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IN THE HIGH COURT OF AUSTRALIA

THE JOINT COAL BOARD.

V.

THURLEYS PROPRIETARY LIMITED &
ANOR.

REASONS FOR JUDGMENT

SYDNEY

Judgment delivered at

on FRIDAY, 4th November, 1949

THE JOINT COAL BOARD

v.

THURLEYS PTY. LTD. and NORMAN ANTHONY WOOD.

JUDGMENT.

WEBB J.

THE JOINT COAL BOARD v. THURLEYS PTY. LTD. AND ANOR.

JUDGMENT.

WEBB J.

The claimant Joint Coal Board created by the Commonwealth Coal Industry Act 1946 (No. 40) and the New South Wales Coal Industry Act 1946 (No. 44) issued out of the Supreme Court of New South Wales a summons in ejectment against the defendants who were tenants of a room in Frazer House, Bridge Street, Sydney. In its particulars of claim the Board claimed to be seized in fee simple of the building as the result of a resumption of the building under the New South Wales Public Works Act 1912 as amended.

It is convenient at this stage to set out provisions of this Commonwealth and New South Wales legislation, so far as material. The long title to the Commonwealth Act states that it is an Act to provide means for securing and maintaining adequate supplies of coal throughout Australia and for providing for the regulation and improvement of the coal industry in the State of New South Wales and for other purposes. The preamble to the Act states, among other things, that it had been agreed between the Commonwealth and New South Wales Governments that they should jointly establish authorities vested with power to take action to attain those objectives. Section 5 provides that the Governor-General may enter into an arrangement with the Governor of New South Wales for the constitution of an authority which shall be known as the Joint Coal Board and that the Board shall be a body corporate with perpetual succession and may acquire real property. In Section 13 it is declared that the Board is to have all the powers and functions specified in the Act and that those powers and functions are vested in the Board to the extent to which they are not in excess of the legislative powers of the Commonwealth. Section 14 provides that the Board generally is

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empowered to take such action as is necessary to ensure adequate and regular coal production in New South Wales for Australian and overseas requirements; to conserve develop and use coal resources to the best advantage, and to ensure that the quantities, classes and grades are produced at such prices as to secure the most economical use of the coal, and to promote the welfare of coal workers. In particular the Board may make provision for the working and getting of coal, the introduction of sound principles of mining, stowage and haulage, the conservation of coal, the opening, development and closing of any mine, the provision and improvement of machinery, the classification and grading of coal, the effective and economical distribution and use of coal and its by-products, the regulation of prices, the health and safety of workers, amenities and other benefits for coal mining communities, the regulation, recruitment and training of employees, the publication of reports and any matter incidental to those powers. The Board is to have power to make orders and do all such things as are necessary for the effective exercise of its powers and functions, and in particular may provide advice and technical assistance, research, surveys, and inspections, make contracts, incur expenditure, advance money and acquire and dispose of any property or rights. It may require the keeping and production of books, accounts, records and statistical data, acquire and sell any coal and improve conditions for the sale or disposition of coal. It may assume control of or acquire and operate any mine and construct or requisition any equipment, establish and operate coal mines, modify any contract relating to the production or distribution of coal, and, subject to an appeal to the Court or a judge thereof suspend any person who acts in a manner prejudicial to the working of the industry. The Board may at any time rescind, terminate or vary any order direction or requirement made or given by it. The Commonwealth Act contains no provision for the acquisition of land for the

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Board's purposes.

The State Coal Industry Act of 1946 was enacted about a month after the Commonwealth Coal Industry Act and contains, among other things, Sections similar to Sections 5 13 and 14 of the Commonwealth Act. In Section 25 the State Act provides that the Board may acquire land for any of the purposes of the State Act. Section 26 provides that the Board shall not be entitled to acquire land by resumption except with the approval of the Premier and the Prime Minister of the Commonwealth; that where the Board proposes to acquire land by resumption, and has obtained the approval referred to, it may apply to the Governor through the Minister; that the Board shall make provision to the satisfaction of the Governor for the payment of compensation together with interest and other incidental expenses; that the Governor may authorise the resumption and may resume the land by Gazette notification under the Public Works Act 1912 and notify that the land is vested in the Board; and that the land shall thereupon vest in the Board.

The notification of resumption of Frazer House sets out that the land is resumed for the purpose of the provision of offices for the transaction of the Board's business, and that the Board had prior to the application for the resumption obtained the approval of the Premier and of the Prime Minister of the Commonwealth to the acquisition.

By Commonwealth and State legislation setting up a single authority to act for both Commonwealth and State those conflicts that would otherwise be resolved by Section 109 of the Commonwealth Constitution are avoided. No question was raised before me as to the validity of this course.

The defendants in their particulars of defence
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claimed among other things that Frazer House was not acquired for any of the purposes of the New South Wales Coal Industry Act; that there was no power in the New South Wales Parliament to resume or make provision for the resumption of land to be vested in a Commonwealth instrumentality; that the claimant Board was a Commonwealth instrumentality and that any land acquired by it should be on just terms; and that Part V of the New South Wales Coal Industry Act did not provide just terms and so was ultra vires.

Upon delivery of the defendants' particulars the claimant Board took out a summons for liberty to enter judgment for the recovery of Frazer House on the ground that the defendants' particulars did not disclose any defence. This summons was supported by an affidavit of Nevil Stuart, the secretary of the claimant Board.

When the matter came before Dwyer J., in the Supreme Court of New South Wales, His Honour took the view that it was removed automatically into the High Court under Section 40A of the Judiciary Act. Mr. Taylor, K.C., for the defendants had told His Honour that a question as to the constitutional limits inter se of the constitutional powers of the Commonwealth and those of the State of New South Wales might have to be decided.

Before me Mr. Taylor stated that he was not relying on the invalidity of any of this Commonwealth or State legislation or of the creation of the Board, nor upon the Board being a Commonwealth instrumentality. Nor did he rely on any want of power to create a single authority to discharge functions, some of which are matters exclusively within the jurisdiction of the Commonwealth, others exclusively within the jurisdiction of the State, and others still within their concurrent jurisdiction. But he submitted that the resumption

of Frazer House was invalid as not having been made for the purposes of the New South Wales Coal Industry Act, and his argument was limited to that question. He argued that a State Parliament cannot authorise the acquisition of land for Commonwealth purposes, or for joint State and Federal purposes, and that, in any event, the power in Section 25 of the New South Wales Coal Industry Act was a power to acquire property for the purposes of that Act, which he submitted, was confined to matters which, after the agreement between the two Governments and the enactment of the Commonwealth Coal Industry Act some time before the State Act, were left for the State Parliament to deal with; and as the State legislation was limited to this residue, the purposes of the State Act were so limited, and there could be no resumption for other than those purposes. This assumes that Frazer House was resumed for the transaction of business extending to matters exclusively within the jurisdiction of the Commonwealth and within the concurrent jurisdiction. However, it may be that actually it was intended to transact in Frazer House only such part of the business as would be exclusively within the field of the State legislation. At all events, apart from the recitals in the notification of resumption, there is no evidence to the contrary. Mr. Stuart, the secretary of the Board was called for cross-examination on his affidavit and it appears from his evidence that the Board's business in fact extends to matters some of which are exclusively within the jurisdiction of the Commonwealth; others within the State's exclusive jurisdiction; and still others within the concurrent jurisdiction. He stated however that some of the staff were not paid from joint funds provided by both Commonwealth and State. As to the recital in the notification of resumption, I think that no presumption arises from the Prime Minister's approval that Frazer House was not resumed for business transacted in relation to matters exclusively within the State's province; whether it was or was not, the approval

the Prime Minister was required by Section 25. Nor do I think that the presumption arises from this requirement of the Prime Minister's approval in all cases that the State legislature intended that land not required in every case for the Board's business of all kinds should not be resumed. Mr. Wallace for the claimant Board submitted that the resumption was for the purposes of the New South Wales Coal Industry Act, although he did not claim to rely on the absence of any proof or presumption that Frazer House was resumed for any business of the Board whatever, whether Commonwealth, or State, or joint.

However, if I am wrong in holding there is no evidence or presumption that Frazer House was resumed for all kinds of the Board's business, still I think that the resumption was for State purposes within the meaning of Section 25, even if it must be concluded from the notification of the resumption that it was made for the purpose of all the Board's business. If the State legislature in making the Prime Minister's approval necessary in all cases must be taken to have contemplated that all resumptions would be for the Commonwealth as well as the State, and assumed that it could authorise resumptions for purposes beyond the State's province, I am not bound to hold that it intended resumptions to be ineffective as to State purposes if invalid as to other purposes. State legislation is not so disposed of.

Mr. Wallace also submitted that in any event after the Governor resumed the land by notification in the Gazette and notified that the land was vested in the Board, it became so vested beyond challenge. He referred to Criterion Theatres Ltd. v. Sydney Municipal Council (35 C.L.R. 554 per Isaacs J. at 561) as deciding that, the publication of the notice of resumption having taken place, the land vested in the Board

under Section 26, and that no Court could dispute that vesting if the prescribed conditions had been fulfilled, as he claimed was the case. However, where on the face of the notification the resumption is for a purpose which the Commonwealth Constitution places beyond the power of the State I do not think that the resumption is valid for Commonwealth purposes as well as for State purposes because of this vesting provision in Section 26. To hold otherwise would be to give no effect to the Commonwealth Constitution.

I order that the claimant Board be at liberty to enter judgment for the recovery of the land the subject of the action and that the defendants, Thurleys Pty. Ltd. and Norman Anthony Wood, pay to the claimant Board its costs of the action.
