[HIGH COURT OF AUSTRALIA.]

BROWNELLS LIMITED . . . . APPELLANTS;
APPLICANT,

AND

THE IRONMONGERS' WAGES BOARD . RESPONDENT.
RESPONDENT,

BROWNELLS LIMITED . . . . APPELLANT;
APPLICANT,

AND

THE DRAPERS' WAGES BOARD . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1950.

HOBART, *March* 20.

MELBOURNE, *April* 5.

Latham C.J., Dixon and Fullagar JJ.

Industrial Law—Wages Boards—Power to establish board in respect of any trade or group of trades of an employer—Establishment of board by reference to group of trades exceeding activities of employers—Validity—Power of board to determine rates by reference to hour when work done—Determination fixing overtime payment in respect of period prior to statutory closing time—Validity—Wages Boards Act 1920-1946 (*Tas.*) (11 *Geo. V. No.* 51—10 *Geo. VI. No.* 25), *ss.* 6, 11, 23—*Shops Act* 1925-1945 (*Tas.*) (16 *Geo. VI. No.* 29—9 *Geo. VI. No.* 20), *s.* 8.

The Governor of Tasmania, being empowered by s. 11 of the *Wages Boards Act* 1920-1946 (Tas.) to establish a wages board in respect of any trade or group of trades adopted in his proclamation descriptions of the trades concerned which did not conform with any business carried on in practice by an employer. In the case of the Ironmongers' Wages Board, there was grouped so wide a variety of selling businesses that, as the evidence showed, no ironmonger carried on all of them. In the case of the Drapers' Wages Board, certain classes of goods were adopted as the description of the trade concerned, whereas in practice sellers of these goods were accustomed to sell them in association with many other wares.

Section 23 of the *Wages Boards Act* 1920-1946 (Tas.) provides that "Every board—I. shall determine the minimum rates which may be paid for wages, or for piecework, or both; and in fixing such rates the board may take into consideration the following matters or any of them and may fix different rates accordingly . . . (*e*) the hour of the day or night when the work is to be done: . . . III. may determine such variations of, or additions to, such rates of hours, and prescribe such extra or special payments, either by way of payment for overtime . . . as to the board shall seem just . . . VII. may fix special rates to be paid for any work which the board considers warrants a special rate." Section 8 of the *Shops Act* 1925-1945 (Tas.) provides that shops shall close at 6 p.m. By clauses 5 and 6 of the Determination of the Ironmongers Wages Board (as varied) it is provided:—"5. The maximum number of working hours per week in respect of which the minimum rates for wages . . . shall be paid shall be 40 to be worked . . . between the hours of 8 a.m. and 5.45 p.m., Monday to Friday inclusive. 6. For all time of duty in excess of the ordinary hours, payment shall be made at the rate of time and a half . . . Provided that if a shop is open for the sale of goods after the hour fixed in clause 5 for ceasing work the minimum amount to be paid for overtime shall be time and a half with a minimum payment of 1s. 6d. per hour or 10s., whichever of these sums gives the highest amount."

Held, that under the *Wages Boards Act* 1920-1946 it was within the power of the Governor to determine the trading activities which were to fall within the jurisdiction of any particular board, and for such purpose to group trades together as he thought proper; and that in each case, therefore, the board was validly established.

Held also that the proviso to clause 5 of the determination of the Ironmongers Wages Board was invalid because the *Wages Board Act* 1925-1946 conferred no power on a wages board to regulate hours of trading as distinct from hours of working and also because it conflicted with the specific provision of the *Shops Act* 1925-1945, s. 8.

Decision of the Supreme Court of Tasmania (*Morris* C.J.) in *Brownells Limited* v. *The Ironmongers' Wages Board*, reversed; in *Brownells Limited* v. *The Drapers' Wages Board*, affirmed.

APPEALS from the Supreme Court of Tasmania.

The *Wages Boards Act*, 1920-1946 (Tas.) by s. 11 provides:—"(1) The Governor shall, by proclamation, establish a wages board for any trade in respect whereof both Houses of Parliament pass a resolution authorising the same. (2) When Parliament is not in session the Governor may, by proclamation, establish a wages board in respect of any trade." By s. 6 it is provided (*inter alia*):—"'Trade' means any function, process, industry, business, work, undertaking, occupation, profession, or calling, performed, carried

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

on, or engaged in by an employer; and also includes a group of trades."

Pursuant to these provisions the Governor of Tasmania by proclamation dated 4th February 1921 established, "wages boards in respect of the following trades or group of trades, namely:— . . . 40. Seller of—(a) Ironmongery and/or Ship Chandlery (b) Crockery and/or Glassware (c) Jewellery, Silverware, and/or Electroplate Goods (d) Fancy Goods and/or Toys (e) Books, Stationery, Music, and/or Musical Instruments, in the areas contained within a 7-mile radius of the General Post-office, Hobart, and within a 7-mile radius of the Post-office, Launceston. 41. Retail Seller of any one or more of the following:—(a) General Drapery (b) Furnishing Drapery (c) Piece Goods (d) Haberdashery (e) Mercery (f) Wearing Apparel (g) Footwear, in the areas contained within a 7-mile radius of the General Post-office, Hobart, and within a 7-mile radius of the Post-office, Launceston." By subsequent proclamations dated 12th August 1921 and 13th January 1938 the Governor extended the powers of the Ironmongers' Wages Board "so that such board may fix the lowest prices or rates for persons employed in the following trades, namely: —Seller of—Sporting Goods; Rubber Goods and/or Leather; Paints, Oils, Varnishes, and/or Wall Papers; Coachbuilders' Hardware; Motor accessories."

Brownells Limited v. *The Ironmongers' Wages Board.*

In accordance with the provisions of the *Wages Boards Act* 1920-1946 (Tas.) the respondent published a determination dated 20th February 1947 the relevant clauses of which, as varied by determinations dated 31st October 1947 and 3rd March 1948, read:—" 5. The maximum number of working hours per week in respect of which the minimum rates for wages determined in this Part shall be paid shall be 40 to be worked as follows:—(a) In the City of Hobart and the Municipality of Glenorchy—(i) Excepting as to employees mentioned in item (e) of the preamble, between the hours of 8 a.m. and 5.45 p.m., Monday to Friday, inclusive. 6. For all time of duty in excess of the ordinary hours, payment shall be made at the rate of time and a half; provided that, on three week days immediately preceding Christmas, overtime may be worked and paid for at ordinary rates. Provided further that, if a shop is open for the sale of goods after the hour fixed in clause 5 for ceasing work, the minimum amount to be paid for overtime shall be time and a half with a minimum payment of 1s. 6d. per hour or 10s. whichever of these sums gives the highest amount."

By virtue of s. 62 of the *Wages Boards Act* 1920-1946, the appellant obtained a rule calling upon the respondent to show cause why its determination dated 20th February 1947 as varied, should not be quashed wholly or in part upon the following grounds :—1. That the respondent was not established in respect of a trade or group of trades carried on or engaged in by an employer within the meaning of the *Wages Boards Act*, 1920-1946, and that the whole of the determination of the respondent was illegal. 2. That the provision in Clause 6 Part 1 of the said determination providing that if a shop is open for the sale of goods after the hour fixed for ceasing work the minimum amount to be paid for overtime is 10s. was beyond the powers of the respondent and was illegal.

The affidavits in support of the rule nisi, which were not disputed, showed that the business of selling musical instruments and sheet music was carried on as a separate trade in Hobart, except in the case of one seller who also sold books and stationery and that such business was not combined or associated in any way in Hobart with the business or businesses of selling any of the other commodities mentioned in clause 40 of the proclamation as extended. The affidavits also showed that the business of bookselling as carried on in Hobart and Launceston was combined with the business of selling stationery and newspapers by the leading booksellers, that in some cases sheet music was also sold by the booksellers, that a number of firms which primarily carried on newsagency business also sold books and stationery and that the bookselling business thus described was not combined with any other business but was carried on as a distinct trade. They also showed that the jewellery trade as carried on in Hobart and Launceston included the selling of jewellery, clocks, watches, silver-ware, electro-plate goods, china and glassware, that most jewellers were also watchmakers, and that the jewellery trade thus described was not associated or combined with other trades, but was carried on as a distinct and separate trade except that ironmongers sold watches, clocks, silver-ware and electro-plate goods, china and glassware, but did not sell jewellery.

Brownells Limited v. *The Drapers' Wages Board.*

In accordance with the provisions of the *Wages Boards Act*, 1920-1946 the respondent published a determination dated 6th January 1947, which was varied by a determination dated 4th November 1947. The provisions of the determination are not relevant to this report.

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

By virtue of s. 62 of the *Wages Boards Act*, 1920-1946 the appellant obtained a rule calling upon the respondent to show cause why its determination dated 6th January 1947, as varied, should not be quashed upon the following grounds :—1. That the respondent was not established in respect of the drapery trade as in fact carried on or engaged in by an employer and that the whole of the determination was illegal. 2. That the determination was not made so as to apply to the whole or any specified part of the drapery trade and was wholly illegal.

The affidavit in support of the rule nisi, which was not disputed, showed that the drapery trade as in fact carried on in Hobart and Launceston included the selling of various classes of goods in addition to those enumerated in clause 41 of the proclamation, that the appellant and other leading drapers in Hobart and Launceston employed employees who were exclusively engaged in selling handbags, and employees who were exclusively engaged in selling carpets and linoleums, that employees engaged in selling imitation jewellery and miscellaneous small wares in some drapery businesses were exclusively employed in selling those goods, that in other drapery businesses such employees also sold items of drapery properly so called, and in four firms of drapers saleswomen were employed exclusively in selling beauty preparations and perfumery.

The Supreme Court of Tasmania (*Morris* C.J.) discharged both rules nisi.

From those decisions Brownells Limited appealed by special leave to the High Court ; the appeals were heard together.

S. C. Burbury (with him *B. M. Wicks*), for the appellants.

The Ironmongers' Wages Board. The determination is invalid because the board is established in respect of a group of trades : (a) which no employer in fact carries on together, and (b) which have no inter-relationship. It is common ground that in Hobart the business of selling musical instruments and sheet music and jewellery is not combined with the business of selling most of the commodities mentioned in the proclamation. Section 11 of the *Wages Boards Act*, 1920-1946 (Tas.) when read with the definitions of " board " and " trade " in s. 6 requires that there must be some mutual relationship between the trades grouped together by the proclamation ; if this were not so the word " group " in the definition of " trade " in s. 6 has no meaning, and the result would be that one wages board could be established for all trades carried on in Tasmania. This contention is supported by s. 13 (1), (2) and (3A)

and by the definition of "group" given in the Oxford Dictionary, namely, "a number of things regarded as forming a unity on account of any kind of mutual or common relation." The things enumerated in the proclamation do not form a natural group. It is apparent that under the Act the trade must exist in community of vocation. and not of commerce; see *R.* v. *Minister of Labour*; *Ex parte National Trade Defence Association* (1). As to the proviso to clause 6 of the amended determination dated 3rd March 1948, Parliament has provided by s. 8 of the *Shops Act*, 1925-1945 (Tas.) that shops should close at 6 p.m. the respondent has attempted to usurp the powers of Parliament by forcing shops to close at 5.45 p.m. as an alternative to paying overtime at an arbitrary rate. In exercising its powers under s. 23 I., II. and III. the board must take into account the actual overtime worked and fix a definite rate; it is apparent that here the board has based its determination upon the hour at which shops are required to close. This is extraneous to its powers. As to the limits of the powers of a wages board in prescribing hours of work see *Hargreaves* v. *Gepp* (2).

The Drapers' Wages Board. The determination is invalid because the board is not established in respect of the whole of an existing trade as in fact carried on by an employer.

M. P. Crisp (with him *D. M. Chambers*), for each respondent. The appellants' argument in both appeals is based on *Tudor* v. *Cheverton* (3) which in turn is based on *R.* v. *Minister for Labour* (4). Since there is a fundamental difference between the Tasmanian and the Imperial Statutes the inference drawn in *Tudor* v. *Cheverton* (5) is unsound: cf. *R.* v. *Minister for Labour* (6), also *Ballantine* v. *Hinchcliffe* (7). The interpretation contended for by the appellant would lead to a number of practical difficulties, e.g., Who is a draper? What would be the position of chain stores? The definition of "board" in s. 6 read with s. 11 means that one board may be established for any combination of functions, not necessarily carried on by the same employer. Section 40 confirms the view that the Act is concerned primarily with industry awards which may be given a craft reference. Sections 11 (2) and (3), and 20 indicate that Parliament contemplated a heterogeneous, rather than a homogeneous, collection of trades. There is nothing in the Act to support the notion that any group of trades should be

(1) (1932) 1 K.B. 1, at p. 26.
(2) (1922) 18 Tas. L.R. 58.
(3) (1933) 28 Tas. L.R. 26.
(4) (1932) 1 K.B. 1.
(5) (1933) 28 Tas. L.R. 26, at p. 30.
(6) (1932) 1 K.B. 1, at p. 11.
(7) (1915) V.L.R. 69.

H. C. OF A. 1950. BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

linked by a common industrial thread. [He referred to *Slattery* v. *Bishop* (1).] As to the overtime proviso in the Ironmongers' Wages Determination, there is no evidence of any specific motive behind the proviso. Since the powers conferred by s. 23 III., VII. and XIV. are as wide as possible, the purpose for which those powers are exercised is immaterial, and in any event this Court is not a court of appeal as to motives: *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* (2).

S. C. Burbury, in reply. The only essential difference between the Imperial and the Tasmanian statutes is that the former sets up a craft, not an industry board.

Cur. adv. vult.

April 5. The following written judgments were delivered:—

LATHAM C.J. These are appeals by special leave from orders of the Supreme Court of Tasmania (*Morris* C.J.) discharging orders nisi calling upon the Drapers' Wages Board and the Ironmongers' Wages Board to show cause why certain determinations of the Boards should not be quashed for illegality. The proceedings were taken under the *Wages Boards Act* 1920-1946 (Tas.), s. 62.

In each case it is objected that the Wages Boards which made the determinations were not established in accordance with the provisions of the Act.

The *Wages Boards Act*, 1920-1946, s. 11, provides—"(1) The Governor shall, by proclamation, establish a wages board for any trade in respect whereof both Houses of Parliament pass a resolution authorising the same. (2) When Parliament is not in session the Governor may, by proclamation, establish a wages board in respect of any trade."

By s. 6 of the Act the word "trade" is defined in the following terms:—"'Trade' means any function, process, industry, business, work, undertaking, occupation, profession, or calling, performed, carried on, or engaged in by an employer; and also includes a group of trades."

This is what "trade" means in this Act. In considering this Act it is not relevant to inquire into and seek to apply the meaning of "trade" according to general usage as was done in the case of *R.* v. *Minister of Labour* (3).

Both Boards were established by a proclamation of the Governor made on 4th February 1921. By this proclamation a board was

(1) (1919) 27 C.L.R. 105.
(2) (1947) 2 All E.R. 680.
(3) (1932) 1 K.B. 1.

established " in respect of the following trades or groups of trades, namely :—40. Seller of—(a) Ironmongery and/or Ship Chandlery (b) Crockery and/or Glassware (c) Jewellery, Silverware, and/or Electroplate Goods (d) Fancy Goods and/or Toys (e) Books, Stationery, Music, and/or Musical Instruments in the areas contained within a 7-mile radius of the General Post-office, Hobart, and within a 7-mile radius of the Post-office, Launceston. 41. Retail Seller of any one or more of the following :—(a) General Drapery (b) Furnishing Drapery (c) Piece Goods (d) Haberdashery (e) Mercery (f) Wearing Apparel (g) Footwear, in the areas contained within a 7-mile radius of the General Post-office, Hobart, and within a 7-mile radius of the Post-office, Launceston."

By subsequent proclamations the powers of the Ironmongers' Wages Board were extended " so that such Board may fix the lowest prices or rates for persons employed in the following trades, namely :—Seller of—Sporting Goods; Rubber Goods and/or Leather, Paints, Oils, Varnishes, and/or Wall Papers; Coachbuilders' Hardware; Motor Accessories."

In the case of the Ironmongers' Board, the evidence shows that the selling of sheet music and musical instruments is not in fact combined as a trading enterprise with the trade of selling the ironmongery and other commodities mentioned in the original and subsequent proclamations, that the business of book-selling is not in fact combined with the selling of any other of the commodities mentioned in the proclamation except sheet music, and that the selling of jewellery is not combined in fact with most of the other trades mentioned in the proclamation. The evidence in the Drapers' Board Case shows that drapers sell many goods other than those mentioned in the proclamation, e.g. handbags, travel goods, carpets, linoleums, toilet accessories, &c., and that some employees are exclusively engaged, while some are only partly engaged, in selling such other goods.

Upon this evidence it is contended that the proclamations establishing the boards and extending the powers of the Ironmongers' Board were not made in respect of trades as defined in the Act, s. 6.

The definition of " trade " shows that for the purposes of the Act the scope or content of a trade is determined by reference to activities " performed, carried on or engaged in by an employer." The industry of the employer (draper, ironmonger, etc.) and not the occupation of the employee (salesman, driver, clerk, etc.) is the relevant test.

H. C. OF A. 1950. BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD. Latham C.J.

It is argued for the appellants that the establishment of the Ironmongers' Board is ineffective because the proclamation does not appoint a board in respect of activities all of which are carried on by any single employer, and that in the case of the Drapers' Board the proclamation is ineffective because it does not include the whole of the activities of any employer. The Ironmongers' Board is said to be invalidly constituted because the proclamation includes too much and the Drapers' Board because it includes too little. It was not argued that a board could be constituted only in respect of a trade the whole of the activities in which and none others were carried on by all the individual employers who carried on any of them, but it was argued that it must be possible, at the time when the constituting proclamation was made, to discover in the case of each board an employer whose activities precisely corresponded with those selected in the proclamation.

This argument was applied to both "trade" and "group of trades," and it was contended that a "group of trades" could not be artificially created by a proclamation—that it must exist in some sense as a group in fact, and that it could not exist in fact unless all the trades grouped together in the proclamation were each (and, in accordance with the argument already stated, the whole of each of such trades) carried on by at least one employer.

This interpretation of the provisions of the Act would make it difficult to apply the Act in practice. In view of the great number of possible combinations of trading activities, dependent as they are entirely upon the choice of individual traders, it would be necessary to establish a very large number of Wages Boards in order to cover all employees. The words of the Act do not in my opinion provide support for the interpretation for which the appellant contends. The definition of "trade" does, it is true, include the "industry, business, undertaking, profession or calling" of an employer, and these words could, not unreasonably, be read as referring to the whole of such an industry, &c. But the definition also provides that "trade" means any function or any process or any work performed or carried on or engaged in by an employer—anything that an employer carries on in his capacity as employer. Thus a Wages Board can be set up in respect of any activity that is such a function or process or work, whether or not the employer is engaged in any other function or process or work. The inclusion of "group of trades" in the definition of "trade" is, in my opinion, intended to make it possible to include what would ordinarily be called different trades within the jurisdiction of a single Wages Board.

It was also argued that the description of a trade by reference to the goods sold by the employer was an insufficient description. But such a description does in fact identify employers who are to be subject to the determinations of a Wages Board and there is nothing in the Act which requires the Governor to adopt one form of description rather than another.

It was alternatively argued that trades could not be treated as a group unless they were in some sense homogeneous. But the Act does not say so, and any such principle would in practice prove to be a very difficult provision for administrative officers or for a court to apply.

Further arguments were based upon s. 13 of the Act, which provides for the constitution of boards consisting of representatives of employers and representatives of employees who must not possess the disqualification of being legal practitioners. Section 13 provides that the representatives of the employers on any board shall be employers engaged in good faith in the trade with a certain period of experience in the trade, or managing experts of experience and in the case of employees that their representatives shall be employees employed in good faith in the trade. It is suggested for the appellant that an employers' representative must, in order to be qualified under s. 13, be engaged in the whole of the trade or trades in respect of which a Wages Board was established. If this is the effect of s. 13, some support would be given to the appellant's argument that there cannot be a "trade" within the meaning of the Act unless some employer carries on all the functions, processes &c. in respect of which the relevant proclamation purports to establish a wages board. But the words of s. 13 do not require the adoption of any such interpretation, and, in the case of employees, who are also required to be "employed in good faith in the trades" it is a matter of common knowledge that most employees in any trade follow a particular occupation, e.g. clerk, driver, &c., and cannot be said to be employed in every branch of the trade carried on by their employer.

The Act in my opinion leaves it to Parliament or the Governor (as the case may be) to determine the trading activities which are to fall within the jurisdiction of any particular board, and for such a purpose to group trades together as may be thought proper.

In the case of the determination of the Ironmongers' Board the validity of the determination is challenged by reason of a provision in the determination with respect to overtime. The *Wages Boards Act*, 1920-1946, s. 23 I., provides that the Board "shall determine the minimum rates which may be paid for wages or for piecework

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

Latham C.J.

or both; and in fixing such rates the board may take into consideration the following matters or any of them, and may fix different rates accordingly—(e) The hour of the day or night when the work is to be done: ".

Section 23 III. provides that the board "May determine such variations of, or additions to, such rates or hours, and prescribe such extra or special payments, either by way of payment for overtime" or for travelling time &c. as to the board shall seem just. Section 23 VII. provides that the board "May fix special rates to be paid for any work which the board considers warrants a special rate."

The Ironmongers' Wages Board included the following provisions in its determination as it now stands:—

"5. *Hours.*

The maximum number of working hours per week in respect of which the minimum rates for wages determined in this Part shall be paid shall be 40 to be worked as follows:—(a) In the City of Hobart and the Municipality of Glenorchy—(i) Excepting as to employees mentioned in item (e) of the preamble, between the hours of 8 a.m. and 5.45 p.m., Monday to Friday, inclusive."

with other provisions for other employees and for employees elsewhere in the State than in the city of Hobart and the Municipality of Glenorchy. The following provision was also included:—

"6. *Overtime.*

For all time of duty in excess of the ordinary hours, payment shall be made at the rate of time and a half; provided that, on three week days immediately preceding Christmas, overtime may be worked and paid for at ordinary rates. Provided further that, if a shop is open for the sale of goods after the hour fixed in clause 5 for ceasing work, the minimum amount to be paid for overtime shall be time and a half with a minimum payment of 1s. 6d. per hour or 10s. whichever of these sums gives the highest amount."

By the *Shops Act*, 1925-1945 (Tas.) s. 8, it is provided that shops (with some exceptions) shall close at 6 o'clock. The effect of the provision of the determination relating to overtime is that if a shop remains open on any day after 5.45 p.m. 1s. 6d. an hour or 10s., whichever of those sums give the highest amount, must be paid to employees engaged in work to which the determination applies. This clause is not in the ordinary form of provisions for extra payment for overtime work. Ordinarily separate periods of overtime are added together for the period, e.g. a week, in respect of which wages are paid and payment is made for the total overtime

involved at the special overtime rate—which in this case is time and a half. The clause in this determination, however, provides for a minimum payment (1s. 6d. per half hour or 10s., whichever is the greater amount) upon each occasion to which the clause applies. The employees of the appellant Brownells Limited include four saleswomen to whom the determination is applicable. In respect of the quarter of an hour after 5.45 p.m. on each day when the shop is allowed to be open under the *Shops Act*, 1925-1945, these employees must be paid at least 10s., i.e. an additional sum for each employee of £2 10s. per week. It is contended that this provision fixes an hour for the closing of shops which is in conflict with the provision of the *Shops Act*, 1925-1945. It is apparent that the object of the Board was to bring about the result that the shops should close at 5.45 p.m. A provision requiring the shops so to close would in my opinion have been beyond the powers of the Board for two reasons. In the first place the statute does not in any express terms give such a power to the Board and the general provision in s. 23 XIV. of the Act authorizing the Board to determine matters pertaining to or affecting the relations of employers and employees does not enable a board to make a determination in relation to hours of trading by employers as distinct from hours of working by employees. In the second place such a provision would conflict with the *Shops Act*, 1925-1945, where the Parliament has made a specific provision dealing with this subject.

The case for the validity of the determination in respect of the challenged provision can, I think, be put most strongly in the following way—the determination does not fix any hour for the closing of shops; keeping a shop open after 5.45 p.m. would not be a breach of the determination; the determination does make it expensive to keep shops open after a particular time, but it does not, as a matter of law, operate or purport to operate as fixing an hour for the closing of shops; the Board may fix hours of work (*Wages Boards Act*, 1920-1946, s. 23 I. (*e*)) and may prescribe such extra or special payment for overtime as to the Board shall seem just: s. 23 III.; these provisions were sufficient to authorize the provisions of the determination of the Board with respect to payment for overtime; the motive of the Board in making a determination which is within its powers does not affect the validity of the determination; and therefore the determination should be held to be valid.

But if a power is conferred by statute upon a body in such terms that it appears that the power was conferred for a particular

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

Latham C.J.

purpose, the power must be exercised only for that purpose, and if it was shown that the power was exercised for a purpose which was "beyond the scope of or not justified by the instrument creating the power" (*Vatcher* v. *Paull* (1)), then such an exercise of the power will not be valid. No inquiry may be made into the motives of the Legislature in enacting a law, but where a statute confers powers upon an officer or a statutory body and either by express provision or by reason of the general character of the statute it appears that the powers were intended to be exercised only for a particular purpose, then the exercise of the powers not for such purpose but for some ulterior object will be invalid. This question was fully examined in *Arthur Yates & Co. Pty Ltd.* v. *Vegetable Seeds Committee* (2), and it was there held that subordinate bodies exercising powers conferred by statutes were bound to exercise their powers bona fide for the purposes for which the power was conferred and not otherwise (3). In the present case it is clear that the *Wages Boards Act*, 1920-1946 confers powers upon Wages Boards for the purpose of determining matters connected with the relations of employers and employees. For reasons already stated the Wages Board has no power to determine the hours of opening and closing of shops, a matter which the Legislature has taken directly into its own hands. In the present case it cannot be disputed that the Board has sought to use its powers to determine overtime rates for the purpose of bringing about the closing of shops at an hour other than that required by the Legislature in the *Shops Act*, 1925-1945. The payment of 10s. has no relation to work actually done or possibly to be done, and it cannot be regarded as a genuine provision for overtime payment for work. Questions of degree might make it difficult in some cases to determine whether a board was exercising its powers bona fide for the purpose for which the powers were conferred but in the present case there can be no doubt that the Board is, under the guise or pretence of fixing rates for overtime, seeking to impose what are in substance penalties upon employers for keeping shops open at a time when the Legislature had said that it shall be lawful to keep shops open. Accordingly, in my opinion, the power possessed by the Board has been illegitimately exercised and the provision of which the appellant complains should be held to be invalid.

The appeal should be dismissed with costs in the case of the Drapers' Wages Board. In the case of the Ironmongers' Wages

(1) (1915) A.C. 372, at p. 378.
(2) (1945) 72 C.L.R. 37.
(3) (1945) 72 C.L.R., at pp. 67-69, 72, 75, 76, 82, 83.

Board the appeal should be allowed with costs, the proviso to clause 6 of the amended determination relating to overtime should be quashed and the order nisi should be made absolute with costs.

DIXON J. These are two appeals by special leave from orders of the Supreme Court of Tasmania discharging rules nisi to quash determinations of wages boards.

The rules nisi were obtained by the appellant company under the statutory jurisdiction of the Supreme Court conferred by s. 62 of the *Wages Boards Act*, 1920-1946 (Tas.). That section provides that a person desiring to challenge or dispute a determination of a board for the illegality thereof may apply to the Supreme Court for a rule calling upon the board to show cause why such determination should not be quashed wholly or in part. A determination may not be challenged in any other manner for illegality.

Of the two determinations under attack in these proceedings one was made by the Ironmongers' Wages Board on 20th February 1947 and amended on 31st October 1947 and again on 3rd March 1948 and the other was made by the Drapers' Wages Board on 6th January 1947 and amended on 4th November 1947. In the case of each determination the validity of the proclamation establishing the wages board is impugned. But in the case of the determination of the Ironmongers' Wages Board it is also said that, even if the Board was validly erected, the Board in making the amended determination went beyond its powers. The matter in which, as it is contended, the Ironmongers' Wages Board exceeded its powers is in prescribing that if a shop is open for the sale of goods after, in effect, 5.45 p.m. on any day from Monday to Friday the minimum amount to be paid for overtime shall be at least 1s. 6d. an hour or 10s., whichever gives the higher amount. The effect of this provision, is to impose upon the appellant company, which carries on the business of a draper and sells in its shop much else besides drapery, the necessity of paying a minimum sum of 10s. to each of its employees affected by the determination of the Ironmongers' Board, if the appellant company keeps its shop open until six o'clock on ordinary trading days.

Proceedings were instituted against the appellant company to enforce this provision and in consequence there appears to have been a reconsideration of its position with reference to both determinations. As a result the two rules nisi to quash the determinations were obtained. The attack upon the validity of the proclamations establishing the respective wages boards is based upon the contention that neither is constituted in respect

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

Dixon J.

of a trade. The power to set up wages boards is conferred upon the Governor in Council by s. 11 of the *Wages Boards Act*, 1920-1946. It is a power to establish a wages board in respect of any trade. The word "trade" is defined. Section 6 says that unless the contrary intention appears "trade" means any function, process, industry, business, work, undertaking, occupation, profession, or calling, performed, carried on, or engaged in by an employer; and also includes a group of trades. The definition makes it clear that what is a trade depends, not on the kind of work done by employees, but upon the kind of business carried on by employers.

The point is not made against the validity of the Ironmongers' Wages Board or of the Drapers' Wages Board that this distinction was ignored by the proclamations setting them up. The vice which the appellant company sees in the constitution of these two Boards, although not the same in each case, depends on another consideration. That consideration is that, while professing to describe the trades for which the two Boards respectively were established in terms of the activities of employers, in neither case did the proclamation adopt a description that conformed with any business carried on in practice by employers or by any employer. In the case of the Ironmongers' Wages Board the objection is that heterogeneous selling businesses have been grouped together and that they are businesses all of which no man carried on or ever did carry on in common. In the case of the Drapers' Wages Board the objection is that, while the retail selling of certain named classes of goods has been adopted as the description of the trade for which the Board is formed, the classes of goods specified are too limited. Leading drapers in Hobart and Launceston, where the Board's determinations apply, sell these goods in association with many other wares, and in the selling of the other wares some of their employees are exclusively engaged.

It is necessary to consider these two objections separately. One proclamation sets up both Boards. It is a proclamation establishing a large number of Wages Boards at one time. They are identified by the trades for which they are respectively set up and these are enumerated in a long list under the operative words of the proclamation. The operative words state that the Governor in Council does by the proclamation "establish Wages Boards in respect of the following trades or groups of trades." As amended the subject of the Ironmongers' Wages Board is given as "Sellers of (a) Ironmongery and/or Ship Chandlery, (b) Crockery and/or Glassware, (c) Jewellery, Silverware, and/or Electroplate Goods,

(d) Fancy Goods and/or Toys, (e) Books, Stationery, Music, and/or Musical Instruments, (f) Sporting Goods, (g) Rubber Goods and/or Leather, (h) Paints, Oils, Varnishes and/or Wallpapers, (i) Coachbuilders' Hardware, (j) Motor Accessories." The application of the definition is limited to sellers of such goods within a 7-mile radius of the General Post-office at Hobart or of the Post-office at Launceston. Common experience and a mere inspection of this list of goods will suffice to make it clear that a single business would be very exceptional indeed if it covered the selling of all the items. Doubtless it is a list of classes of articles which are sold as a matter of practice in a number of distinct businesses. An examination of the list did, however, suggest that the separate items it contains, though no trader sells them all in the same business, are yet the subject of a variety of combinations, one or more with another or others, to form the stock in trade of different shops or businesses the character of which varies indefinitely. The contention of the appellant company is that in adopting such a description of the trade for which the Ironmongers' Wages Board is set up the proclamation deserts any classification of trades which could correspond with practical affairs. It is therefore not a wages board in respect of a trade. Clearly enough this would be so if the word "trade" bore its ordinary meaning when used in relation to an employer's business and if it had not been defined to include a group of trades. But the definition not only includes a group of trades; it does so after extending the natural meaning of the word "trade" so as to cover not only any industry, business or work carried on or engaged in by an employer but also any function, process, undertaking, occupation or calling performed, carried on or engaged in by an employer. It is apparent that upon any literal application of this definition it must cover a very wide field of operations carried on by employers and include many possible combinations and subdivisions of activities within that field.

In *R.* v. *Minister of Labour* (1) a case concerned with the possibility of treating the "catering trade" as something which could be specified as a trade for the purpose of the *Trade Boards Acts* of Great Britain and otherwise throwing but little light on the present question, *Scrutton*, L.J. (2), expressed his doubt whether there is such a thing as a "definite" trade and said—"The boundaries of a trade are always uncertain and need definition or specification by someone." His Lordship went on to state his opinion that the *Trade Boards Acts* had given that power of

(1) (1932) 1 K.B. 1.

(2) (1932) 1 K.B., at p. 11.

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

Dixon J.

definition or specification to the Minister with the qualification that there must be some subject matter which can be reasonably described as "a trade" before its exact limits are defined. It is at least a reasonable prima-facie interpretation of s. 11, read with the definition of trade, that it gives a discretionary power to select as the subject in respect of which a wages board is established any function, process, industry, business, work, undertaking, occupation, profession or calling performed, carried on or engaged in by an employer, and power to group two or more of them together for that purpose. It would not be unreasonable to suppose that it was left to the Governor in Council or, where he acts pursuant to a resolution of both Houses of Parliament, to the Houses to make a group of such functions, processes, industries &c. so performed &c. by an employer in any way that appeared convenient for the purposes of a particular wages board.

In opposition to this view of the provisions authorizing the establishment of wages boards a number of considerations is marshalled which, it is said, shows that the discretion of the body erecting a wages board is limited to choosing either a function, process, industry, business, work, undertaking, profession or calling which in actual practice is found to be performed, carried on or engaged in by one or more employers, or a group of such functions, processes &c. which it is found in actual practice have been combined or grouped together by some employer or employers so that the combination or group forms the trade or business or the trades or businesses which he or they in fact carry on. I presume that where the wages board is established for a specified place or territory and not for the whole State the contention means that the trade or business so constituted must be found to exist in that place or territory.

The first consideration relied upon is that the trade is defined by reference to what an employer does and not the work done by the man he employs. That of course is so. But it is said to point to the conclusion that the criterion, not only of what is a function, process &c., but of what is a group, must be determined by forms of business in fact found to be carried on by traders. Perhaps the use in the definition of "wages board" (s. 6) of the expression "wages board established in respect of the particular trade" may be laid hold of as an additional indication. Secondly, it is contended that the word "group" is not a synonym for "number" but connotes common characteristics of some kind in the units forming the group. That is to say there must be some kind of common relation: some similarity or other connection:

some attribute giving them a unity as a class. Thirdly, it is said that other provisions of the *Wages Boards Act*, 1920-1946, notably that dealing with the qualifications of the members (s. 13) make it necessary to limit a group of trades to a group forming some existing business or businesses actually carried on as single ventures. Fourthly, it may be said that the purpose of the provisions is to have one determination for a known trade described in broad terms and one that would apply to every business within the description and alone apply to it. It was urged that it was wrong to attempt to define selling businesses by reference to the classes of goods forming the stock-in-trade; what the statute intended was that general classes of business should be named by the common descriptions current, as butchers, bakers, drapers and so on. No doubt these considerations must be weighed together cumulatively. But it is possible to discuss them only one by one. As to the first, it is enough to say that it appears to me to involve a quite unwarranted step. It is of course true that the common understanding of what is a trade carried on by an employer arises from the practice pursued in trade or business; and that is true even when trade is specially defined to mean function, process, industry, business, work, undertaking, occupation, profession or calling performed, carried on or engaged in by an employer. But it is an unwarranted step to infer from this that when the definition goes on to include a group of trades it means that it must be a group formed by some actual employer for the purpose of his business. The words "by an employer" do not mean by a specific employer. It means by employers considered as a class as distinguished from employees or workmen following a craft or pursuit. But even if it were otherwise it would be no ground for adding to the notions, whatever they are, contained in the word "group" the further requirement that it must be a group constituting an existing or known business or businesses carried on by an actual employer or actual employers. The subsidiary point open on the definition of (wages) "board" appears to me to be deprived of effect by the carefulness of the draftsman. For after the words "of the particular trade" he has placed a parenthesis in brackets—"(as herein defined)." That makes "particular trade" include a group of trades (as defined).

As to the second consideration relied upon, it is enough to say it seeks to extract more from the difference between a "group" and a "collection" or a "number" of things than common usage will justify. It is true that the subject is not concerned with the names of physical things standing in proximity and for that reason

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

Dixon J.

forming a " group," but with a more abstract word " trade " defined by a series of connotative words and phrases. But if the business activities of employers answer a description given in the definition it seems to me that those activities must possess all the qualifications demanded for membership of a group, and that to look for some further common property or attribute is to strive after a greater degree of definition and precision than the word " group " is capable of conveying and than was ever intended.

The third consideration depends upon the form in which s. 13 (2) of the *Wages Boards Act*, 1920-1946, is framed. Sub-section (1) of s. 13 provides that one-half of the representative members of every board shall be appointed as representatives of employers and one-half as representatives of employees. Sub-section (2) then requires that the representatives of the employers should be employers engaged in good faith in the trade who have had at least twelve months' actual experience in such trade or be managing experts who have had the like experience.

It is contended that this provision means that a representative employer must have exercised the trade for twelve months. This means that to exercise " the trade " with respect to which a board is appointed he must have carried on a business covering the whole of the trade as defined in the proclamation establishing the wages board. Accordingly, so it is said, a group of trades cannot be adopted in such a proclamation unless it is a group which at least one employer has constituted as the basis of his business. It is probable that in framing sub-s. 2 no thought was given to the question whether the experience of a representative of the employers must extend over the field of business in respect of which the wages board is established or it is enough if he obtained it by engaging in some part of that field. But the expression " engage in the trade " is very indefinite and when, in obedience to the definition of " trade," it is re-written as " engage in the group of trades " it seems to me to be capable of application to a man carrying on any business falling within the group. I do not think that anything can be got out of the form of expression which would authorize an inference that the grouping of the trades must be one corresponding with a grouping found to exist in practice in one or more undivided businesses.

The fourth argument stated above seems to me to be no more than a speculative rationalization of a policy attributed to the statute as a result of the inference which it is sought to deduce from the three earlier arguments.

I am therefore of opinion that it was within the power of the Governor in Council to group " trades " in the manner appearing in so much of the amended proclamation as sets up the Ironmongers' Wages Board. I do not say that the discretion to group " trades " for the purposes of wages boards has no bounds. But I attach little weight to the arguments from the possibility of abuse. Very wide powers indeed are given to the Governor in Council by s. 20 and by s. 40 of the *Wages Boards Act*, 1920-1946, and it is plain from the whole tenor of the Act that it was intended that much should depend on the judgment and wisdom of the Governor in Council.

It is necessary now to turn to the attack upon the setting up of the Drapers' Wages Board. It was established by the same proclamation. But the trade or groups of trades in respect of which this wages board was established are described as " retail sellers of any one or more of the following : (a) General Drapery ; (b) Furnishing Drapery : (c) Piece Goods ; (d) Haberdashery ; (e) Mercery ; (f) Wearing Apparel ; (g) Footwear." They must be retail sellers in areas contained within a seven-mile radius of the General Post-office, Hobart, and within a seven-mile radius of the Post-office, Launceston. It appears from affidavits that the drapery trade as in fact carried on in Hobart and Launceston includes the selling of other classes of goods in addition to those enumerated. Leading drapers as part of their business engage in selling handbags, travel goods, carpets, linoleum, imitation jewellery, perfumes, toilet accessories, ornamental articles, fancy goods and other miscellaneous small wares and umbrellas. The appellants and some other leading drapers employ some employees exclusively in the sale of things contained in these additional classes.

The objection to so much of the proclamation as established the Drapers' Wages Board is that in view of the foregoing it is not sufficiently extensive in its list of goods to cover the whole of a draper's business. For this reason it is said to be invalid through its failure to correspond with the drapery trade as carried on in practice. It is not a question of grouping trades but of failure to adopt a definition embracing the whole of one trade. In my opinion this objection is met by the earlier part of the definition of " trade " in s. 6. Section 11 read with that definition leaves it open to the Governor in Council to adopt as the trade for which the Wages Board is established any function, process, industry, business, work, undertaking and so on, performed, carried on or

H. C. OF A. 1950.

BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD.

Dixon J.

engaged in by an employer. This must give room for much discretion in the selection of the activities of employers for which the board is to be established. But in any case the fact that leading drapers have businesses wider in scope than the description of retail trade assigned to the board is quite consistent with the existence of many other drapery businesses which are not materially wider in scope than the retail trade so described.

For the foregoing reasons I am of opinion that the objections fail to the validity of so much of the amended proclamation as sets up either of the two wages boards.

It remains to deal with the objection to the provision contained in the actual determination made by the Ironmongers' Wages Board on 20th February 1947 as subsequently amended. The determination, in compliance with the proclamation constituting the Board, is expressed to apply to the areas contained in a seven-mile radius of the General Post-office at Hobart and of the Post-office at Launceston. The provision attacked is that requiring payment of a minimum for overtime if a shop is kept open after a quarter to six in the evening. The attack is upon the ground that the purpose of the provision apparent *ex facie* is really to regulate the hours of business for shops and that that is ultra vires of the Wages Board. A wages board is authorized by the Act not only to determine the minimum rates of pay but also the number of working hours during any specified period for which such rates shall be paid (s. 23 I. and II.). In determining the minimum rates it may take into consideration the hour of the day or night when the work is to be done and fix different rates accordingly (s. 23 I. (*e*)). Further a board may prescribe such extra or special payments, either by way of payment for overtime or for time occupied in travelling to and from the place of work or for work done during any specified hours or for such other matters as to the board may seem just (s. 23 III.). The hours within which shops may be open for trading form a matter dealt with by the *Shops Act*, 1925-1945 (Tas.). The determination as amended deals with " hours " and " overtime " in two separate paragraphs. The material part of that dealing with " hours " prescribes as the maximum number of working hours for which the minimum rates of pay are to be paid forty hours per week to be worked between the hours of 8.30 a.m. and 5.45 p.m., Monday to Friday inclusive. The paragraph relating to " overtime " provides for the payment of time and a half for all time of duty in excess of the ordinary hours. There is then a proviso that if a shop is open for the sale of goods after the hour fixed in the clause relating to " hours " for ceasing work, the

minimum amount to be paid for overtime shall be time and a half with a minimum payment of 1s. 6d. per hour or 10s., whichever of these sums gives the higher amount. The appellant company attacks the validity of this proviso as an attempt to regulate the hours for closing shops in which there are employees governed by the determination.

Before the question is considered there are some matters concerning the meaning of the clause relating to overtime which must be disposed of. In the first place, although the clause does not expressly say so, it may be taken that the clause meant that, subject to the proviso, overtime shall be paid at the rate of time and a half for work done in Hobart by employees outside the daily spread of hours specified, as for example in Hobart outside the hours between 8 a.m. and 5.45 p.m., Monday and Friday, although the maximum number of working hours per week, viz. forty hours, had not been exceeded. It may also be taken that the clause is meant to apply whether the employee works in the employer's shop or elsewhere, as for instance if he is engaged in the despatch of goods or in office work in connection with the shop. The condition upon which the proviso depends is expressed simply in the words, " if a shop is open for the sale of goods after the hour fixed " &c. It does not in terms require that the employee should be engaged in the sale of goods in the shop or even that his work should be in or in connection with the shop. Probably the proviso is intended to cover the whole of the staff employed for a business of which, so to speak, the shop is the centre, whether their work takes them into the shop or not. It would, I think, be wrong to imply any greater restriction upon the operation of the proviso.

The proviso describes the hours fixed by the previous clause, the clause dealing with " hours," as the " hours fixed for ceasing work." This is not an accurate description. For, properly considered, they are hours governing not the cessation of work but the calculation of the time worked for which overtime rates must be paid. The form of expression, however, is probably not important, even if it does tend somewhat to strengthen the impression that the proviso is less concerned with remuneration for overtime than with ensuring that work, and therefore trading, stops at the prescribed hours. What is important is that the clause, having fixed a rate of overtime, proceeds by the proviso to fix minimum payments for that overtime, if and only if the shop remains open beyond the specified times. Further, it is not without importance that it fixes them at alternative amounts capable of operating as a heavy charge upon a shop-keeper who exceeds by

H. C. OF A. 1950. BROWNELLS LTD. v. IRONMONGERS' WAGES BOARD. Dixon J.

say fifteen minutes the specified hour. Two things thus appear clearly upon the face of the proviso. One is that rates are fixed which will operate as a deterrent. The other is that the thing it would operate to deter the employer from doing is, not requiring the employee to work overtime *simpliciter*, but keeping his shop open in so doing. It is not a question of remuneration or reward for working overtime. That is dealt with by fixing time and a half. It is keeping open the shop.

Now there can be no doubt that the power of the Wages Board extends to fixing a special rate for work after a fixed time of day, such as 5. 45 p.m. Nor do I think that there can be much doubt that among the lawful purposes of fixing a special rate is that of reducing the probability of the employee being required to work in the specified circumstances or during the specified hours except when a real necessity arises. But that is all a question directly affecting the conditions of employment. The further question of the hours within which shops may trade is a matter which no doubt, unless regulated, would or might produce consequences which would have to be taken into account in the regulation of conditions of employment. But the regulation of the hours of trading is not a matter committed to wages boards, though the regulation of conditions of employment is committed to them, at all events to an important extent. The regulation of the hours of trading is a matter which the Legislature has itself directly undertaken by the *Shops Act*, 1925-1945.

In purporting to impose a burdensome rate of overtime payment contingently upon the shop-keeper failing to close his shop at specified hours the proviso appears to me to go beyond the true scope of the board's power to provide overtime rates and extra or special payments and, under cover of doing so, to attempt to regulate something else, namely the closing hours of shops. It was suggested that the proviso might be justified under s. 23 XIV. of the *Wages Boards Act*, 1920-1946 as the determination of a matter pertaining to or affecting the relations of employers and employees. Although by a burdensome imposition it seeks to regulate the trading hours of shops, it is not easy to say that it " determines " such a matter. But, be that as it may, in my opinion the matter does not form part of or an element in such relations so as to pertain to them, and the consequences which may indirectly be produced by the limitation of hours of trading do not satisfy the meaning the word " affecting " bears in this context.

I think that the proviso is beyond the powers conferred upon a wages board.

It is, in my opinion, invalid.

The analysis which has already been made of the clause relating to overtime seems to me to carry with it the conclusion that the proviso is severable from the general provision dealing with overtime. Section 62 of the *Wages Boards Act*, 1920-1946 authorizes the Supreme Court to quash a determination in part as well as wholly.

I think that an order should be made quashing the proviso to the clause relating to overtime, that is to clause 6 of the determination as amended. In the case of the Ironmongers' Wages Board I would allow the appeal with costs and discharge the order of the Supreme Court made on 11th November, 1949. In lieu thereof I would order that the rule be made absolute with costs and that the proviso to clause 6 of the determination of the Ironmongers' Wages Board dated 20th February, 1947 as varied or amended by the determination dated 31st October, 1947 and the determination dated 3rd March, 1948 be quashed.

In the case of the Drapers' Wages Board I would dismiss the appeal with costs.

FULLAGAR J. I agree.

Brownells Limited v. *The Ironmongers' Wages Board. Appeal allowed with costs. Order of Supreme Court discharged. Proviso to clause* 6 *of amended determination dated 3rd March,* 1948 *quashed. Order absolute with costs.*

Brownells Limited v. *The Drapers' Wages Board. Appeal dismissed with costs.*

Solicitors for the appellant: *Burbury, Dixon & Wicks.*

Solicitors for each respondent: *M. P. Crisp,* Crown Solicitor for the State of Tasmania.

J. R. R.