Cons R v President of Industrial Comm 43 SASR 434
Appl North West County Council v Dunn (1971) 126 CLR 247
Appl R v Central Sugar Cane Prices Board; Ex p Maryborough Sugar Factory 101 CLR 246
Foll Talbot v Lane (1994) 14 WAR 120
Dist J-Corp Pty Ltd v City of Melville (1998) 100 LGERA 376
Cons J-Corp Pty Ltd v City of Melville (1998) 20 WAR 72
Foll NAAV v MIMIA (2002) 69 ALD 1
Foll NAAV v MIMIA (2002) 193 ALR 449
Cons Wang v MIMIA (2002) 119 FCR 405
Cons Plaintiff S157/2002 v Commonwealth (2003) 195 ALR 24
Cons Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Appl NAAV v MIMIA (2002) 123 FCR 298
Cons Awan v MIMIA (2002) 120 FCR 1
Cons Plaintiff S157/2002 v Commonwealth (2003) 72 ALD 1

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

MURRAY AND OTHERS; EX PARTE PROCTOR AND OTHERS.

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SYDNEY, *April* 1, 4.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Industrial Arbitration (Cth.)—Conciliation and arbitration—Coal mining—Local Reference Board—Meeting—Quorum—Less than required number of members present—Order—Validity—Prohibition—Defence (Transitional Provisions) Act 1946-1947 (*No.* 77 *of* 1946—*No.* 78 *of* 1947)—*National Security (Coal Mining Industry Employment) Regulations* (*S.R.* 1941 *No.* 25—1948 *No.* 45), *regs.* 12, 13, 17.

Regulation 12 of the *National Security (Coal Mining Industry Employment) Regulations* provides for the constitution of Local Reference Boards consisting of a chairman and other members representative of employers and employees. Regulation 13 (2) provides that "The Chairman and half the other members of the Board as constituted for the time being in accordance with the provisions of this regulation shall form a quorum and when a quorum is present the Board may validly function notwithstanding that the representatives of one party have failed to attend." Regulation 17 provides that "a decision of a Local Reference Board shall not be challenged appealed against quashed or called in question or be subject to prohibition . . . in any court on any account whatsoever."

Held that reg. 13 (2) made the presence of a quorum a necessary condition of the valid exercise by a Local Reference Board of its functions, and where a Board purported to act in the absence of a quorum prohibition would lie notwithstanding reg. 17 of the regulations.

The effect of provisions expressed to protect orders from challenge and to make them not subject to prohibition discussed, both as a matter of interpretation and under the Constitution.

ORDER NISI for prohibition.

In July 1948 there arose at the Burgowan No. 10 Colliery, Torbanlea, Queensland, a dispute as to whether contract miners

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could be required to erect cogs as directed by the manager or whether such work should be done by shiftmen, or employees other than contract miners. This dispute was referred to the Local Reference Board (Queensland) established under the *National Security (Coal Mining Industry Employment) Regulations*. The representative members of the Board, being equally divided on the matter, the chairman, on 24th September 1948, determined that the contract miners at the colliery could be required by the management to erect cogs as and where necessary if it did not prefer to use shiftmen labour for the work, the price payable to contract miners to be at the rate of 2s. 3d. per foot in height for filled cogs.

The miners employed at the colliery refused to accept the decision so made and to erect cogs at the direction of the manager of the colliery, and were dismissed from their employment.

The appointment of the chairman of the Board expired in October 1948, and Mr. Murray was appointed chairman in his stead.

At a meeting of the Board held on 19th November 1948 the Queensland Colliery Employees' Union applied for a review of the decision and the members present not being unanimous the chairman, Murray, decided that the decision could and should be reviewed.

The dispute was next dealt with at a meeting of the Board convened by the chairman and held on 29th November 1948. At that meeting there were present three members of the Board as employers' representatives and Messrs. Millar, Tucker and Caldwell were present as employees' representatives. A representative of the employers informed the Board that whatever proceedings were to be conducted by the Board were without prejudice to the objections of the employers' representatives as set forth in a statement submitted by him. After some evidence had been given on behalf of the employees and of the employers and various aspects had been considered, the meeting was adjourned until 7th December 1948.

In an affidavit made by the chairman he stated that at the adjourned meeting held on 7th December 1948, there were present, in addition to himself, only Messrs. Millar and Tucker, "duly qualified members of the said Board and representatives of the employees. The employers' representatives did not attend the said meeting having intimated that acting on legal advice it was not their intention to do so because of objections to the jurisdiction of the Board." The chairman further stated that the members present at the meeting together with himself constituted a quorum by virtue of reg. 13 (2) of the *National Security (Coal Mining Industry Employment) Regulations* and the Board proceeded to function and unanimously ordered that all employees dismissed

from the Burgowan Collieries Nos. 7, 9 and 10 be reinstated; that work be resumed on pre-stoppage conditions and subject to certain other conditions.

The management failed to comply with the order and a summons, charging them with that offence, returnable at Maryborough on 6th January 1949, was served on William Curl Proctor, Arthur Henry Proctor and Archibald Herbert Yates, the three members of the firm of Burgowan Colliery Co. which owned the said collieries.

Upon an application made to *Williams* J. on 6th January 1949, the said three members submitted that the order was invalid and void. His Honour ordered that the chairman of the Local Reference Board (Queensland), Millar, Tucker, Caldwell and the Queensland Colliery Employees' Union show cause before the Full Court of the High Court why a writ of prohibition should not issue to each of them prohibiting them and each of them from proceeding further upon the order purporting to have been made on 7th December 1948, by that Board, on three grounds one only of which is material to this report, namely :—That the Local Reference Board (Queensland) at the date of the making of the said order was not validly constituted in that one only of the employees' representatives there present had been appointed in accordance with the provisions of reg. 12 of the *National Security* (*Coal Mining Industry Employment*) *Regulations*.

The Local Reference Board (Queensland) was first constituted under those regulations in April 1941.

Murray was appointed chairman of the Board on 5th November 1948, and Millar was appointed a member of the Board representative of employees on 28th May 1942, a notification of such appointment appearing in the Commonwealth Government *Gazette* issued the following day. The Commonwealth Government *Gazette* issued on 27th January 1944 contained a notification of the appointment of one Jim Donald as a member of the Board representative of employees to hold office on and from 21st January 1944 and during the pleasure of the Governor-General.

There was no record of the appointment of either Caldwell or Tucker as a member of the Board.

The chairman stated in his affidavit referred to above that at the commencement of the meeting held on 7th December 1948, he inquired from, *inter alia*, Tucker as to the manner of his appointment as a member of the Board and Millar produced to him as chairman a statement, said by both Millar and Tucker to have been signed by Donald, authorizing Tucker to act as a substitute in the stead of Donald as a member of the Board as from the

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beginning of May 1946, and he, the chairman, accepted Tucker as a person duly qualified to sit as a member of the Board. The chairman further stated that although Caldwell was present in the room when the meeting was held on 7th December 1948, he did not take any part in the meeting or conduct of business of the Board, the only persons who did so take part being himself, Millar and Tucker.

In an affidavit William Curl Proctor stated that a search made of the Commonwealth Government *Gazettes* published since 20th April 1945 disclosed no subsequent gazettals of appointment of employees' representatives to the Board.

The provisions of regs. 12, 13 and 17 of the *National Security* (*Coal Mining Industry Employment*) *Regulations* are sufficiently set forth in the reasons for judgment of *Latham* C.J. and *Dixon* J. hereunder.

Although served with notice of the order made by *Williams* J. on the return of that order there was no appearance by or on behalf of Caldwell or the Queensland Colliery Employees' Union.

A. R. Taylor K.C. (with him *Ashburner*), for the prosecutors. From the documents before the Court it does appear that some of the persons who purported to sit as members of the Local Reference Board (Queensland) were not in fact members of that Board, or that they did not sit as members. In either event there was not a quorum present at the meeting on 7th December 1948 to deal with the matter. Neither Tucker nor Caldwell was ever appointed a member of the Board, and Caldwell was never a substitute for any other member. There is some doubt as to whether Tucker was at any time appointed a substitute pursuant to the regulations, but if he was so appointed his appointment was not made until subsequent to the meeting of the Board held on 29th November 1948, that is after the Board had become seised of the matter. The meeting held on 7th December 1948 was a continuation of the meeting held on 29th November; it was not "another" meeting, but was the second part of a meeting the first part of which had been held on 29th November 1948. At no stage did the chairman select any new members to take part in the adjourned meeting of 7th December. According to the official record there were present three representatives of employers and three representatives of employees when the meeting commenced on 29th November, and the quorum would be three members and the chairman. Under reg. 13 (2) the quorum must be maintained throughout the meeting. The order challenged purports to have been made by two members and the chairman which is less than a quorum if in fact there were

more than six members present at the commencement of the meeting on 29th November. If, as is now submitted, Caldwell was not qualified to, or did not, act or sit as a member, so that there were only the chairman and five representatives present on 29th November then the two representatives present on 7th December did not constitute "half the other members of the Board" as required by reg. 13, and thus there was not a quorum present on 7th December. Applying the view that Tucker's appointment as substitute was, in the circumstances, too late to be effective, it follows that at the commencement of the meeting on 29th November there were present four representative members of the Board one only of whom was present at the adjourned meeting, and thus a quorum was not present.

[WILLIAMS J. referred to *R.* v. *Drake-Brockman*; *Ex parte Northern Colliery Proprietors' Association* (1).

DIXON J. referred to *R.* v. *Central Reference Board*; *Ex parte Thiess (Repairs) Pty. Ltd.* (2).]

The circumstances in *R.* v. *Drake-Brockman*; *Ex parte Northern Colliery Proprietors' Association* (1) were different from the circumstances in this case. The Board was invalidly constituted from its inception. It commenced the meeting on 29th November with, in addition to the chairman, three representatives of employers and only one representative of employees, whereas the regulations provide that the Board shall consist of at least two representatives on each side. It never was a Board. Regulation 17 of the regulations was considered by this Court in *R.* v. *Hickman*; *Ex parte Fox and Clinton* (3). That case is not an authority for the proposition that a Board, however constituted, could not be subject to prohibition. In this case the want of jurisdiction has been clearly shown and issue of prohibition is not a matter of discretion of the Court but is a matter of right (*R.* v. *President of Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Agricultural Co. Ltd.* (4)). The issue of prerogative writs was discussed in *Ex parte Mullen*; *Re Hood* (5). It would seem that the only case in which it is suggested there is a discretion in prohibition is *Turner* v. *Kingsbury Collieries, Ltd.* (6), where it was decided that prohibition would not lie because there was an alternative remedy. There is no alternative remedy in this case.

Holmes K.C. (with him *Macfarlan*), for the respondents Murray, Millar and Tucker. The Board consisted of the chairman, three

(1) (1946) A.L.R. 106.
(2) (1948) 77 C.L.R. 123.
(3) (1945) 70 C.L.R. 598.
(4) (1916) 22 C.L.R. 261, at p. 266.
(5) (1935) 35 S.R. (N.S.W.) 289, at pp. 294-301.
(6) (1921) 3 K.B. 169.

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representatives of the employers and two representatives, that is Millar and Tucker, of the employees. That was an effective Board under the regulations although the representation was unequal. It was not necessary that Tucker's appointment as substitute in the stead of Donald should be in writing. Donald's letter dated 5th December 1948 was only evidence of Tucker's appointment, and was not his appointment. The evidence shows that Tucker had been a substitute from May 1946, and it follows that he was a member of the Board at all material times. In the circumstances it must be conceded that a quorum was not present at the meeting of the Board held on 7th December 1948, but nevertheless the decision then made by the Board comes within the protection of reg. 17 (*R.* v. *Hickman*; *Ex parte Fox and Clinton* (1)). The point in that case was whether the Board had purported to deal with a special matter which was outside its jurisdiction.

[DIXON J. referred to *R.* v. *Drake-Brockman*; *Ex parte Australian Iron & Steel Ltd.* (2)].

Regulation 13 (2) is directive only and the lack of a quorum was an irregularity for which, by virtue of reg. 17, prohibition will not lie. Upon a proper construction reg. 13 (2) should be read as if it were in two parts, and so construed it would read "the chairman and half the other members of the Board as constituted for the time being in accordance with the provisions of the regulations shall form a quorum" and, secondly, "And when a quorum is present the Board may validly function notwithstanding the representatives of one party have failed to attend." It was irregular to make an order at a meeting of the Board at which a quorum was not present but it was no more than an irregularity. In the first part of reg. 13 (2) construed as above, nothing was said about function or validity of function, but merely what should form a quorum. The question of validly functioning was only dealt with in conjunction with the provision as to the failure of one set of representatives to attend. It was a direction to the Board which the Board should carry out if it could do so.

A. R. Taylor K.C. was not called upon to reply.

The following judgments were delivered:—

LATHAM C.J. The prosecutors in these proceedings are the members of a firm, the Burgowan Coal Co., which controls a colliery in Queensland known as Burgowan No. 10. The individual respondents are persons joined in the proceedings who are or who have

(1) (1945) 70 C.L.R. 598. (2) Noted *Australian Law Journal*, vol. 19, p. 355.

acted as members of a Local Reference Board, established under the *Coal Mining Industry Employment Regulations*. These regulations were originally made under the *National Security Act*, 1939, as amended, and were continued in operation by the *Defence (Transitional Provisions) Acts*, which have been passed after the expiry of the *National Security Act*. The last relevant Act is the *Defence (Transitional Provisions) Act* 1947, No. 78, which purported to continue the regulations in operation until 31st December 1948. The other respondent is the Queensland Colliery Employees' Union.

A dispute arose between the union and the firm upon the question whether the employer should have the power of requiring contract miners to build cogs, which constitute a particular form of mine timbering.

This dispute was referred to a Local Reference Board under the regulations, and that Board ultimately, on 7th December 1948, made an order in favour of the contention of the union. The prosecutors obtained an order nisi for prohibition against the enforcement of the order. The grounds of the order nisi are, first :— "That the *Defence (Transitional Provisions) Act* 1946-1947 in so far as it purports to continue in force the *National Security (Coal Mining Industry Employment) Regulations* is beyond the powers of the Parliament of the Commonwealth and void," and secondly :— "That the *Defence (Transitional Provisions) Act* 1946-1947 in so far as it purports to continue in force Part III. of the said Regulations is beyond the powers of the Parliament of the Commonwealth and void." It is not necessary in the view which we take of the case to reach any decision upon these grounds.

The third ground is that the Local Reference Board (Queensland), at the date of the making of the order, was not validly constituted, and that one only of the employees' representatives there present had been appointed in accordance with the provisions of reg. 12 of the said regulations. The *Coal Mining Industry Employment Regulations* provide in reg. 12 for the constitution of Local Reference Boards, consisting of a chairman and other members representative of employers and employees.

Regulation 13 provides :—"(1) A Local Reference Board, when meeting to exercise its powers under these Regulations, shall be constituted from time to time, by the Chairman and not less than two and not more than three members representative of employers and of employees, respectively, to be selected by the Chairman according to the subject matter to be dealt with by the Board. (2) The Chairman and half the other members of the Board as constituted for the time being in accordance with the provisions

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of this regulation shall form a quorum and when a quorum is present the Board may validly function notwithstanding that the representatives of one party have failed to attend. (3) If on any question before a Local Reference Board at any meeting the members present are not unanimous, the opinion of the Chairman shall prevail."

A Local Reference Board was established for Queensland. It is unnecessary to state in detail the appointments and retirements from the Board, because it is not disputed that on 7th December 1948, when the meeting was held at which the challenged order was made, the Board consisted of the chairman, Mr. J. A. Murray, three employers' representatives and T. M. Millar, and possibly C. Tucker, as employees' representatives. That is to say, there were altogether four, or possibly five, members, other than the chairman. The question as to whether there were four or five members depends upon certain matters affecting the right of Mr. Tucker to sit and to act upon the Board.

There were no employers' representatives at the meeting on 7th December, but only the chairman and Messrs. Millar and Tucker. Thus, the only members of the Board present, other than the chairman, were Millar, and possibly Tucker. There were three employers' representatives who were not present. If Tucker was a member, then there were five members other than the chairman, and two is not one-half of five. If Tucker was not a member, then one is not one-half of four. Therefore it is clear that a quorum was not present at the meeting.

Regulation 13 (2) is at least a direction that the Board should not act unless a quorum is present. The respondents, however, rely on reg. 17, which, so far as relevant, is in the following terms:— "a decision of a Local Reference Board shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition . . . in any court on any account whatever."

In terms this regulation purports to exclude prohibition in relation to any decision of a Local Reference Board. Such a provision, however, does not exclude the jurisdiction of this Court under s. 75 (v.) of the Constitution. The members of a Local Reference Board are officers of the Commonwealth, within the meaning of that provision. It was so decided in *R.* v. *Hickman*; *Ex parte Fox and Clinton* (1) and reference may also be made to *R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (2)—a decision with respect to the Central Reference Board, acting under these regulations. But reg. 17 does prevent an order of the Board from being held to be invalid by reason of irregularities not going to

(1) (1945) 70 C.L.R. 598. (2) (1943) 68 C.L.R. 51.

jurisdiction. It is a statement of the intention of the legislature that not every direction prescribed for the conduct of the tribunal should be regarded as mandatory. The effect of such a provision was stated in the following terms in the case of *R.* v. *The Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia Ltd.* (1), by *Dixon* J. and myself:—"When Commonwealth legislation confers powers upon an officer a provision such as reg. 38 cannot be construed as intended to provide that his powers are absolutely unlimited. Such a construction would raise questions of the validity of the legislation. Such a provision cannot help to give effect to any legislation which it is beyond the power of the Commonwealth Parliament to enact" —as the question here is one of the construction and not of the validity of the regulations, I continue reading:—"Further, even where no question of validity arises, the effect of such a provision in a particular case depends upon the construction of the relevant statute taken as a whole. 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 and Clinton* (2). It is therefore necessary to inquire whether the regulations now under consideration impose any condition which must be satisfied when it is sought to exercise the power", which in that case was a power to vary a determination of rent.

Therefore it is necessary to consider the meaning of reg. 13 (2)—whether it means that the Board can act only when a quorum is present. The regulation is directed to the possible absence of members, perhaps including all the representatives of one party,

(1) (1947) 75 C.L.R. 361, at p. 369. (2) (1945) 70 C.L.R., at pp. 614-617.

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from a meeting of the Board. It provides that in such a case the chairman and half the other members of the Board shall form a quorum. This provision enables a quorum to do the business of the Board. When a quorum is prescribed in relation to a body it means imperatively that no business shall be transacted by the body unless the prescribed number at least is present. In *In re Alma Spinning Co. (Bottomley's Case)* (1) Sir *George Jessel*, M.R., said this :—" When you say 'the quorum of directors shall be three,' what does that mean ? Stated in full, it amounts to this, that 'no business shall be transacted unless there shall be three directors present.' That is the meaning of a quorum. If it is said that is directory only, the answer is, it is not : it is of the very essence of the authority that there shall not be less." The necessity of a quorum in the present case is emphasized by the words of the second part of par. (2) of reg. 13 :—" when a quorum is present the Board may validly function notwithstanding that the representatives of one party have failed to attend."

The regulation, therefore, makes the presence of a quorum essential to valid action by the Board. A quorum was not present on 7th December. Regulation 17, accordingly, does not apply in this case to exclude prohibition, and the order nisi for a writ of prohibition should accordingly be made absolute, with costs against the union. No order should go against the respondent, F. Caldwell, who did not act as a member of the Board.

DIXON J. This is an application for a writ of prohibition against the chairman and two members of a Local Reference Board established for the State of Queensland under Part III. of the *Coal Mining Industry Employment Regulations*. The two members are named Millar and Tucker. A fourth person, named Caldwell, is included in the order nisi as a respondent. The writ is sought to restrain further proceedings upon an order or decision made on 7th December 1948. When the order was made there were present at the meeting of the Local Reference Board the chairman, the two members Millar and Tucker and possibly the fourth person Caldwell who, as is now conceded, was not a member. The first question for consideration is whether the Board was, in these circumstances so composed as to be able to make a valid order or decision.

Sub-regulation (1) of reg. 12 provides that a Local Reference Board shall consist of a chairman and of other members representative of employers and of employees respectively to be appointed

(1) (1880) 16 Ch. D. 681, at p. 689.

by the Governor-General. Sub-regulation (2) enables a member other than the chairman to appoint a substitute to act in his stead at any time who shall have all the powers and may exercise all the functions of the member appointing him. The question turns on reg. 13, which is as follows :—" (1) A Local Reference Board, when meeting to exercise its powers under these Regulations, shall be constituted, from time to time, by the Chairman and not less than two and not more than three members representative of employers and of employees, respectively, to be selected by the Chairman according to the subject matter to be dealt with by the Board. (2) The Chairman and half the other members of the Board as constituted for the time being in accordance with the provisions of this regulation shall form a quorum and when a quorum is present the Board may validly function notwithstanding that the representatives of one party have failed to attend. (3) If on any question before a Local Reference Board at any meeting the members present are not unanimous, the opinion of the Chairman shall prevail."

At previous sittings of the Board three representatives of the employers had been present. They had been duly appointed as members of the Board and it may be taken, I think, that they had in some manner been selected by the chairman under reg. 13 (1) to take their places in constituting the Board. They, however, stayed away from the meeting of 7th December of set purpose.

It does not appear that at the relevant time there were more than two members of the Board who had been appointed as representatives of employees. They were the respondent T. M. Millar and one J. Donald. The latter, it now appears, had appointed the respondent Tucker as his substitute to act in his stead. Millar and Tucker attended the meeting of the Board on 7th December and probably it may be taken that in some informal way the chairman had " selected " them within the meaning of reg. 13 (1).

On this footing we should perhaps regard the Board when meeting on this occasion to exercise its powers under the regulations as constituted of the chairman, of the three representatives of employers and of the two representatives of employees, or rather one representative of employees and the substitute of another. The alternative is to suppose that for the occasion in question the Board was not constituted so as to meet for the exercise of its functions. But, accepting the view that it was so constituted, the absence of the employers' representatives left an insufficient number to form a quorum. Including the chairman, the Board as constituted numbered six. It was necessary in order to comply with sub-reg. (2)

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of reg. 13 that three members should be present in addition to the chairman.

It is only when a quorum is present that a Local Reference Board may, under that sub-regulation, "validly function notwithstanding that the representatives of one party have failed to attend."

In these circumstances, however unfortunate it may be, the order of 7th December 1948 was not validly made under the regulations, that is unless validity can be obtained for it under some other provision.

It is contended, however, that, notwithstanding that the requirements of sub-reg. (2) were not observed, the award cannot be subject to prohibition because of reg. 17. The material part of that regulation provides that an award order or determination 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 jurisdiction of this Court to issue a writ of prohibition is conferred by s. 75 (v.) of the Constitution. That paragraph says that in all matters in which a writ of prohibition is sought against an officer of the Commonwealth the High Court shall have original jurisdiction. The chairman and members of a Local Reference Board are in that capacity officers of the Commonwealth. It follows that in a case where a writ of prohibition is a proper remedy, it may be directed to them by this Court in virtue of the jurisdiction conferred by the Constitution. In so far as reg. 17 purports to deny the remedy where it properly lies, it is unconstitutional and void. But the question must always remain whether in a given case the writ does properly lie. That depends in turn upon the authority which the law gives to the proceedings which it is sought to prohibit. If the law denies to the tribunal in question all authority over the proceedings so that they cannot result in a lawful and effective exercise of power, then the proper remedy is prohibition. In form reg. 17 may appear to be an attempt to say that even where this is so there shall be no prohibition. But even in jurisdictions where there is no constitutional limitation upon legislative power similar enactments have not received so drastic an interpretation. They have been read rather as meaning that, where the tribunal has made a bona-fide attempt to exercise its authority in a matter relating to the subject with which the legislation deals and capable reasonably of being referred to the power possessed by the tribunal, the acts of the tribunal shall not be invalidated and accordingly shall not be the subject of prohibition. This has been explained in *The*

Colonial Bank of Australasia v. *Willan* (1); *Clancy* v. *Butchers' Shop Employés Union* (2); *Baxter* v. *New South Wales Clickers' Association* (3); *Morgan* v. *Rylands Bros. (Australia) Ltd.* (4); and *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (5). In *R.* v. *Hickman*; *Ex parte Fox and Clinton* (6) I have referred to these cases and stated my opinion as to the operation of the rule of construction in relation to reg. 17 reinforced as the rule is by the application of s. 75 (v.) of the Constitution. It is, of course, clear that in a matter which could not under the Constitution be placed by the legislature under the authority of the Board, reg. 17 could have no effect in protecting the Board's order or determination from prohibition. But where the Board has acted with reference to a subject matter over which the legislature might have conferred power and in a way which the legislature might have authorized had it so chosen the situation is different. It then becomes a question whether, upon the true interpretation of the legislative instrument as a whole, it does not sufficiently express an intention that what the Board does shall be considered an authorized exercise of its power and accordingly valid and effectual, notwithstanding that the Board has failed strictly to pursue the procedure the instrument indicates or prescribes and that the Board has in some respects gone outside or beyond the limits within which it was intended that the actual exercise of its authority should be confined.

We are familiar with the distinction between provisions that are directory and those that are mandatory. The distinction supplies an analogy which may help to explain the effect of reg. 17. For construed in the traditional manner it must be taken to mean that strict compliance with at least some of the provisions of Part III. is not an indispensable condition to the jurisdiction of the Board and to its authority to make a valid and binding award order or determination. There is necessarily an appearance of inconsistency between a provision which defines and restricts the power of a tribunal and prescribes the course it must pursue and a provision which says that the validity of its decrees shall not be challenged or called in question on any account whatever.

The apparent inconsistency should be resolved by an attempt to arrive at the true intention of the legislative document containing the two provisions considered as a whole. The first step in such a

(1) (1874) L.R. 5 P.C. 417, at pp. 442-445.
(2) (1904) 1 C.L.R. 181, at p. 204.
(3) (1909) 10 C.L.R. 114, at pp. 148, 162.
(4) (1927) 39 C.L.R. 517.
(5) (1924) 34 C.L.R. 482, at p. 520.
(6) (1945) 70 C.L.R. 598, at pp. 614-618.

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process of interpretation is to apply to a provision like reg. 17 the traditional or established interpretation which makes the protection it purports to afford inapplicable unless there has been an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province. There is nothing artificial in such an interpretation. For it could hardly be supposed, to take perhaps an extreme example, that it was intended that reg. 17 should give validity and protection to the awards of a tribunal established in relation to one industry when the tribunal intentionally stepped outside its allotted industrial field and proceeded to regulate an entirely different industry. A second step in interpreting the whole legislative instrument must be to consider whether particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action. For a clearly expressed specific intention of this kind can hardly give way to the general intention indicated by such a provision as reg. 17.

In *R.* v. *Hickman*; *Ex parte Fox and Clinton* (1) it was decided that in defining the powers duties and functions of the Central Reference Board and the Local Reference Boards, the regulations had confined them to the coal-mining industry and had thereby imposed a final limitation upon the jurisdiction of the Boards. An award or other proceeding of a Board which went outside or beyond that industry could not be considered as validated by reg. 17 and could not obtain protection from prohibition.

On the other hand, in *R.* v. *Drake-Brockman*; *Ex parte Northern Colliery Proprietors' Association* (2) it was decided by a majority of the Court that a proceeding before the Central Reference Board constituted *de facto* of a chairman and three representatives on each side of employers and employees was not invalidated by the fact that, though one of the representatives of the employees sat for the special representative, he had not been actually appointed by the chairman as a substitute as required by reg. 6 (2).

In the present case, upon the assumptions I have made about the constitution of the Local Reference Board, the question is whether the provision contained in reg. 13 (2) as to a quorum is imperatively expressed or may on the contrary yield to the general policy or intention indicated by reg. 17. In the latter event it would be necessary to construe it as stating what number should

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

(2) (1946) A.L.R. 106.

form a quorum but not as making the presence of a quorum essential to the validity of what is done.

In my opinion the language of reg. 13 (2) is too clear and specific to allow of such an interpretation. It says "when a quorum is present the Board may validly function notwithstanding that the representatives of one party have failed to attend." This cannot possibly be construed as meaning that, in the contingency of the absence of one side's representatives, the Board may validly function although a quorum is not present. The word "validly" shows that the sub-regulation is addressed to the question of validity. It states the conditions and to disregard them would be to set at nought the specific intention of the regulations. The general intent disclosed by reg. 17 does not justify such a process of interpretation. Accordingly I do not think that it is possible to apply the reasoning of *R.* v. *Drake-Brockman*; *Ex parte Northern Colliery Proprietors' Association* (1) to reg. 13 (2). In that case it was not a question of a quorum under reg. 6 (3). A quorum was present. Nor was it a question of the effect under reg. 6 (2) of the absence of a special representative. Regulation 6 (2) says that in the event of any special representative or any substitute appointed by the chairman failing to attend a meeting of the Board to which he has been summoned the Board may validly proceed in his absence. The special representative did fail to attend. The difficulty was that three representatives of the employees did attend, whereas, in addition to the absent special representative, there ought under reg. 6 (1) only to have been two. The attendance of three would have been regular had one of them been a substitute for the special representative, but, though one of them acted as if he were a substitute, he had not been appointed by the chairman as a substitute. There was nothing, as I thought, in the regulations to exclude the operation of reg. 17 with reference to an irregularity of that character. But in my opinion reg. 13 (2) distinctly makes the presence of a quorum a necessary condition of the valid exercise by the Local Reference Board of its functions.

It follows that a meeting as constituted on 7th December 1948 had no authority and the award of that date has no validity. In these circumstances prohibition is a proper remedy and reg. 17 does not operate to exclude it.

The order nisi should be made absolute on the ground stated. It should be made absolute as against the respondents other than Caldwell. It is unnecessary to consider the question whether the *Coal Mining Industry Employment Regulations* still continue in

(1) (1946) A.L.R. 106.

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valid operation, a question the argument of which was deferred until the consequence upon the validity of the order of the manner in which the Board had been constituted had been discussed.

McTIERNAN J. I agree that the order nisi for prohibition should be made absolute. I am of opinion the true interpretation of reg. 13 is that it gives jurisdiction to an authority constituted by a quorum, not by a lesser number of persons than the prescribed quorum. In this case a lesser number of persons than the quorum made the order or award which is now challenged. In my opinion, they had no authority whatever to do so. Regulation 17 is of course not a total bar against prohibition. If it were it would not be valid. Regulation 17 is not effective to bar prohibition against a body which pretends to exercise the jurisdiction which is given to another and different body. The body which made the award now challenged was a group of individuals pretending to be the authority empowered by the regulations to act under them. They had no jurisdiction to make an award. The supposed award is not within the protection of reg. 17.

WILLIAMS J. I agree and can sum up my opinion by saying that reg. 13 (2) states quite specifically that it is when a quorum is present the Board may validly function. The regulation therefore in plain language makes the presence of a quorum a condition of the Board having jurisdiction to exercise its functions. There was not, on any view of the evidence, a quorum present at the adjourned meeting of the Board held on 7th December 1948, when the order under challenge was made. In the absence of a quorum the Board had no authority to function at all. It was not a case of a mere irregularity occurring within the authority conferred upon the Board capable of deriving protection from reg. 17. Accordingly the Board in the absence of a quorum had no jurisdiction to make the order of 7th December 1948, and it is therefore void, and the rule nisi should be made absolute on this ground.

WEBB J. I agree that the order should be made absolute.

Order absolute for writ of prohibition against all respondents other than Caldwell. Costs to be paid by the respondent union.

Solicitors for the prosecutors, *Minter, Simpson & Co.*

Solicitor for the respondents Murray, Millar and Tucker, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.