. Ltd. and the Repairs company. In each case he has full power of control. The Repairs company has four directors, all members of the Thiess family. Thiess Bros. Pty. Ltd. has five directors, four of them being the same members of the Thiess family as are directors of the Repairs company. The Repairs company is a substantial shareholder in Thiess Bros. Pty. Ltd.

The two companies (Thiess Bros. and Repairs) have the same manager, one O. F. Anderson. Occasionally tools belonging to one company are lent to the other company. The employees, however, are employed by one company only, and all the work done by the Repairs company for Thiess Bros. Pty. Ltd. is charged against the latter company. The directors of the company who are common to both companies work in the workshop of the Repairs company, and also at the open cut.

The respondent union, the Amalgamated Engineering Union, relied not only upon the facts which I have stated, but upon certain further evidence with respect to the practice at other open-cut coal mines. Open-cut coal-mining has developed only within very recent years, and apparently it hardly existed at the time when the *Coal Mining Industry Regulations* were first promulgated. At some open cuts the union has succeeded in having employees of repair establishments associated with the cuts recognized as being within the coal-mining industry. At another open cut some repairs are done on the mine premises and other repairs are sent away to be done in Sydney by engineering firms. The union further relies upon a resolution passed by the Mining Unions' Council as showing that the applicant company's workshop, where Belmar worked, is within the coal-mining industry. This resolution was expressly relied upon by the Chairman of the Board in giving the decision of the Board that Belmar was engaged in the coal-mining industry. The resolution was in the following terms:—"Re Muswellbrook disputes—Under instructions from the Coalmining Unions' Council,

a meeting of which was held in Sydney yesterday (15th March) I am directed to forward on to you the following resolution adopted by Council—That this Coalmining Unions' Council supports any action taken by the Local Combined Mining Unions' Committee in Muswellbrook . . . and in respect to the dismissal of employees employed in Thiess Bros. Repairs Shop that this Council determine that such repair shops as established are directly connected with the coal-mining industry and in the maintenance of the Open Cut workings at Muswellbrook."

This resolution expresses the policy of the unions. But the desire of a party to proceedings and of its industrial associates that a particular view should be adopted and put into operation cannot in itself be regarded as evidence upon which the controversy should be decided in favour of that party. But when the terms of the resolution are closely examined, it will be seen that it does no more than state the opinion of the council that the repair shops as established " are directly connected with the coal-mining industry and in the maintenance of the Open Cut workings at Muswellbrook." Plainly the workshops are connected with the coal-mining industry in so far as they execute repairs to machinery used in that industry, and plainly the execution of such repairs by the company or some other engineering service is essential to the maintenance of the open-cut workings. But a full admission of the truth of these propositions does not show that the prosecutor company itself is engaged in the coal-mining industry.

In giving the decision of the Board the Chairman stated the grounds of the decision in a number of definite propositions, some of which are not open to question, e.g., that open-cut mining operations are carried on at Muswellbrook by Thiess Bros. Pty. Ltd., and that the Repairs company carries on operations on land owned by the coal company. There is, too, some degree of common management of the two companies, Thiess Bros. and Thiess Repairs. Thiess Repairs does work for Thiess Bros. and, accordingly, in this sense it is accurate to say, as the Chairman states, that the activities of the two companies are " closely connected." Another proposition stated by the Chairman is also established by the evidence: " That, predominantly, and very substantially, the business of Thiess (Repairs) Pty. Ltd. is confined to the repair or overhaul of machinery used exclusively by Thiess Bros. Pty. Ltd. for the purpose of the coal-mining industry, that is, in the production of coal, at the open-cut mine." A further statement that " workmen employed by Thiess Bros. Pty. Ltd. and Thiess (Repairs) Pty. Ltd. are closely associated " is rather vague in its terms. They have

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different employers. Their places of work are separated by a distance of three-quarters of a mile; but the men employed by the Repairs company spend most of their time in doing work upon machines belonging to the other company. In that sense there is an association between the workmen, but only in that sense. The two sets of workmen do not work together in any sense. The Chairman further stated that the mining operations could not be carried on without the employment of men on the repair and overhaul of machinery and referred to Mr. Anderson's position in managing both companies.

The conclusion that the Repairs company, and therefore Belmar, were engaged in the coal-mining industry was apparently principally founded upon the finding of the Chairman expressed in the following words:—" That it is the custom or usage in the coal-mining industry to regard the 'whole business,' that is the production of the coal at the open cut and the repair or overhaul of the machinery used in the cut, as 'one section of industry.' (See Mr. Herron's evidence quoted within)." Mr. Herron's evidence on this point, as distinct from argument submitted by him, consisted principally of the resolution the terms of which have already been examined.

The fact that the operations of one enterprise are carried on in proximity to another enterprise cannot in itself show that the enterprises are part of the same industry. The two companies, Thiess Bros. and Thiess Repairs, are separate juristic persons. But it needs no argument to show that nevertheless they may both be engaged in the same industry. On the other hand, a single employer may conduct two or more separate enterprises in two or more distinct industries—*R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (1). The two Thiess companies have four directors and a manager in common, but this fact has no relevance to the question here to be determined, the answer to which depends upon the character of the industry carried on by the Repairs company and its place in the general industrial set-up. Is it in substance an engineering enterprise or a coal-mining enterprise? The answer to this question does not depend upon whether the two companies are regarded as separate persons or as only one person. The two companies are, it is true, " closely associated " in general control, management, and a common dependence upon the continuance of work at the open cut. But the fact that enterprise A is " closely associated " with enterprise B does not in itself establish either that enterprise A is engaged in the same industry as B or that enterprise B is engaged in the same industry as A.

(1) (1943) 68 C.L.R. 51.

Many industries supply goods to or provide services for other industries. A motor garage may be almost exclusively engaged in repairing trucks for a transport company, and it may do such work under a contract under which it is entitled to obtain and bound to do all the transport company's work. But it would not follow that the motor garage was in the transport industry. Similarly, an engineering workshop which does all the repairs for a coal mine and a gold mine and a shipping company would not, according to the ordinary use of language, be said to be engaged in the coal-mining industry, the gold-mining industry and the shipping industry. There would be as much reason for saying that it was engaged in any one of them as for saying that it was engaged in any other of them. There are obvious difficulties in saying that it is at one and the same time in each of these industries and in the engineering industry as well. Thus the fact that an enterprise provides a service for a particular industry cannot be held to identify that enterprise with that industry so as to make it a part of the industry.

In my opinion the question to be asked is—What is the substantial character of the industrial enterprise in which the employer and employee are concerned? In the present case the employer is Thiess (Repairs) Pty. Ltd. That employer is not engaged in coal-mining, but is an engineering company carrying on general work. It is not under the control of the mine owner, or even of the contracting party (Thiess Bros. Pty. Ltd.), which actually conducts the mining operations. But the more important fact is that its operations are separate from and different in kind from the operations carried on at the open cut. It supplies certain needs of the coal-mining industry in the same way as do many other industrial enterprises. But these facts do not show that all such suppliers of goods or services to that industry are themselves engaged in that industry. In my opinion the evidence in this case shows that Thiess (Repairs) Pty. Ltd. did not employ Belmar in the coal-mining industry. As already stated, the Central Reference Board can make an order only in relation to certain matters in or in connection with that industry, and therefore the Board had no jurisdiction to make the order for the reinstatement of Belmar.

In my opinion, therefore, the order nisi should be made absolute.

RICH J. The Central Reference Board has, under reg. 7 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, cognizance of matters relating to the coal-mining industry. And it is admitted that there is a dispute which may relate to an industrial matter, but it is contended that it is not a dispute or threatened dispute in the coal-mining industry.

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Rich J.

This Court derives from s. 75 (v.) of the Constitution its jurisdiction over the members of the Board as officers of the Commonwealth. And reg. 17 does not preclude the exercise of this jurisdiction where it appears that an award is invalid.

In a previous case which involved the ambit of the coal-mining industry, it was said that the expression was 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). It is a well known industry but no evidence is forthcoming to designate the aggregate of objects that may be included under this industry: *R.* v. *Hickman*; *Ex parte Fox* (2). It thus becomes a question of fact and of degree. And necessarily differences of opinion may occur in arriving at a decision. The facts have been fully set out in other judgments and I do not propose to detail them. In cases of this kind one is called upon to decide whether a particular function, which may be said to be on the borders of the coal-mining industry, falls within the conception. The evidence in the case leads me to the conclusion that the work carried on by the Repairs company falls outside the coal-mining industry.

The rule nisi should be made absolute.

STARKE J. Order nisi for prohibition issued pursuant to the Constitution s. 75 (v.) and directed to the Central Reference Board established under the *National Security* (*Coal Mining Industry Employment*) *Regulations*, its Chairman, members and others calling upon them to show cause why a writ of prohibition should not issue prohibiting them and each of them from further proceeding upon an order of the Board and its Chairman dated 8th April 1948 directing that one Belmar be reinstated in his employment as a fitter in the employ of Thiess (Repairs) Pty. Ltd. as from 26th February 1948 without loss of pay.

The regulations provide that the Governor-General may appoint a Central Reference Board for the prevention or settlement of any industrial dispute in the coal-mining industry and gives it cognizance *inter alia* of any industrial dispute between an organization of employees on the one hand and employers or associations of employers on the other hand referred to it by the persons or organizations or associations parties thereto . . . and any other matter affecting industrial relations in that industry which the Chairman of the Board declares is, in the public interest, proper to be dealt with under these regulations. The jurisdiction and

(1) (1943) 68 C.L.R. 51, at p. 59.

(2) (1945) 70 C.L.R. 598, at pp. 610, 612.

authority of the Boards under these regulations, this Court has already held, is limited to the coal-mining industry (*R.* v. *Hickman*; *Ex parte Fox* (1)).

Despite this decision an argument was addressed to the Court that the order of the Board was a reasonable and bona-fide attempt on the part of the Central Reference Board to exercise the authority conferred upon it by the *National Security* (*Coal Mining Industry Employment*) *Regulations* and therefore within jurisdiction. It was said that reg. 17, which provides that an award or order of the Central Reference Board should not be challenged or be subject to prohibition &c., operated so to extend the jurisdiction and authority of the Board. But I am unable to accede to the view that a regulation which takes away jurisdiction from superior tribunals confers jurisdiction upon inferior tribunals. It is nevertheless true that privative provisions such as reg. 17, though absolute in form, do not deprive competent superior tribunals of jurisdiction to grant prohibition if it be established that the jurisdiction and authority of the inferior court was not exercised in good faith and for the purpose for which that jurisdiction was granted. The fact that the tribunal made a bona-fide attempt to act within the course of its authority is no reason for departing from the express words of provisions such as reg. 17 nor for construing the provision as an extension of the jurisdiction of inferior tribunals (see *Colonial Bank of Australasia* v. *Willan* (2); *Baxter* v. *N.S.W. Clickers' Association* (3); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4)).

The authority given by the Constitution to grant prohibition is, in this view, unaffected by reg. 17.

The questions argued on the return of the order nisi were in truth questions of fact, namely, whether the prosecutor, Thiess (Repairs) Pty. Ltd., was at any relevant time engaged in the coal-mining industry and whether its employee, Belmar, referred to in the order was at any relevant time employed by the prosecutor in the coal-mining industry.

It appears that a partnership of Thiess Bros. had, since 1938, been engaged in Queensland and New South Wales in road-making, land-clearing and levelling, agricultural dam excavating, water-supply and drainage excavating, open-cut coal-mining and other excavating work and had for these purposes operated various types of earth-moving and excavating equipment including tractors, bulldozers, scoops, carry-alls, rollers and tip trucks.

(1) (1945) 70 C.L.R. 598.
(2) (1874) L.R. 5 P.C. 417, at p. 442.
(3) (1909) 10 C.L.R. 114, at p. 162.
(4) (1924) 34 C.L.R. 482, at pp. 525-527.

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Starke J.

In 1945 an agreement was entered into by the partnership of Thiess Bros. with the Muswellbrook Coal Co. Ltd. whereby Thiess Bros. undertook to break up and remove by excavation the overburden of soil from the land used by the coal company as an open cut and to break up and remove by similar means the coal beneath the overburden in accordance with the directions of the coal company.

In May 1946 Thiess Bros. Pty. Ltd. was incorporated in New South Wales. Four of its directors were members of the Thiess family. The objects of this company were *inter alia* to undertake the work of excavators, road-builders and mining and general earth-moving contractors and for these purposes operated earth-moving and excavating equipment of the types mentioned.

The agreement between Thiess Bros. and the coal company was assigned to Thiess Bros. Pty. Ltd. which, since the assignment, has continuously removed overburden and coal from the open cut at Muswellbrook.

In December 1946 a company called Thiess (Repairs) Pty. Ltd. was incorporated in the State of Queensland and was registered as a foreign corporation in New South Wales in February 1947. Its four directors were members of the Thiess family. It effected engineering repairs and maintained a shop for the major repair and overhaul of diesel engines, motor trucks and mobile earth-moving and excavating equipment. It held in 1948 a considerable parcel of shares in Thiess Bros. Pty. Ltd. At first Thiess Bros. Pty. Ltd. itself did what are described as running and minor repairs to its equipment and plant on its open-cut works at Muswellbrook and sent the major or heavy repairs to its equipment and plant to outside engineering firms. But this arrangement proved to be unsatisfactory so it effected a re-arrangement of repair work whereby Thiess Bros. Pty. Ltd. did the minor or running repairs on the works and Thiess (Repairs) Pty. Ltd. did the major or heavy repairs.

Thiess Bros. Pty. Ltd. had a small workshop at the open cut where it did minor or running repairs. And Thiess (Repairs) Pty. Ltd. erected a workshop three-quarters of a mile or so from the small workshop of Thiess Bros. Pty. Ltd. but adjacent to the open cut and upon land leased from the coal company where it did major repairs to equipment and plant used in connection with the open-cut works, Tools appear to have been taken from one workshop to the other, spare parts required for the repair of all equipment and plant were stored at the workshop of Thiess (Repairs) Pty. Ltd. and persons exercising authority in connection with work on the open cut spent portion of their time at the workshop of Thiess (Repairs) Pty. Ltd.

directing or supervising, I take it, the repair work there being effected.

It thus appears that the activities and operations of the Thiess Bros. are conducted by companies which they formed. But the companies are distinct legal entities. And, so far as the evidence goes, the one company is not an instrumentality or an agent of the other. Each company has its own sphere of activity, though the fruits of their endeavours may ultimately reach Thiess Bros. The one company is a coal-excavating company and the other an engineering repair company.

If Thiess Bros. Pty. Ltd. had set up a workshop at the open cut wherein its workmen effected major and minor repairs to equipment and plant used in connection with the company's mining operations then a finding that the company and its workmen were engaged in the coal-mining industry might have a basis of fact to support it. The work might then be regarded as ancillary to and part of the mining operations.

But if the repair work was sent to and effected by persons or bodies carrying on an independent engineering business then the fact that the work was upon equipment and plant used in connection with mining operations would not support a finding that those persons or bodies or their workmen were engaged in the coal-mining industry. They would be engaged in the engineering business or industry.

So here the fact that the Thiess Bros. divided their activities between two independent companies, one a mining company and the other a repair company, does not support a finding that the Repairs company is engaged in the coal-mining industry because it repairs coal-mining equipment and plant.

In my opinion, the Repairs company was not as a matter of fact—and the question is really one of fact—engaged nor were its workmen engaged in the coal-mining industry but in an industry which effected repairs to coal-mining and other equipment and plant.

The result is that the order nisi should be made absolute.

DIXON J. This case is very much upon the border line but on the whole I am not satisfied that the dispute with which the Central Reference Board dealt was not a dispute as to industrial matters in relation to the coal-mining industry or a threatened or impending or probable industrial dispute in that industry, within the meaning of reg. 4 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*. No point has been made as to the existence of a dispute or as to the subject of the dispute amounting to an

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industrial matter. I therefore assume those elements. What the prosecutor denies is that the dispute is as to matters in relation to the coal-mining industry or is a threatened dispute in the industry. The burden of establishing this negative proposition lies upon the prosecutor. But upon discharging the onus, I do not doubt that he would be entitled to the writ. It is, I think, true that the presence in the regulations of reg. 17 means that the awards, orders and determinations of the Board are not to be invalid if the only ground is that there has not been a strict adherence to the directions given by the regulations as to the mode in which the Board shall proceed or the manner in which it shall exercise its powers or even that it has exceeded the limits imposed upon its powers or authority. Such a provision is taken to mean that it is enough if the award order or determination deals with a subject matter placed within the province of the tribunal and represents a bona-fide attempt to exercise its powers and authorities or some of them. In those conditions a failure to observe the requirements of the regulations does not spell invalidity and a valid award or order is not prohibited. But in *R.* v. *Hickman*; *Ex parte Fox* (1) we decided, without, I think, derogating from these principles, which were there discussed, that the *Coal Mining Industry Employment Regulations* do not mean to give the Board any authority at all beyond what is within the true application of the expression "coal-mining industry." We decided that the expression forms a final and definitive limitation upon the powers, duties and functions of the Board. Once it steps outside the ambit described by that expression it is not dealing with a subject placed within its province and, upon the proper interpretation of the regulations, the conditions upon which the curative effect of reg. 17 depends cannot be fulfilled.

The meaning of "Coal Mining Industry" is unfortunately indefinite and flexible. It affords no clear and certain guide either to the Board or to the courts of law as to the exact ambit of the Board's authority. In the present case the coal-mining that affects the question for decision is done by an open cut, and we are told that, owing to the short period over which that method has been seriously practised in New South Wales, no usages or common understandings have been established which would assist us in determining what marginal functions and activities fall within an accepted conception of that branch of the coal-mining industry.

The function or activity with which we are concerned is the major repair and overhaul of the earth-moving and excavating equipment used in removing the over-burden and in winning the coal from the

(1) (1945) 70 C.L.R. 598.

open cut. As a matter of reason, it seems to me that such repairs and overhauls may be carried out as an integral part of the operations of open-cut mining so as to form an indivisible element in the undertaking or may be relegated to separate and independent engineering operations outside the undertaking. In the one case I should have thought that they might quite well be considered part of the industry. In the other case I do not think they ought to be so considered. The difference must depend upon circumstances, the chief of which must be separateness of establishments in point of control, organization, place, interest, personnel and equipment. It must in the end come down to a matter of degree. It is not like the cases of *Ex parte Fox and Clinton* (1) where the distinction rested upon the character of the operations, upon function. There we thought that the transport of coal in distribution was to be distinguished from coal-mining as an industry.

In the present case the prosecutor has not satisfied me that the major repair and overhaul of the machines is conducted otherwise than as an integral part of the mining undertaking, because of the following factors. The operations, although carried on by a distinct company, are under one control and management with the mining operations. The distinct company is a subsidiary. The works are situated close to the open cut, about three-quarters of a mile away, and the site was obviously chosen for that reason. The site is variously described as " upon " the open cut, as adjacent to but outside the area of the open cut and as upon the mine-owner's land but outside the fence. Although some other work has been done, the repair and overhaul of the mining machinery was the purpose of setting up the engineering shop and substantially, it has no other present purpose. It was set up because of the inconvenience, and I would assume cost, of having the work done by outside engineering establishments. Another workshop for minor repairs and adjustments is in the open cut. Though that belongs to the mining or excavating company there is an interchange of tools and spare parts. The major repair and overhaul of the machines doing the mining is of course essential to the mining operation and to do it as part of the same undertaking may be considered to give all the advantages of expedition, co-ordination and reduction of cost that are supposed to arise from unity of control and proximity. The fact that the operations of mining and of major mechanical repair are divided between distinct legal entities ought not, where the question is whether they form a main and an incidental part of the

(1) (1945) 70 C.L.R. 598.

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same undertaking, to weigh against the facts that they are under one control and management and conducted in the same interest.

Because of these factors I am unable to subscribe to the view that the work carried on by Thiess (Repairs) Pty. Ltd. has been shown to fall outside the coal-mining industry.

I think that the order nisi should be discharged.

McTIERNAN J. I think that the order nisi should be discharged.

Having regard to the material which was before the Central Reference Board and before us, I am not satisfied that the former tribunal arrived at an erroneous conclusion in finding that the major repair and overhaul of the excavating machinery was incident to the mining operations.

Order absolute: costs of prosecutor to be paid by the respondents, the Amalgamated Engineering Union Australian Section.

Solicitors for the prosecutor: *Fisher and Macansh with J. T. Ralston and Son*, Sydney.

Solicitors for the respondents: *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth; *Jack Lazarus*.

E. F. H.