[HIGH COURT OF AUSTRALIA.]

JENKINS AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1947.

MELBOURNE, *Oct*, 22, 29.

Williams J.

Constitutional law (Cth.)—Defence—National Security—Minerals—Regulations—Validity—Mica—Compulsory acquisition—Just compensation not provided for—Regulations amended in 1947*—Just compensation provided for—Validity of amending regulations—Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 46 (*b*)—*Defence (Transitional Provisions) Act*, 1946 (*No.* 77 *of* 1946), *s.* 6 (2)—*National Security (Minerals) Regulations* (*S.R.* 1942 *No.* 109—1947 *No.* 97.)

The *National Security (Minerals) Regulations*, which were gazetted on 9th March 1942, provided by reg. 6 (1) that the Controller appointed under the regulations should have power " on behalf of the Commonwealth, to operate, control, and direct the production and supply of minerals and for that purpose to take such measures, make such orders, give such directions and do such things as he thinks necessary or expedient." Regulation 6 (2) conferred on the Controller " without limiting the generality of the last preceding sub-regulation " certain specific powers relating to the acquisition of land and plant for the production of minerals. By *Statutory Rules* 1947 *No.* 97 the following additional powers were conferred on the Controller ; (*aa*) compulsorily to acquire any minerals and (*ab*) by order to direct the supply and delivery to the Commonwealth of minerals ; and provision was also made for the payment by the Commonwealth of just compensation in the event of the exercise of such additional powers. The *National Security (Minerals) Regulations* were continued in force until 31st December 1947 by the *Defence (Transitional Provisions) Act* 1946.

Orders pursuant to the above regulations, as amended, and signed by the Controller were served on the plaintiffs between 30th July and 4th August 1947 directing them to deliver to the Commonwealth all mica which was then in their control. In an action by the plaintiffs challenging the validity of the orders :—

Held, that there should be judgment for the defendants since the *National Security* (*Minerals*) *Regulations* (*S.R.* 1947 *No.* 97), which amended the *National Security* (*Minerals*) *Regulations* (*S.R.* 1942 *No.* 109), was a valid exercise of the defence power and was a valid amendment to those regulations " in respect of a matter dealt with by those regulations " within the meaning of s. 6 (2) of the *Defence* (*Transitional Provisions*) *Act* 1946.

TRIAL OF ACTION.

Hector Norman Jenkins and others brought an action against the Commonwealth and Harold George Raggatt claiming declarations that certain orders made by the defendant Raggatt, as Controller of Minerals Production, under the *National Security* (*Minerals*) *Regulations*, were invalid. The plaintiffs were engaged in the business of mining for mica in the Harts Range in the Northern Territory of Australia. The orders were served on the plaintiffs between 30th July 1947 and 4th August 1947 and directed them to deliver to the Commonwealth all mica in their possession or under their control at the mica depot in the Harts Range.

The action was heard by *Williams* J., in whose judgment the relevant facts and statutory provisions are sufficiently set forth.

Ward K.C. and *Travers*, for the plaintiffs.

Alderman K.C. and *T. W. Smith*, for the defendants.

Cur. adv. vult.

WILLIAMS J. delivered the following written judgment :— Oct. 29.

This is an action in which the plaintiffs, who are engaged in the business of mining for mica in the Harts Range in the Northern Territory of Australia, are claiming declarations that orders served on them between 30th July and 4th August 1947 are void, and for consequential relief. The orders directed the plaintiffs to supply and deliver to the Commonwealth all mica, which was then in their possession or under their control at the mica depot in the Harts Range, to the manager of the Commonwealth mica pool within seven days after the date of such service. The orders were signed by the defendant Raggatt who has been the Controller of Minerals Production appointed under the *National Security* (*Minerals*) *Regulations* since April 1946.

These regulations, which were first made in March 1942, are one of the many sets of regulations included in the first schedule to the *Defence* (*Transitional Provisions*) *Act* 1946, and have been continued in force by that Act until 31st December 1947. The orders depend

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for their validity upon an amendment of the *Minerals Regulations* made by Statutory Rules 1947 No. 97 on 29th July 1947. Section 6 (2) of the *Defence (Transitional Provisions) Act* authorizes amendments to the regulations in the first schedule " but so that any such amendment shall be in respect of a matter dealt with by those regulations."

The evidence shows that mica is an essential mineral for the purposes of defence. It is a necessary component in practically all electronic devices used by the navy, army and air force. The only area in Australia where mica is produced in any quantity is the Harts Range. Since 1929 the Australian production has been about thirty tons a year. During hostilities the whole of the Australian production was purchased by the Commonwealth mica pool. The only other part of the British Commonwealth where mica is produced is India. During hostilities the mica produced in India was purchased and distributed by an allied purchasing commission. The Commonwealth received its share, which was added to the Commonwealth mica pool. The pool supplied the Commonwealth with its needs, and apportioned the balance amongst private manufacturers engaged in the production of defence equipment. The average consumption of mica in Australia is between sixty and seventy tons per annum. The consumption is therefore about double the Australian production and the surplus has so far been met by the supplies from India. The allied purchasing commission ceased to function in 1946, since when the industry in India has been in a chaotic condition. With the cessation of hostilities less mica has been required to supply the needs of the armed forces and more has been available for civilian purposes, but it is probable that the needs of the armed forces will increase in the near future with the increased use of guided projectiles and the expansion of the navy, and it is in the interests of defence to build up a reserve.

Australian mica is a mineral which is sorted into four grades: clear, commercial clear, stained, and spotted. The percentage of clear and commercial clear to the total quantity is relatively small. It is only the clear and commercial clear, particularly the former, and to a small extent the stained mica, which is suitable for defence purposes. The lower grades, particularly spotted mica, are difficult to sell. Mica not required for the armed forces is used by the Department of the Postmaster-General, in civil aviation, and by the manufacturers of civilian requirements such as electric irons, toasters and articles of that nature.

The *Minerals Regulations* define minerals to include metals, the ore of any metal, mineral oils, natural gas, oil shale and all rocks

and earthy substances but not to include coal. It was faintly contended that this definition, including as it does rocks and earthy substances, is so wide that the regulations were not authorized by the defence power even during hostilities. In my opinion there is no substance in this contention. The words " all rocks and earthy substances " should be construed *ejusdem generis* with the preceding words and refer to rocks and earthy substances containing metals, the ores of metals &c. Further, effect must be given to the provisions of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 so that if any words in the definition following the words " metals and the ore of any metals " would have the effect of making the regulations beyond the defence power, the definition must be construed as if such words were omitted, and the regulations held to be valid to the extent to which they are not in excess of that power (*Pidoto* v. *Victoria* (1)). It is not in my opinion possible for the court to say that the control of the production and supply of all metals during hostilities had no sufficient connection with the prosecution of the war, so that the regulations for this purpose would be authorized by the defence power when they were made, at least in relation to metals and the ore of any metals.

The principal regulation is reg. 6. Regulation 6 (1) provides, so far as material, that the Controller shall have power, on behalf of the Commonwealth, to operate, control and direct the production and supply of minerals, and for that purpose to make such orders as he thinks necessary or expedient. Regulation 6 (2) provides that, in particular, but without limiting the generality of the last preceding sub-regulation, the Controller, on behalf of the Commonwealth, may exercise certain specific powers. These include the power to—(*a*) take possession of any land ; (*b*) use or authorize the use of such land for the production and supply of minerals either by the Commonwealth or by any other person ; (*e*) compulsorily acquire the property in, or requisition the use of, any machinery equipment or plant for the production and supply of minerals ; (*f*) make contracts or agreements for the production and supply of minerals. Regulation 10 provides for compensation in relation to things done in pursuance of pars. (*a*), (*b*) or (*e*) of reg. 6 (2).

The only order made under reg. 6 (1) prior to 1947 was an order made on 27th April 1942 directing all persons, who had in their possession or under their control any mica, to retain and hold the same for and on behalf of the Commonwealth and to sell, supply and deliver it to the Commonwealth as directed. It would appear that no further orders were necessary during this period because the

(1) (1943) 68 C.L.R. 87.

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miners at Harts Range voluntarily delivered and sold all the mica they produced to the Commonwealth at the mica depot and accepted as payment the maximum price fixed by the Prices Commissioner. But in 1947 some miners, including the plaintiffs, refused to deliver their mica to the mica depot, and on 21st May 1947 the defendant Raggatt made an order that any person who then or at any time thereafter had any mica in his possession or under his control should retain and hold the mica for and on behalf of the Commonwealth and sell and supply the mica to the Commonwealth as directed. On 29th May 1947 the plaintiffs were directed to deliver all the mica then in their possession to the mica depot, the direction stating that the Commonwealth would pay reasonable delivery charges and a reasonable price for the mica, the price being that fixed by the Prices Commissioner.

The word " operate " in reg. 6 would appear to relate to the Commonwealth itself undertaking the production of the minerals, and the words " control and direct " to the production and supply of minerals by private persons. The words " direct the supply of minerals " are wide enough to include directions that the minerals be supplied to private persons or to the Commonwealth. A direction to deliver the mica to the Commonwealth would be a compulsory acquisition of the mica by the Commonwealth. The *Constitution*, s. 51 (xxxi.), provides that the Parliament may make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. I have frequently expressed the opinion (to which I adhere) that legislation of the Parliament which provides for the acquisition of property, but does not contain just terms, is invalid. I agree with the statement of the law on this point by the Chief Justice in *Johnston Fear & Kingham* v. *The Commonwealth* (1). The only provisions for compensation in the *Minerals Regulations* prior to Statutory Rule 1947 No. 97 were contained in reg. 10 and related to acquisitions under reg. 6 (2) (*a*), (*b*) or (*e*). There was therefore no valid provision for the compulsory acquisition of minerals produced by persons and directed to be delivered to the Commonwealth prior to Statutory Rules 1947 No. 97. These statutory rules inserted in reg. 6 (2) specific powers for the Controller (*aa*) compulsorily to acquire any minerals and (*ab*) by order to direct the supply and delivery to the Commonwealth of minerals or of such quantity of any minerals as were specified in the order, such minerals to become the absolute property of the Commonwealth. They also provided that reg. 10 should be amended by inserting in sub-reg. (1) after the

(1) (1943) 67 C.L.R. 314, at p. 318.

word " paragraph " the letters and symbols " (*aa*) (*ab*)." Provision was therefore made for just compensation where the minerals were acquired by the Commonwealth.

The crucial questions are whether Statutory Rules 1947 No. 97 were a valid exercise of the defence power in July 1947, and whether these rules were amendments of the *Minerals Regulations* within the meaning of s. 6 (2) of the *Defence* (*Transitional Provisions*) *Act*, 1946.

The plaintiffs contend that the right compulsorily to acquire mica was a totally new right and not a mere amendment of the existing regulations; that it had not been found necessary to confer such a right on the Commonwealth during hostilities; and that it was beyond the defence power to do so nearly two years after the cessation of hostilities. The *Minerals Regulations* were made at the height of hostilities, and formed part of a mass of legislation made under the *National Security Act* at that time. In *Dawson* v. *The Commonwealth* (1) *Dixon* J. pointed out that the defence power must " extend to sustaining for some reasonable interval of time the laws and regulations in force at the end of hostilities . . . while the steps are taken that are considered necessary for the remission of the community to an order proper to peace." In *Miller* v. *The Commonwealth* (2) I ventured to say that " after the conclusion of hostilities the defence power must continue to be wide enough to enable the executive under existing or fresh legislation to cope with the transition to peace." The remarks of Viscount *Haldane* referred to on that and the following page have recently been reasserted by Lord *Wright* delivering the judgment of the Privy Council in *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (3). It is clear therefore that the defence power would be wide enough to sustain the minerals regulations as they existed during hostilities for some reasonable period after the cessation of hostilities. It is just as likely that some defect may be found in the regulations during this period as during the period of hostilities, so that to ensure that the regulations shall be effective the defence power must be wide enough to authorize amendments to be made in either period in order to carry into effect the purpose for which the regulations were made.

The purpose of the *Minerals Regulations* during hostilities was to enable the Commonwealth to obtain adequate supplies of any minerals other than coal required to prosecute the war. For that purpose the Controller was authorized to enter upon lands where there were minerals and carry on mining operations, or alternatively to direct

(1) (1946) 73 C.L.R. 157, at p. 184.
(2) (1946) 73 C.L.R. 187, at p. 211.
(3) (1947) A.C. 87 at pp. 101, 102.

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persons in possession of minerals to dispose of them as he directed. Section 51 (xxxi.) of the *Constitution* is not limited to acquisitions by the Commonwealth. It extends to acquisitions of property for any purpose in respect of which the Parliament has power to make laws. A direction under reg. 6 of the *Minerals Regulations* to supply minerals to a person would be a compulsory acquisition by that person just as much as a direction to supply a mineral to the Commonwealth would be a compulsory acquisition by the Commonwealth. A main purpose of the regulations was to enable the Controller to require persons in posession of mica to supply it where it was wanted whether to some person who was engaged in manufacturing goods required for defence or to the Commonwealth itself. The regulations were at all times defective for that purpose because they did not provide for just compensation.

But until 1947 no occasion arose to remedy the defect because the directions of the Controller were complied with and the price fixed by the Prices Commissioner was accepted. But the plaintiffs and others refused to deliver their mica to the pool in 1947. The order of 21st May of 1947 was then made to compel them to do so. That order was challenged successfully by the plaintiffs on the ground that the regulations did not authorize an order for compulsory acquisition, and Statutory Rules 1947 No. 97 was then made so that a direction by the Controller to supply mica to the Commonwealth would be effective. In these circumstances Statutory Rules 1947 No. 97 were no more than what *Dixon* J. called in *Real Estate Institute of New South Wales* v. *Blair* (1), a strengthening of the original "provisions expressing the same policy and proceeding upon the same general plan." They did not, as the plaintiffs contended, create a totally different right and were not a completely new departure from the existing regulations.

It is true that less mica is now required for defence purposes than during hostilities. But a substantial portion of the clear and commercial clear is still required for this purpose, all four grades are part of the one mineral and it would be plainly unjust and probably impracticable to acquire these grades without acquiring the other grades. There is also the necessity of building up an adequate reserve for defence purposes, especially in view of the conditions in India. There is also the consideration already adverted to that the Parliament and executive must be afforded a reasonable period during the transition from hostilities to peace to consider whether legislation within the constitutional powers of the Commonwealth in normal times is required to replace the existing regulations.

(1) (1946) 73 C.L.R. 213, at p. 232.

For these reasons I am of opinion that Statutory Rules 1947 No. 97 were authorized by the defence power. For the same reasons I am of opinion that these Statutory Rules were an amendment in respect of a matter dealt with by the *Minerals Regulations* within the meaning of s. 6 (2) of the *Defence (Transitional Provisions) Act.* I must therefore give judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors for the plaintiffs, *Kelly, Travers, Melville and Hague.*

Solicitor for the defendants, *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

C. C. B.