principle expressed by Lord *Wright* in *Rowell* v. *Pratt* (1) and stronger than the words in s. 17 (2) of the *Agricultural Marketing Act* 1931 (Imp.) (21 & 22 Geo. V. c. 42) there under consideration, because prohibition is directed to the court as well as to the person who would be infringing the section. In its literal sense sub-s. (3) is a direct prohibition to the court to require that that evidence be produced. In sub-s. (2) an officer is bound not to make any disclosure to any person whatsoever. Sub-section (2) is directed to an officer, prohibiting any disclosure to any person whatsoever. The prohibition applies not only to direct disclosures but also to indirect disclosures. The giving of such evidence by an officer in a court would, unless he were protected by an order of the court, be a disclosure not only to the court itself but also to all persons, members of the public in general, who may be in the court in their right of being present therein. The words " shall not be required " are directed to the court, that is, that the court is not to require the witness to divulge the information. Sub-section (2) does not refer to the court as a person. It does not refer to disclosure in court so far as the court is concerned, but disclosure in the court would be disclosure to the public generally. Sub-sections (2) and (3) together make such evidence inadmissible. The matter is beyond the stage where the officer gave the evidence for the purpose of carrying into effect the provisions of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952. These are proceedings for contempt of court, which is not in any way related to the provisions of that Act. The matter complained of is the breach of the undertaking; not the disposal of the assets. There is not any necessary connection between these proceedings and the Bankruptcy Court or the administration in bankruptcy. A statutory provision corresponding to s. 16 was discussed in *Honeychurch* v. *Honeychurch* (2). The effect of sub-ss. (2) and (3) of s. 16 is to absolutely exclude the evidence of this officer unless it is admissible as being necessary for the purpose of carrying into effect the provisions of the Act. These proceedings are not necessarily coupled with the bankruptcy, and do not, in the particular circumstances, come within the principles of carrying into effect the provisions of the said Act. If that evidence were excluded then, it is submitted, on the reasoning of the Chief Justice as appears in his reasons for judgment, this Court could not be satisfied that his Honour, as a primary tribunal of fact, would have been prepared to make the order. The orders made

(1) (1938) A.C. 101, at pp. 104-106. (2) (1943) S.A.S.R. 31.

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by the Chief Justice should be set aside and the matter remitted for re-hearing.

E. J. Moynahan, for the respondent-applicant was not called upon to argue.

The following judgments were delivered :—

McTIERNAN J. In my opinion this appeal should be dismissed.

The principal question is the construction of s. 16 of the *Income Tax and Social Services Contribution Act* 1936-1952. I agree with the construction which the Chief Justice placed upon the section. That is expressed in the judgment which his Honour delivered at the hearing of the motion, after the argument upon the objection, founded upon s. 16, to the admission of Mr. Tobin's affidavit. He was an " officer " within the meaning of s. 16 of the Act. Having regard to the proceedings out of which the motion arose, the exception in sub-s. (2) of s. 16 applied to the affidavit, because the furnishing of the information which it contained for use as evidence in the motion, was connected with the office in which Mr. Tobin was employed by the Commonwealth. The furnishing of this information for use as evidence in the motion was done in performance of Mr. Tobin's duty as an officer. The question then arises whether the admission of the affidavit was prohibited by sub-s. (3). Mr. Tobin was not required to give the evidence contained in the affidavit. There is nothing in sub-s. (3) which made the affidavit inadmissible. The sub-section excludes the obligation of an officer to produce certain documents and give certain evidence, except in the circumstances which it mentions. This is as far, as *Rich* J. said in delivering the judgment of the Court in *O'Flaherty* v. *McBride* (1) as the sub-section goes. If an officer is not " required " to give evidence there is nothing in the sub-section which excludes his evidence. I am of opinion that the affidavit was rightly admitted in evidence.

The next question is whether the finding that there was a breach of the undertaking was correct. When the evidence provided by Mr. Tobin's affidavit is taken into consideration there can be no doubt that the Chief Justice was well justified in arriving at the conclusion that there was a breach of the undertaking.

For these reasons I think the appeal should be dismissed.

WILLIAMS J. I agree. Mr. *Gilmour's* main submission, as I understand it, is that Mr. Tobin's affidavit is not admissible because there arises from s. 16, sub-s. (3), of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952, which provides

(1) (1930) 28 C.L.R., at p. 286.

that an officer shall not be required to produce in court any return, &c., or to divulge or communicate to any court any matter or thing coming under his notice in the performance of his duty as an officer except &c. a necessary implication that he is prohibited from doing those things.

In my opinion there is no justification for making such an implication, or for giving the sub-section a wider meaning than its express terms. In express terms the sub-section only protects an officer from being required to do those things, it does not forbid his doing them. The difference between compellability and competency to give evidence is well known and the sub-section is concerned only with compellability and not with competency.

I agree that his Honour the Chief Justice rightly admitted Tobin's affidavit and it is not contested that, on the evidence as a whole, that affidavit forming part of it, his Honour was justified in coming to the conclusion to which he came.

KITTO J. I agree. I may say that I am sure the careful argument to which we have listened from Mr. *Gilmour* has placed before us every consideration which could fairly be urged against the conclusion to which his Honour the Chief Justice came. However, I am satisfied that the conclusion which his Honour has expressed is correct. I agree with the reasons which he gave for it.

Appeal dismissed.

Solicitors for the appellants, *Kenneth H. Mitchell*, Brisbane.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

ABERDARE COLLIERIES PROPRIETARY LIMITED AND ANOTHER . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . . } DEFENDANTS.

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SYDNEY, 1951, *Dec.* 13, 14.

MELBOURNE, 1952, *March* 17.

Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Constitutional Law (Cth.)—Industrial Arbitration—Defence power—War-time legislation and regulations—Validity—Coal industry—Reference boards constituted under regulations—Awards, orders, determinations and decisions—Continuance in force—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*), (*xxxv.*) *—Defence* (*Transitional Provisions*) *Act* 1946-1951 (*No.* 77 *of* 1946—*No.* 43 *of* 1951), *s.* 8 (3)—*Defence* (*Transitional Provisions*) *Act* 1950-1951 (*No.* 78 *of* 1950—*No.* 43 *of* 1951), *s.* 4—*Coal Industry Act* 1946-1951 (*No.* 40 *of* 1946 —*No.* 61 *of* 1951), *ss.* 3 (2), 4—*Coal Industry* (*Amendment*) *Act* 1951 (*N.S.W.*) (*No.* 47 *of* 1951), *s.* 3 (2)—*National Security* (*Coal Mining Industry Employment*) *Regulations* (*S.R.* 1941 *No.* 25—*S.R.* 1950 *No.* 25).

The *Defence* (*Transitional Provisions*) *Act* 1946-1951 and the *Defence* (*Transitional Provisions*) *Act* 1950-1951 to the extent to which they purport to continue in force the *National Security* (*Coal Mining Industry Employment*) *Regulations* are beyond the power of the Commonwealth Parliament and are void.

Section 3 (2) of the *Coal Industry Act* 1951 is as follows:—"An award, order or determination made or given, or purporting to have been made or given, under the National Security (Coal Mining Industry Employment) Regulations or otherwise in operation or purporting to be in operation, by virtue of those Regulations, and an agreement in writing filed in the Commonwealth Court of Conciliation and Arbitration under those Regulations, being an award, order, determination or agreement in force, or purporting to be in force, immediately before the commencement of this section, shall continue in force until revoked by competent authority, and, if varied by competent authority, as so varied."

Held that this sub-section to the extent to which it purported to authorize the continuance in Queensland of awards orders determinations and decisions made under the *National Security* (*Coal Mining Industry Employment*) *Regulations* was beyond the power of the Commonwealth and was void.

DEMURRER.

Aberdare Collieries Pty. Ltd. and Blackheath Collieries Pty. Ltd., each of which carried on business as a colliery proprietor and was the owner and occupier of a coal mine or coal mines in the State of Queensland, brought an action in the High Court against Harold Edward Holt, the Minister of State for Labour and National Service of the Commonwealth and who as such was the Minister responsible for the administration of the *National Security* (*Coal Mining Industry Employment*) *Regulations*; Francis Heath Gallagher the person constituting the Coal Industry Tribunal duly appointed in pursuance of the *Coal Industry Act* 1946-1951 (Cth.) and who as such was the chairman of the Central Reference Board constituted by Part II of the said regulations: and James Murray, the chairman of the Local Reference Board for the State of Queensland established under Part III of those regulations, in which they claimed the following declarations:—1. that the *Defence* (*Transitional Provisions*) *Act* 1946-1950 in so far as it purported to continue in force the *National Security* (*Coal Mining Industry Employment*) *Regulations* was beyond the powers of the Parliament of the Commonwealth and void; 2. that the said Act in so far as it purported to continue in force Part II of those regulations was beyond the powers of the Parliament of the Commonwealth and void; 3. that the said Act in so far as it purported to continue in force Part III of those regulations was beyond the powers of the Parliament of the Commonwealth and void; 4. that all current awards and orders made under the said regulations by the Central Reference Board were void and of no effect; and 5. that all current decisions made under those regulations by the Local Reference Board for the State of Queensland were void and of no effect.

After stating particulars as to the parties the statement of claim proceeded substantially as follows:—

(6) The *National Security* (*Coal Mining Industry Employment*) *Regulations* being Statutory Rules No. 25 of 1941, as amended from time to time, were made under the *National Security Act* 1939-1946 and purport to be continued in force by the *Defence* (*Transitional Provisions*) *Act* 1946-1950. Leave was craved to refer to those regulations as if fully set out.

(7) The Central Reference Board, acting under the powers purporting to be conferred on it by those regulations, had made awards and orders purporting to bind named employers in the coal mining industry in the States of New South Wales, Victoria, Queensland and Tasmania, including the plaintiffs, in respect of the wages and terms and conditions of employment of their employees other

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than members of the Australian Coal and Shale Employees Federation, and a number of such awards and orders purported still to be in force.

(8) The Local Reference Board for the State of Queensland, acting under the powers purporting to be conferred on it by those regulations, had given decisions purporting to bind named employers in the coal mining industry in the State of Queensland, including the plaintiffs, in respect of matters falling within sub-reg. (2) of reg. 11 of those regulations, and a number of such decisions purported still to be in force.

(9) The *Defence (Transitional Provisions) Act* 1946-1950, in so far as it purported to continue in force the *National Security (Coal Mining Industry Employment) Regulations*, was beyond the powers of the Parliament of the Commonwealth and void.

Each of the defendants demurred to the whole of the statement of claim on the grounds, *inter alia*, (i) that the *Defence (Transitional Provisions) Act* 1946-1950, including such parts of it as purported to continue in force the whole or any part of the *National Security (Coal Mining Industry Employment) Regulations* was a valid and effective exercise of the legislative powers of the Parliament of the Commonwealth; and (ii) that the current awards, orders and decisions mentioned in the statement of claim were and each of them was authorized by those regulations and were and each of them was valid and effective.

On 7th December 1942, assent was given to Act No. 43 of 1951, by which amendments were made to the *Defence (Transitional Provisions) Act* 1946-1950 and the *Defence (Transitional Provisions) Act* 1950. The short title of each of these Acts thereupon became the *Defence (Transitional Provisions) Act* 1946-1951, and the *Defence (Transitional Provisions) Act* 1950-1951.

On 11th December 1951 assent was given to Act No. 61 of 1951, by which amendments were made to the *Coal Industry Act* 1946 (Cth.) and on the same day assent was given to Act No. 47 of 1951 (N.S.W.) by which the *Coal Industry Act* 1946 (N.S.W.) was amended. Each of these last two Acts was proclaimed to come into force on 12th December 1951.

Further relevant statutory provisions are sufficiently set out in the judgment hereunder.

P. D. Phillips K.C. (with him *B. B. Riley*), for the defendants, by consent, first addressed the Court. From 1951 onwards the jurisdiction to deal with the whole of the coal-mining industry rests on the arbitration power as to inter-State disputes, and on

the State sovereign authority as to State disputes, the State authority investing the Federal tribunal with power to deal with those matters within the State. In so far as the *National Security* (*Coal Mining Industry Employment*) *Regulations* give validity to determinations, the *Defence* (*Transitional Provisions*) *Act* 1946-1950, which purports to continue in force those regulations, or Parts II or III thereof, is not void. The Act having been effective to give validity to the determinations, continues to be effective for that purpose even though the defence power, and therefore the Act, may shrink so as no longer to sustain the tribunals in their terms. Independently of that Act, the *Coal Industry Act* 1951 is a valid exercise of Commonwealth power, and is an additional answer. Alternatively, this last Act is effective to keep in existence the decisions of the Local Reference Boards which were within the Federal arbitration power. The Central Reference Board now has the powers of both the Arbitration Court and the coal commissioner, and the general power to consider and determine any industrial dispute or matter of which it has cognizance. The expression " until a new award " in s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1951 does not mean until a new award by the board has been made. A review of the legislation shows that the Commonwealth Act vested the powers so far as it could under its constitutional power ; the State Act vested powers so far as it could. The Commonwealth Act prescribed both sets of powers, inter-State powers and State powers, but did not claim to invest the tribunal with the State powers except so far as the Constitution permitted that to be done. The whole scheme envisaged a comprehensive plan for regulating the whole, irrespective of State boundaries, extending beyond State boundaries and operating within States, with a system of devolution to local authorities. The whole scheme was a national scheme, with local devolution irrespective of State boundaries. As to the problem of awards that have been made under the defence power when the defence power is no longer wide enough, there is always a double question : what is the legislative provision which is alleged no longer to operate by reason of the shrinkage, and, what are the surrounding facts and circumstances relative to a consideration whether that provision has ceased to be law because of the shrinkage. If the State Parliaments did nothing the award would continue to bind the parties until some competent law affected it. If there had not been any *Defence* (*Transitional Provisions*) *Act* at all ; if the *National Security Act* had come to an end and nothing more had been done, it was within the power of the Commonwealth Parliament originally to authorize

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the making of regulations which would authorize the making of an award which would be expressed to continue in operation until varied. It would have indefinite continuity subject to the provision that it could be varied or terminated. Controverting the proposition that the regulations fail because the Act expires and they cease to be valid, and the tribunal ceases to be valid, it is only true necessarily that, in those circumstances, all the awards made thereunder must also cease. The constituting in 1943 of a tribunal and authorizing it to make awards—which awards, though to be for a specified period, were to continue after the termination of that period until varied—was within the defence power at that time. All awards which were valid when made are still valid for those reasons. They operated of their own force ; they had legal effect. The first *Defence (Transitional Provisions) Act* (No. 77 of 1946), by s. 6 (1), (2), continued the tribunal and gave statutory force to the determinations then existing. In so far as arbitral tribunals were given power to settle inter-State industrial disputes, the regulations were a valid law after 1st January 1947, under the arbitration power, and determinations made by the authorities, in the settlement of inter-State disputes, after that date, were valid. In so far as they dealt with something other than inter-State disputes and were continued after 1st January 1947, they were validly continued for some period later than that date. For some time after that date it was still competent for the Commonwealth Parliament to keep in existence and working the Central Reference Board. Determinations made by it while a validly constituted tribunal were valid when made. Section 8 (1) which provided that determinations of the Central Reference Board were valid, was a legitimate exercise of the defence power. It was within the defence transition power that determinations should be deemed to continue to operate according to their tenor until revoked by competent authority which expression includes an authority set up by a State. The Commonwealth is not limited to a fixed time in transition Acts, and, as on 1st January 1947, it was competent for that Parliament to provide that the then subsisting determinations should continue. A characteristic feature of the content of the transitional defence power is that *a priori* its nature cannot be defined. It is relative to the circumstances with which it deals (*R.* v. *Foster* ; *Ex parte Rural Bank of N.S.W.* (1)).

[DIXON J. referred to *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2).]

(1) (1949) 79 C.L.R. 43, at p. 84.

(2) (1920) 28 C.L.R. 209, at pp. 222-233.

The broad question raised upon the demurrer is that once the regulations fall all awards and determinations go. If the *Coal Industry Act* 1951 be taken in so far as it continues the determinations or some of them it is valid, even though it be invalid in continuing a tribunal. Some of the awards must be valid on the very narrowest view of available constitutional powers ; to say in respect of them the Commonwealth power under s. 51 (xxxv.) at all material times has authorized them, has given the force of law to awards made, and justifies the continuance of awards when validly made until revoked by competent authority. It cannot be said that those awards fall merely because the Coal Mining Industry Employment Regulations have become invalid. The practical way to deal with the matter is to uphold the demurrer, deny the allegation that all determinations are invalid, and leave the problem to be solved by the selection, if desired, of a particular determination and test it on the ground of validity or otherwise, that it could never be continued under the arbitration power, and raising the question of being justified under the defence power. If the Central Reference Board had been confined to making awards in inter-State disputes in the coal-mining industry it would have been a valid enactment under s. 51 (xxxv.) notwithstanding that it was a regulation made under the *National Security Act* (*Johnston Fear & Kingham & the Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1)). What is to the point is : was the law when made, including statutory regulations, a law with respect to the subject matter ? The shrinkage of power takes place, not in the abstract as it were, it shrinks so as to cease to provide the constitutional basis for giving legal force to some things, but not so as to cease to provide the legal strength for some other things. That is to say, it shrinks up so that it no longer justifies the tribunal, but does not cease as to the determinations. On the true construction of s. 3 of the *Coal Industry Act* 1951 (Cth.), Parliament faced the situation that there were awards, some of which might be good, and some of which might no longer be good, only purporting to be effective but no longer so. Section 3 (2) was intended to, and does, mean that all those awards, whether before 12th December 1951 they were valid or not, because they purported to be regulating the industry and the relations of the parties to it, and because they had come into existence because of the bodies created under war-time legislation, and had been acted upon by the authorities and were apparently effective, that it was within the defence transition power to give

(1) (1943) 67 C.L.R. 314.

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temporary validity to those regulations until they were revoked or varied by a competent authority. That was a war-created situation of great importance. In its terms without qualification that was a valid law, and although it was 1951, a long time after the cessation of hostilities, still there was that much of the defence transitional power which was faced with that situation of a multitude of complicated regulations, some, perhaps, of indubitable validity, some of doubtful validity, and some, perhaps, of no validity at all, and all purporting to make these regulations, and hitherto acted upon. Section 3 (2) in its terms is a valid exercise of the Commonwealth power to deal with a situation of fact. It is not proper to limit "competent authority" to the tribunal referred to in the Act. Section 3 (2) is a valid enactment and has the effect of saving all the awards and determinations until varied or revoked by a competent authority which, in New South Wales, is the tribunal. In Queensland, Victoria and Tasmania, it is whatever authority is competent under the State law or may be made so by its legislation. If that submission be unacceptable, then some of the awards were valid when made and have at all times been valid under a law which can be justified under s. 51 (xxxv.), and it was within the power given by s. 51 (xxxv.) to provide that they should continue until varied or revoked by competent authority, and if some of them are so valid the demurrer should be allowed. Alternatively, it is clear that some of the determinations are valid because at all times they were valid under the arbitration power and the demurrer should be allowed, or, alternatively, that some of the determinations are valid under the general constitutional power without recourse to the statutes, and if some of them are valid then on that basis the demurrer should be allowed. If either of the two latter views be the true one, and not the operation of s. 3 (2) of the *Coal Industry Act* 1951 (Cth.), then the demurrer should be allowed and the parties left to attack a particular award which was either not valid when made, and therefore no longer capable of continuance, or valid when made but not capable of continuance by express Commonwealth statute because of its nature, or valid when made but expiring because the constitutional basis had shrunk. If the view based on s. 3 (2) be rejected, it is essential, in the consideration of any particular award, to have it, its content, the nature of the matter which it settled, available to the tribunal in order to determine the legal basis, and to ascertain whether it had been effectively continued or not.

B. P. Macfarlan, for the plaintiffs. The Coal Mining Industry Employment regulations could only be valid if based on the defence

power. That power is not now sufficient to support them. The expression " competent authority " as used in s. 8 (3) of the *Defence (Transitional Provisions) Act* 1946, as amended, is not capable of referring to any State authority ; it refers to the authorities in the regulations which had been made under the *National Security Act* and which were statutorily continued by s. 6 of the *Defence (Transitional Provisions) Act*. The operation of s. 6 (1) of that Act is merely to continue the regulations as if they were part of the Act ; they were re-enacted by the operation of the Act and nothing in s. 6 (1) would operate to continue any rules, awards, orders or determinations made under those regulations. Section 8 (3) deals with awards, orders and determinations which had been made under the regulations which were in force by reason of their enactment or notification under the *National Security Act* but which were re-enacted statutorily with the authority of the 1946 Act pursuant to s. 6 (1). The regulations having been continued, the awards and determinations were also continued. The " competent authority " there referred to is a Federal authority and is those authorities which are specified in the various regulations which were statutorily re-enacted by s. 6 (1). There was not any power to revoke those regulations. The regulations really went forward from 1946 as part of the 1946 Act itself and could not be revoked by the Governor-General unless an authority were given. Similarly, the awards, determinations and orders went forward as part of the Act itself in s. 8 (3) and to ensure that they might not be a fixture for the future the power of revocation was given. Although sub-s. (3) has a general application it has a limited operation. That sub-section does not deal as a substantive point with the continuation of orders, awards and determinations of tribunals which have ceased to exist but deals as a complementary part of s. 6 which provides for the continuance of tribunals and the award-making power itself. The true operation of sub-s. (3) is side by side with the intention to continue the tribunals and the award-making power. Sub-section (1) of s. 6 and sub-s. (3) of s. 8 should be viewed as two parts of the one scheme by the legislature in its intention to continue the regulations, the authorities and the awards made under it. The one test to be applied in this case is whether the defence power is strong enough, and wide enough, to continue all the regulations, including the setting up of the tribunal, the making of the awards and the provision for their revocation in the future. The regulations have not as their purpose the settling back of ex-service personnel into the coal-mining industry, making provision in the industry for such personnel,

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for their dependents, or for setting up or setting in order any problem created by the war. It is not denied that ex-service personnel must now be settled, but the urgency which supported the regulations was the war, and with the passing of the war, prima facie, it is to be expected that those conditions which are not complicated by any particular factor related to defence, other than that there should be peace in industry, should be reverted to as soon as possible. There is a great distinction between those regulations and the Economic Organization Regulations upheld in *Hume* v. *Higgins* (1), which were regulations of a general application, dealing with a re-adjustment of the whole community as a result of the consequences of the war. These regulations, although they deal perhaps with a large class, deal with a limited class of people which is the same class as it was before, during and after the war. It is not complicated by the return of persons to or from its ranks or any other particular problems related to the war other than the urgency of determining disputes as early as possible. That being so, the machinery and legislative power being available in September 1945 to deal with these matters in the way in which under the Federal system of government they had been dealt with before the war, the defence power was not strong enough to support these regulations. The object of the gradual contraction of the defence power is to enable an orderly restoration to the conditions of peace, having regard to the particular regulations before the Court and the particular subject matter dealt with by those regulations. From the nature of these regulations and the powers they give, an extension of the period beyond a very close point of time from the cessation of hostilities is likely, in the nature of this subject-matter, to increase the complexities of a restoration to the conditions prevailing before 1939, rather than to diminish them. Since 1945 the various tribunals constituted by the regulations have been functioning, *inter alia*, making variations of the various awards, orders and determinations which were made during the war period, and also additional awards which can only tend to increase the complexity of the restoration. The jurisdiction which is exercised by the various bodies under these regulations is the powers in relation to the Central Reference Board given by reg. 8 in relation to matters of which it has cognizance; in relation to the Local Reference Boards also in respect of matters of which they have cognizance. Each of those bodies has the powers of the Court or a conciliation commissioner under the *Industrial Peace Regulations* and whether or not the Court would

(1) (1949) 78 C.L.R. 116.

hold that these last regulations are still in force as a matter of constitutionality, as a matter of referential legislation, for the purpose of testing these regulations, their provisions are deemed to be incorporated.

[DIXON J. referred to *Australian Railways Union* v. *Victorian Railways Commissioners* (1).]

The decision in *Pidoto* v. *Victoria* (2) made it apparent that the authority instituted under the *Industrial Peace Regulations* was not limited in any way by the necessity for an inter-State character in disputes ; there was not any need even for a dispute or for a settlement by conciliation or arbitration. In fact the matter was at large for the industrial authority to determine as it thought just in the case. If it be contended by the defendants that the words " competent authority " as used in s. 8 (3) were intended to include a State or Federal authority, according to which body had jurisdiction to exercise control of the industrial matters before 1939, then such contention can only be based on the hypothesis that the awards, orders and determinations made under the Coal Mining Industry Employment Regulations continue valid until superseded or revoked by State authorities. The Court would not hold that unlimited continuance of an award would be within the defence power. The defendants' contention would involve the further consequence that the State legislature in determining when it would authorize the State tribunal to recall the award, would, in effect, be determining when the defence power, in its secondary aspect, in relation to those matters, contracted to its normal peace-time extent. That point was noticed in *R.* v. *Kelly* ; *Ex parte State of Victoria* (3) and *R.* v. *Foster* (4). From the provisions of the *Defence* (*Transitional Provisions*) *Act* 1950, it would seem that the legislature considered that by making a fresh enactment operative for the first time from December 1950, it could in some way inject new constitutional life in these regulations. That statute may have been enacted upon a belief that there had been an expansion of the defence power based upon a new public situation which would either keep it constant at the 1946 level, or give it a still wider expansion. Section 3 (1) of the *Coal Industry Act* 1951 (Cth.) indicates that the legislature sought to rely on the residue of the old power and the growing amplitude of a new power. Counsel for the defendants did not base an argument upon the extension of the defence power in relation to a new war.

[*P. D. Phillips* K.C. I would like to absolve myself from suggesting that we rely on any future war power. The essence of

(1) (1930) 44 C.L.R. 319.
(2) (1943) 68 C.L.R. 87.
(3) (1950) 81 C.L.R. 64, at p. 78.
(4) (1949) 79 C.L.R. 43.

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our argument is that it is taking over a situation from the past until it can be dealt with.]

Sub-section (2) of s. 3 of the *Coal Industry Act* 1951, is to be read against the background of sub-s. (1) and can only be wholly supported on the basis of the defence power. It is therefore void. Sub-section (3) must go with sub-s. (2). The true character of the 1951 Act is to make a direct legislative enactment in terms of the awards and other instruments which are described in it. Having regard to the nature of those awards, as appears from the regulations, it is clear, for reasons already submitted, no such authority can be derived from the defence power. As a matter of construction s. 3 (2) of the 1951 Act attempts to give a direct and prospective legislative effect to what is contained in the awards, orders and determinations to which it refers. The reasoning of the majority in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1) supports the contention now addressed to the Court. The section cannot be supported by s. 51 (xxxv.) of the Constitution as it is a direct legislative enactment and is therefore beyond the powers of par. (xxxv.) (*R.* v. *Commonwealth Court of Conciliation and Arbitration and the Australian Railways Union*; *Ex parte Victorian Railways Commissioners* (2); *Australian Tramway and Motor Omnibus Employees Association* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (3); *Pidoto* v. *Victoria* (4); *R.* v. *Kelly* (5)). Alternatively, some part of the enactment must be bad in so far as it depends upon the defence power in relation to intra-State awards or awards other than inter-State awards or settled otherwise than by conciliation and arbitration. Section 3 on that point is not capable of severance and the operation of s. 15A of the *Acts Interpretation Act* is excluded. It is significant that s. 3 (1) amends the *Defence (Transitional Provisions) Act* 1946-1950 and continues the *Coal Mining Industry Employment Regulations* and from that, as a matter of legislative intention as opposed to legislative competence, it shows that the legislature intended to continue the regulations, the tribunals, the award-making authorities and the awards—the whole complex of matters which were set up by those regulations and with which those tribunals could deal. That supports the contention that sub-s. (2) shows the intention that all should be dealt with or none. Even if the awards, orders and determinations which were within power were clearly severable and distinct from those outside power, it

(1) (1920) 28 C.L.R., at pp. 218, 228, 229, 233, 234, 244, 248, 253.
(2) (1935) 53 C.L.R. 113.
(3) (1935) 54 C.L.R. 470, at p. 501.
(4) (1943) 68 C.L.R., at p. 100.
(5) (1950) 81 C.L.R., at pp. 79, 80.

is to be presumed that all the awards would have been made by the various authorities according to an integrated scheme, and if from all the awards there is subtracted those clearly beyond power, it is probable that those which remained would have a different meaning, or a different operation.

P. D. Phillips K.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment :—

March 17, 1952.

This is a demurrer by the defendants to the whole of a statement of claim. The relief which the plaintiffs claim in their pleading consists in five declarations of right and such further or other relief as to the Court may seem fit. The first three of these declarations are directed against the present validity of the *National Security* (*Coal Mining Industry Employment*) *Regulations*, which the *Defence* (*Transitional Provisions*) *Act* 1946-1951 purports to continue in force, or alternatively against Parts II and III of such regulations. The fourth declaration is to the effect that all awards and orders still current made by the Central Reference Board set up by these regulations are invalid. The fifth, that all current decisions made by the Local Reference Board for the State of Queensland, a board also owing its existence to the regulations, are invalid. To found a title to such relief the plaintiffs allege in their statement of claim that they are companies, incorporated under the laws of Queensland, carrying on business as colliery proprietors and owners and operators of coal mines in that State ; that the Central Reference Board has made awards and orders, now purporting to be in force and to bind employers in the coal mining industry in New South Wales, Victoria, Queensland and Tasmania including the plaintiffs in respect of the wages and conditions of employees other than members of the Australian Coal and Shale Employees Federation ; and that the Local Reference Board for Queensland has given decisions now purporting to be in force and to bind employers in the coal mining industry in Queensland including the plaintiffs in respect of matters lawfully specified for the exercise of its powers.

A final paragraph in the pleading puts forward the contention that the *Defence* (*Transitional Provisions*) *Act* 1946-1950 (now 1946-1951) in so far as it purports to continue the *National Security* (*Coal Mining Industry Employment*) *Regulations* is beyond the powers of the Parliament of the Commonwealth and void. It is not easy to see how the constitutional correctness of this proposition could be denied and counsel for the defendants did not deny it. The regulations were originally made in 1941 as a war measure, the validity of which could be sustained only under the legislative

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power with respect to defence. The defence power would not suffice to continue them in force up to the present time, unless, by their nature, their continuance in force formed a reasonably necessary incident of the transition from the organization of the country for war to the forms of control available to the Commonwealth in peace or to the States independently of war or peace. Plainly this condition could not be fulfilled as at this date. Since the statement of claim discloses sufficient interest in the plaintiffs and the Commonwealth itself is included among the defendants it follows that the statement of claim makes out a title to relief, that is to say in respect of the first three declarations. The demurrer is to the whole statement of claim and therefore it must necessarily be overruled. This disposes of the proceeding but it does so upon a ground which was not in contest between the parties at the hearing of the demurrer. What was in contest was the continued validity of the awards, orders, determinations and decisions of the Central Reference Board and the Local Reference Board of Queensland. If the defendants had been able to sustain the regulations as still operative, it would necessarily follow that the awards, orders, determinations and decisions made in pursuance of the regulations could be sustained. But once it appeared that they could no longer sustain the regulation as continuing in operation two things logically followed. First it followed that the continuance in operation of the awards, orders, determinations and decisions must depend on other statutory provisions the validity of which must be supported on different grounds. Secondly it followed that to show that all the awards, orders and decisions still current remained of full force and validity could be of no help in sustaining the demurrer. The first of these consequences the defendants, as the demurring parties, recognized, the second they did not. Accordingly the question whether all or any of such awards, orders, determinations and decisions now have force was argued. In all the circumstances it seems better to express an opinion upon this question even if it cannot form any part of the *ratio decidendi* of the demurrer. It is a question which depends upon the effect of a succession of statutory provisions the purpose of which is to take up awards, orders, determinations and decisions depending upon the *National Security* (*Coal Mining Industry Employment*) *Regulations* and continue them in force or give them a valid future operation.

The history of the statutory provisions relating to employment in coal mining during and since the war is a little involved and for an understanding of the matter in question some explanation is

necessary. The *National Security* (*Coal Mining Industry Employment*) *Regulations* at first set up bodies to deal with disputes and matters affecting employees in the whole coal and shale mining industry without distinction. The bodies consisted of two kinds. First there was a Central Reference Board with power to consider and determine industrial disputes referred to it by any of the parties or the Minister, all matters arising under an award, if so referred, a dispute or matter referred to it by a Local Reference Board and any matter affecting industrial relations, if the chairman declared it proper to be dealt with. Secondly there were Local Reference Boards whose power was exercisable within limits as to locality or otherwise specified sometimes by the chairman of the Central Reference Board and sometimes by some other authority. Local Reference Boards were to settle disputes as to local matters and industrial disputes and matters referred to it by the Central Board. The authority of these bodies was not obtained under, and no part of it could be referred to, the legislative power with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond any one State. It was independent of almost every one of the elements upon which that power depends, arbitration, the existence of an industrial dispute and the extension of the dispute beyond one State. But for the purpose of considering and determining any dispute or matter the boards were given, by reference, the powers of the Commonwealth Court of Conciliation and Arbitration under the Commonwealth *Conciliation and Arbitration Act* and the *National Security* (*Industrial Peace*) *Regulations*. Further a board's awards and orders upon being filed in the Court were to have the same effect as, and to be enforceable as if they were, awards and orders of the Court. They thus were given the quality, which is characteristic of instruments of industrial regulation, of continuing in force until a new award or order was made.

At the end of the year 1943 a change was made in the uniform character of the authority which these boards had possessed over the industry without any distinction between industrial organizations. By S.R. 1943, No. 295, coming into force on 10th December 1943, a new Part called Part 1A was introduced into the regulations setting up a parallel authority, parallel to the Central Reference Board, to deal only with industrial disputes and matters affecting the employment of members of the Australian Coal and Shale Employees Federation, called "the Federation". The new body was called the Central Coal Authority. On matters concerning

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members of the Federation references to the Local Reference Board were to be made by the Central Coal Authority.

In March 1944, Part V of the *Coal Production (War-time) Act* of that year established a Central Industrial Authority consisting of one person and Local Industrial Authorities, equipping them with powers in relation to the Federation corresponding with those formerly possessed in relation to the whole industry by the Central Reference Board and Local Reference Boards, whose powers thereafter were confined to disputes and matters affecting others than members of the Federation. Part 1A of the regulations was repealed and consequential amendments were made: S.R. 1944 No. 48. The Statutory Rule contained in reg. 2 (2) a saving clause as follows:—"2. (2) Notwithstanding the repeal effected by this regulation, every award or order made by the Central Coal Authority appointed under the National Security (Coal Mining Industry Employment) Regulations and in force immediately prior to the commencement of this regulation shall continue in force subject to the *Coal Production (War-time) Act* 1944."

The same Statutory Rule (reg. 4) excluded the power of the Central Reference and Local Reference Boards with respect to members of the Federation, subject to any exception made by the Commonwealth Coal Commissioner with respect to members or with respect to parts of Australia.

Part V of the *Coal Production (War-time) Act* 1944, was repealed by s. 28 of the *Coal Industry Act* 1946. Part V of the latter Act deals with "Industrial Matters" and contains the provisions enabling the Governor-General to enter into an arrangement with the Governor of the State of New South Wales for the constitution of a Coal Industry Tribunal and for the appointment of a person to constitute the tribunal: s. 30. The disputes and matters of which this tribunal has cognizance are those concerning the Federation. Unlike the previous Act and the regulations, this Act in conferring power makes a separate category for disputes extending beyond the limits of any one State, though whether the powers conferred are arbitral may be a question. The plan, however, depends on the combined or co-ordinated exercise of Federal and State power in New South Wales, the legislature of which passed the *Coal Industry Act* 1946 (No. 44 of 1946) in corresponding terms.

The plan included the establishment of local coal authorities appointed by the tribunal: s. 37. This demurrer turns in no way upon the Acts of 1946, subject to one not very important qualification. The qualification relates to s. 29 of the *Coal Industry Act* 1946 (Cth.) which provides that any award, order or determination

made or given under Part V of the *Coal Production (War-time) Act* 1944 and in force immediately prior to the commencement of this section shall continue in force until rescinded by competent authority and, while it so remains in force, may be varied by such authority. The statutory provision was repeated in the regulations as reg. 4A, introduced by S.R. 1947 No. 42. It is not easy to say what is the scope of the expression "competent authority" used by s. 29 and reg. 4A. But it appears clear enough that the tribunal and local coal authorities would be within its intended application. Yet it can hardly be supposed that, except in so far as the tribunal or local coal authorities may be considered State authorities, the expression was meant to enable a State industrial authority to rescind the awards or orders of the former Federal central industrial authority. The relevance of this observation is to the interpretation of the expression in later Federal legislation where it reappears.

From the commencement of Part V of the *Coal Industry Act* 1946 (1st March 1947) the tribunal and local coal authorities have dealt with disputes and matters affecting members of the Federation; the Central Reference Board and Local Reference Boards, purporting to act under the regulations, have dealt with other disputes and matters in the industry. The *Defence (Transitional Provisions) Acts*, No. 77 of 1946, No. 78 of 1947, No. 88 of 1948, No. 70 of 1949, No. 78 of 1950 and No. 43 of 1951, have purported annually to renew the operation of the regulations for each ensuing twelve months. It is not material to the decision of the case to determine up to what exact point these successive attempts to keep the regulations alive continued to find support under the necessarily contracting application of the defence power. Clearly enough they no longer do so. All that is necessary is to classify the descriptions of *de facto* awards, orders, determinations and decisions of the Central Reference Board and Local Reference Boards and other authorities which must have derived their force from or have depended upon the regulations. This classification must be in the abstract. For the statement of claim sets none of the instruments out and refers to none of them so as to make it part of the record. As it is a demurrer we must deal with the matter on the footing of the possible exercises of the powers of the boards amounting to awards, orders or decisions within the pleading. In effect this means such instruments as may have come into existence during various periods and, considered apart from the validity of the regulations, may not yet have expired or been ended. There are first the possible awards, orders, determinations and decisions of the Central and Local

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reference boards made before the commencement of the *Defence* (*Transitional Provisions*) *Act* 1946 came into force on 1st January 1947. Secondly there are the possible awards, orders, determinations and decisions of the same bodies made after that date and before the regulations went out of force because no longer was there legislative power to continue them. Thirdly there is the possibility that awards, orders, determinations or decisions have been made *de facto* since that time. Fourthly there are the possible awards, orders, determinations and decisions which were made by the central coal authority under Part IA of the regulations before that Part was repealed but are continued by reg. 2 (2) of S.R. 1944 No. 48. Fifthly there are possible awards &c. made under Part V of the *Coal Production* (*War-time*) *Act* 1944 which reg. 4A purports to continue as does s. 29 of the *Coal Industry Act* 1946 (Cth.).

Now s. 8 (3) of the *Defence* (*Transitional Provisions*) *Act* 1946-1951 contains a general provision purporting to continue in force awards &c. of industrial authorities under any National Security regulation, but it applies only to awards &c. made before the commencement of that Act, e.g. before 1st January, 1947. The provision is as follows: "8. (3.) Each award, order and determination in force or subsisting immediately prior to the commencement of this Act and made or given by any industrial authority having power to fix rates of pay or conditions of employment under any regulation under the National Security Act, shall remain in force or subsisting until revoked by competent authority." In terms this sub-section is wide enough to embrace the first and fourth of the foregoing classifications of awards &c. but not the second, third, or fifth.

It will be seen that again the expression "competent authority" is used, this time with the word "revoke".

Then s. 4 (1) of the *Defence* (*Transitional Provisions*) *Act* 1950 (No. 78 of 1950) provides that the instruments to which the *Defence* (*Transitional Provisions*) *Act* 1946-1949 purported to give force or subsistence immediately before the date of commencement of this Act shall, by force of this Act, be in force or subsisting until the 31st day of December 1951. Sub-section (3) defines "instruments" to include regulations, orders, awards and determinations. The year "1951" mentioned in s. 4 (1) becomes "1952" by a specific amendment made by s. 4 of the *Defence* (*Transitional Provisions*) *Act* 1951 (No. 43 of 1951).

The provision appears to relate to the instruments referred to in sub-ss. (1), (2) and (3) of s. 8 of the *Defence* (*Transitional Provisions*) *Act* 1946-1949, but it may also cover other instruments.

One effect which it seems to have is to provide for the continuance of the awards, orders and determinations mentioned in sub-s. (3) of s. 8 until 31st December 1952. Probably as a result of sub-s. (2) of s. 4 of the Act of 1950, a sub-section which it is unnecessary to set out, they may be revoked in the meantime by a "competent authority", whatever that expression may cover.

The next and latest step in the legislative history of the matter is the enactment in December 1951, just before the hearing of this demurrer, of a Federal and a State statute, the one called the *Coal Industry Act* 1951 (No. 61 of 1951) and the other the *Coal Industry (Amendment) Act* 1951 (N.S.W.). These statutes contain amendments of the respective *Coal Industry Acts* 1946 of Commonwealth and State and are evidently pieces of combined or co-ordinated legislation, as those Acts were. The substantial purposes of the amendments, which are similarly expressed, is to bring all disputes and matters within the authority of the tribunal, whether or not they affect members of the Federation, to re-define and enlarge the ambit of the tribunal's authority and, by consequence, of the authority of the local coal authorities, and to strengthen and amplify the powers conferred. So far as the State of New South Wales is concerned all this rests alike on an exertion of State and of Commonwealth legislative power. All that is important however, in the case before us is a provision which occurs in both Acts as sub-s. (2) of s. 3.

It is expressed as follows :—"(2). An award, order or determination made or given, or purporting to have been made or given, under the National Security (Coal Mining Industry Employment) Regulations or otherwise in operation or purporting to be in operation, by virtue of those Regulations, and an agreement in writing filed in the Commonwealth Court of Conciliation and Arbitration under those Regulations, being an award, order, determination or agreement in force, or purporting to be in force, immediately before the commencement of this section, shall continue in force until revoked by competent authority, and, if varied by competent authority, as so varied." In the Commonwealth Act this is followed by a provision (sub-s. (3)) for enforcement under the *Conciliation and Arbitration Act* 1904-1951, while in the State the corresponding provision is for enforcement under the *Industrial Arbitration Act* 1940-1951 (N.S.W.). The expression *National Security (Coal Mining Industry Employment) Regulations* is defined so as to cover those regulations as in force under the *National Security Act* or the *Defence (Transitional Provisions) Act*. It follows from this and from the terms of sub-s. (2) that it is wide enough to

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embrace all five of the foregoing classifications of awards, orders and determinations. We would treat the word "determinations" as including decisions of a Local Reference Board. In so far as s. 3 (2) of the *Coal Industry Act* 1951 (Cth.) is valid, we would take it to be a provision covering part of the same ground as s. 8 (3) of the *Defence (Transitional Provisions) Act* 1946-1951 and s. 4 of the *Defence (Transitional Provisions) Act* 1950-1951. We doubt if there is any inconsistency between the provisions, but if there were, the *Coal Industry Act* 1951 is the later enactment. Again to the extent of the validity of s. 3 (2) of the *Coal Industry Act* 1951 (Cth.) it might be said that it is inconsistent with s. 3 (2) of the *Coal Industry (Amendment) Act* 1951 (N.S.W.) which *pro tanto* becomes inoperative under s. 109 of the Constitution: cf. *Hume* v. *Palmer* (1). But in combined legislation of this type we think that the Federal statute should be interpreted as not meaning to occupy the field to the exclusion of the State legislation.

We see no reason as at present advised for thinking that s. 3 (2) of the State Act is constitutionally inefficacious in its attempt to give force and valid effect to the instruments which it covers so far as they purport to operate in New South Wales. But it cannot give them any effect outside New South Wales. The plaintiffs have alleged facts showing an interest by virtue of business and of operations in Queensland. In the case of decisions of the Local Reference Board the declaration claimed is confined to the decisions of the Queensland board, although it is true there is no territorial restriction in the relief claimed in connection with the awards &c. of the Central Reference Board. But in the circumstances we ought not to deal with the situation as it exists in New South Wales. But so far as Queensland is concerned, where there is no State Act, we are of opinion that neither s. 3 (2) of the *Coal Industry Act* 1951 (No. 61 of 1951) nor s. 4 of the *Defence (Transitional Provisions) Act* 1950-1951, nor s. 8 (3) of the *Defence (Transitional Provisions) Act* 1946-1951 validly operates to keep any of the awards, orders, determinations or decisions of the Central Reference Board or of the Queensland Local Reference Board in force or effect in that State.

There are only two Federal legislative powers in virtue of which such an operation could be given to these provisions. One is s. 51 (xxxv.) and the other is s. 51 (vi.).

It is convenient to deal with them in that order.

It is impossible to find in s. 51 (xxxv.), that is the power to legislate with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits

(1) (1926) 38 C.L.R. 441.