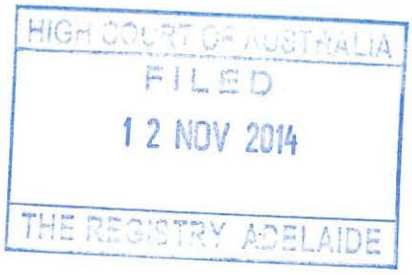
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: No. S119 of 2014



TRAVERS WILLIAM DUNCAN
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

BETWEEN: No. S206 of 2014

CASCADE COAL PTY LIMITED
First Plaintiff

MT PENNY COAL PTY LIMITED
Second Plaintiff

GLENDON BROOK COAL PTY LIMITED
Third Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

Crown Solicitor for the State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Tel: 08 8207 1760
Fax: 08 8207 2013
Email: boisseau.matthew@agd.sa.gov.au
Ref: 141956 - Matthew Boisseau

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Defendant in each action.

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the Plaintiffs' statements of the applicable legislative provisions.

Part V: Submissions

5. The Plaintiffs in matter S206 of 2014 contends that Schedule 6A to the *Mining Act 1992* (NSW) (**Mining Act**) is inconsistent with the *Copyright Act 1968* (Cth). South Australia does not intend to make any submission on this issue.

6. Of the remaining issues, the Plaintiffs' three central propositions can be summarised as follows:

   i. it is beyond the competence of the Parliament of New South Wales to exercise judicial power (**proposition (i)**);

   ii. clauses 1 to 13 of Schedule 6A to the Mining Act, either individually or in combination, amount to a purported exercise of judicial power by the Parliament of New South Wales because their operation in substance amounts to a legislative finding of guilt or liability in respect of which a punishment is imposed (**proposition (ii)**);

   iii. clauses 1 to 13 of Schedule 6A to the Mining Act, either individually or in combination, are not "laws" for the purposes of s5 of the *Constitution Act 1902* (NSW) because they are judicial in nature (**proposition (iii)**).

7. Thus the key to the Plaintiffs' submissions is the contention that the power exercised was judicial or judicial in nature. If that contention is not made good, propositions (ii) and (iii) will be rejected, and proposition (i) becomes academic and should not be further considered.

8. In summary, South Australia submits that:

   i. in enacting Schedule 6A to the Mining Act, the Parliament of New South Wales did not exercise judicial power because the provisions of that Schedule:

      a. operate as a prospective alteration of various rights and obligations which may be

exercised pursuant to or in connection with certain exploration licences previously granted under the Mining Act, and the land and minerals that those licences pertained to. Schedule 6A is, therefore, a law and is analogous to other legislation the validity of which has been upheld by this Court;

b. do not result in a finding of guilt or determination of liability against any person; nor is any person or class of persons punished as a result of their actions pursuant to those clauses. Consequently, Schedule 6A cannot be equated with a bill of pains and penalties;

ii. if, as South Australia contends, Schedule 6A does not amount to an exercise of judicial power, and is a law, proposition (i) should not be further considered, consistent with the long-standing approach of this Court.

9. In order to analyse whether Schedule 6A is an exercise of judicial power the substantive operation and effect of the relevant legislative provisions must first be ascertained.

Relevant aspects of the statutory scheme

10. The *Mining Act 1992* (NSW) (**Mining Act**) provides an integrated framework for the regulation of authorisations for prospecting and mining operations in New South Wales.[1]

11. The following features of the scheme established by the Mining Act are relevant to the nature of the rights created by the Act on the issue of an exploration licence:

i. The right to prospect for, or mine, publicly owned minerals (including coal[2]) in New South Wales is not generally held.[3] Such rights are only bestowed pursuant to the grant of a relevant authorisation under the Mining Act;

ii. An exploration licence is a form of exclusive licence to conduct prospecting on specified land in relation to a specified group or groups of minerals.[4] The grant of an exploration licence is discretionary[5] and for a limited term.[6] There is no absolute right to transfer an

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1 Mining Act, s3A(b).

2 Mineral includes coal: Mining Act sch 7. Coal in New South Wales was reserved to the Crown by s5 of the *Coal Acquisition Act 1981* (NSW), and is therefore a '*publicly owned mineral*' under the Mining Act (sch 7).

3 It is an offence to prospect for, or mine, any mineral except in accordance with an authorisation granted under the Mining Act in respect of both the mineral and the land on which the prospecting or mining operation takes place: s5.

4 Mining Act s29, s68(1), s22(1)(a), s24(2), s24(3). Prospecting is defined as the carrying out of works on land for the purpose of testing the mineral bearing qualities of the land: Mining Act sch 7. The Minister may not grant an application for an exploration licence or mining lease over any land which is the subject of an existing exploration licence, if that existing exploration licence includes a group of minerals the subject of the application, unless the holder of the existing exploration licence consents: Mining Act s19(1); s58(1).

5 Mining Act s63, s22(1), 23(1), (2), sch 7. The grounds on which an application may be refused are not specified exhaustively, although satisfaction that the application has contravened the Act or provided false or misleading information are two grounds upon which an application may be refused: Mining Act, s22(2)(a) and (b), 23(3)(a) and (b). The Land and Environment Court has jurisdiction to hear and determine proceedings relating to any

exploration licence. The approval of a transfer is discretionary;[7]

iii. A holder of an exploration licence does not have the right to extract (and thereby become the owner of[8]) minerals from land: extraction requires a mining lease;[9]

iv. While obtaining an exploration licence and conducting prospecting operations on the land is ordinarily a preliminary step to obtaining a mining lease, a grant of an exploration licence does not guarantee that a mining lease will be granted in respect of the land and minerals concerned;

v. The rights attaching to an exploration licence may be altered[10] or cancelled via an administrative process during its term.[11]

10 vi. A holder of an exploration licence must secure and comply with an access arrangement with the land holder of the relevant land when seeking to exercise any rights provided under the licence.[12]

Schedule 6A

12. Schedule 6A of the Mining Act is headed "*cancellation of certain authorities*". It was inserted by the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (**Amending Act**).

13. Clause 3 sets out the purposes and objects of the Schedule. It records Parliament's satisfaction that the "*grant of the relevant licences, and the decisions and processes that culminated in the grant of the relevant licences,*

"*question or dispute*" as to a decision not to grant an exploration licence: Mining Act, s293(1)(q)(ii). This is a supervisory jurisdiction to review for error of law or absence of jurisdictional fact: *Martin v State of New South Wales (No 14)* [2012] NSWCA 46, [5].

6 An exploration licence lasts for a term of not exceeding 5 years as determined by the Minister, but is subject to extension for up to 2 years if it is due to expire before an application for an assessment lease, mining lease or mineral claim in relation to the same land is finally dealt with: Mining Act s27(b)(ii), s29(2) and (3).

7 Mining Act, s120, 121.

8 Mining Act, s11(1).

9 A mining lease therefore permits the holder to create a new form of property by extracting material from the land and recovering minerals from the material extracted: Mining Act, s73, sch 7; *Valuer-General v Perilya Broken Hill Ltd* (2013) 195 LGERA 416, [29] (Leeming JA).

10 An exploration licence may be issued unconditionally or subject to conditions, including conditions as to the payment of royalties: Mining Act s26(1), s26(2). Conditions may be imposed at the time of the grant, or at a later time: Mining Act s26(1); for example under ss 117(2), 168A, 239(2). A breach of a condition of an exploration licence is an offence: Mining Act, s378D.

11 The Minister is empowered to cancel an exploration licence, although must afford the holder of an exploration licence a reasonable opportunity to make representations: Mining Act, s125, s126. The grounds for cancellation are listed exhaustively in s125 and 380A, the latter of which empowers a decision-maker to cancel where a relevant person is not a fit and proper person. Section 380A was introduced by Act No 10 of 2014, *Mining and Petroleum Legislation Amendment Act 2014* (NSW), after sch 6A of the Mining Act was inserted. The Mining Act provides that the cancellation of an authority does not entitle the holder to compensation: Mining Act, s127(1), except in circumstances where the authority is cancelled because the underlying land is required for a public purpose: s127(2). A person aggrieved may appeal to the Land and Environment Court from a cancellation, such appeal being by way of new hearing and any decision of the Court being given effect to as if it were the decision of the Minister: Mining Act, s128.

12 Where the licence holder does not own the land, prospecting operations may only be carried out on the land in accordance with an access arrangement under Part 8 Div 2: Mining Act, s140.

were tainted by serious corruption". The Schedule was enacted for the broad purposes of *'restoring public confidence'* in the allocation of mineral resources, promoting integrity in public administration, deterring future corruption, and restoring the State to a position as if the relevant licences had not been granted.[13] The specific objects of the Schedule are then set out:

i. to cancel the relevant licences;

ii. to ensure that the tainted processes have no continuing impact and cannot affect future processes in respect of the relevant land;

iii. to ensure that the State has the opportunity to allocate mining and prospecting rights in respect of the relevant land in the future;

10 iv. to ensure that no person (whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes;

v. to protect the State against potential loss, damage or claims for compensation.

14. Clause 4 of Sch 6A is the primary operative provision. It provides that three specified exploration licences "*are cancelled by this Schedule*". The date upon which the cancellation "*takes effect*" is the date of assent of the Amending Act (**cancellation date**).

15. The following consequences for those licence holders also apply from the cancellation date:

i. First, cl4(3) provides that the cancellation does not affect any liabilities incurred before the cancellation date by or on behalf of the holder of a relevant licence or a person involved in the holder's management.

20 ii. Second, cl6 provides for the refund of certain fees paid in connection with the relevant licences.

iii. Third, the obligation to provide reports under s163C of the Mining Act continues despite the cancellation.[14]

iv. Fourth, certain conditions of the relevant licences are expressly continued such that obligations imposed by those conditions continue to have effect.[15]

v. Fifth, the liabilities of a licence holder under an access arrangement under Division 2 of Part 8 of the Mining Act are not affected, and the cancellation is treated as a cancellation by the relevant decision-maker under the provisions of Division 3 of Part 7 of the Mining Act

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13 Mining Act, sch 6A cl 3(1).
14 cl 9.
15 cls 13, 14.

for the purposes of any provision of such an access arrangement.[16]

16. Clause 5 of the Schedule also renders *"void and of no effect"* certain *"associated applications"* relating to the cancelled licences or the land over which the cancelled licences were granted, including applications for grant, renewal or transfer of authorisations under the Mining Act, and certain applications under the *Environmental Planning and Assessment Act* 1979 (NSW) (the **Planning Act**). Clause 5 thereby alters, from the cancellation date, the rights and obligations of any relevant applicants, and the relevant bodies dealing with those applications.

17. Clause 10 of the Schedule allows for certain exploration information obtained by or on behalf of the licence holders to be provided to an inspector where required in accordance with s248B of the Mining Act, and to thereupon become the property of the State. Clause 11 allows the State to use and disclose such information for future mining purposes.

18. Other clauses of Schedule 6A alter rights and obligations beyond the licence holders from the cancellation date:

    i. the State is provided with immunity from liability to compensate any person as a direct or indirect consequence of the Amending Act, or because of any conduct relating to the enactment or operation of the Amending Act;[17]

    ii. the State is provided with immunity from all types of civil liability to any person as a result of conduct relating to a relevant licence or mining on relevant land;[18]

    iii. any person, other than the holder of an exploration licence or mining lease, is prohibited from applying for consent or approval to carry out development on relevant land under the Planning Act.[19]

Schedule 6A does not constitute an exercise of judicial power

Schedule 6A alters rights and obligations for the future

19. Whilst clause 4 speaks of the licence being 'cancelled', Schedule 6A does not operate to determine retrospectively that either the licences, or the pre-existing rights attached to them, never in fact existed. From the cancellation date, the provisions of Schedule 6A operate to either preserve, alter or create for the future the rights and obligations of affected persons, including the holders of the cancelled licences.

    i. *Preservation of rights and obligations.* Clause 4(3) preserves liabilities incurred prior to the

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16 cl 15.
17 cl 7.
18 cl 8.
19 cl 16.

cancellation date by a licence holder or director or person involved in the management of a licence holder. Clauses 9, 13, 14 and 15 continue obligations of the holders of relevant licences despite the cancellation of those licences.

ii. *Alteration of rights and obligations.* Prior to the cancellation date, the licence holders were beneficiaries of the exclusive right under the Mining Act to prospect on the relevant land for coal. Clause 4(1) alters such rights by reducing their content. From the cancellation date, the cancelled licences are not authorisations "in force".[20] The licence holders therefore no longer have a right to prospect on the relevant land. As for any other person, for the licence holders to seek to do so would amount to a criminal offence.[21] From the perspective of the Defendant, the content of its right to allocate prospecting and mining rights over the relevant land in future is increased (by operation of clause 4); and the content of other of its existing rights and obligations are reduced (by clauses 5, 6, 7, 8, 14 and 16). The increase or reduction in the content of rights and obligations previously held by the licence holders and the Defendant will have a corresponding impact on relevant rights or obligations held by other interested persons, for example, persons with a relevant potential claim against the Defendant (clauses 7 and 8); parties to an access arrangement (clause 15); and persons wishing to develop the relevant land for future mining or prospecting purposes (clause 16).

iii. *Creation of rights and obligations.* Clause 6 creates rights to refund of application fees paid in connection with relevant licences and associated applications. Clause 10 extends the potential scope of the obligation of a licence holder with respect to providing information and records.

20. Thus, the provisions of Schedule 6A operate as a whole to alter the law with respect to various rights and obligations associated with certain exploration licences previously granted under the Mining Act. In prospectively altering or otherwise declaring the normative content of various rights and obligations, it is quintessentially legislative: it "*determines the content of a law as a rule of conduct or a declaration as to power, right or duty.*"[22] As Dixon CJ and McTiernan J stated in *The Queen v Davison*:[23]

> *A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist... Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.*

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20 Mining Act, s5.

21 Mining Act, s5.

22 *The Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).

23 *The Queen v Davison* (1954) 90 CLR 353, 370 (Dixon CJ, McTiernan J), referring to Holmes J in *Prentis v Atlantic Coast Line* (1908) 211 US 210.

21. Schedule 6A creates such a new rule. While clause 4 of Schedule 6A to the Mining Act effects the cancellation of an instrument to which existing rights were attached, it can only be described as *'purport[ing] to determine existing rights and liabilities'*[24] in the broadest possible sense. An exercise of power will only determine rights in the judicial sense where it involves the application of the judicial method, namely the application of legal principles to facts found to arrive at a conclusion. The provisions of Schedule 6A, in modifying rights and obligations, do not 'determine' past rights in this sense. In substance and effect, when considered as a whole, they operate to "*create new rights and obligations for the future*"[25] and are therefore laws and not an exercise of judicial power. Moreover, to accept the proposition that a legislative act "*determines the content of a law as a rule of conduct or a declaration as to power, right or duty*"[26] does not necessarily require acceptance of the further proposition that "*to qualify as a law, a norm must formulate a rule of general application*".[27]

22. No provision of Schedule 6A exhibits any feature indicative of judicial power. While judicial power has defied precise definition,[28] the following factors are significant in this case:

    i. no provision of Schedule 6A purports to decide a controversy between persons;[29]

    ii. Schedule 6A did not enter into effect as a result of an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined;[30]

    iii. as further discussed below, no provision of Schedule 6A either purports to adjudge a specific person or specific persons guilty of any offence[31] or to determine an action for breach of contract or other civil wrong;[32] or purports to impose a punishment on a specific

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24 Plaintiff's submissions in S119 of 2014, [46]; referring to language used in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 110 [41], and *Luton v Lessels* (2002) 210 CLR 333, 345 [22].

25 *Luton v Lessels* (2002) 210 CLR 333, 345 [22] (Gleeson CJ).

26 *The Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).

27 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 634-5 (Gummow J). Gummow J referred to the work of Professor Raz, who points to "individual norms" applying to the actions of a single person on a single occasion which are nevertheless laws.

28 *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410, [27] (French CJ and Gageler J); *Polyukhovich v the Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ); *Nicholas v the Queen* (1998) 193 CLR 173, 207 (Gaudron J), 259 (Kirby J), 273 (Hayne J).

29 *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410, [28] (French CJ and Gageler J); *Polyukhovich v the Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ)

30 *Reg. v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 - 374 (Kitto J), referred to in *Polyukhovich v the Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ).

31 *Polyukhovich v the Commonwealth* (1991) 172 CLR 501, 608 - 609 (Deane J), 649 (Dawson J), 685 (Toohey J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas v the Queen* (1998) 193 CLR 173, 231 (Gummow J).

32 *H A Bachrach Pty Ltd v the State of Queensland & Ors* (1998) 195 CLR 547, 562 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

person or specific persons as a result of acts they have committed.[33]

Schedule 6A does not determine guilt or impose punishment

23. The Plaintiffs assert that Schedule 6A constitutes an exercise of judicial power as effecting a legislative judgment and imposition of punishment. The Plaintiffs contend that "*the legislature has taken the extraordinary, and ad hominem, step of finding for itself the fact of 'serious corruption' .... [which] operates in substance to determine in a conclusive and binding manner the rights of the holders of the exploration licences.*"[34]

24. However, clause 3(1) of Schedule 6A, in referring to the satisfaction of the Parliament as to the tainted nature of the "*decisions and processes that culminated in the grant of the relevant licences*", makes no conclusive or binding determination that the holders of the exploration licences, nor any other particular person or class of persons, has acted unlawfully.

    i. There is no offence under the law of NSW of "corruption" or "serious corruption". The term 'corruption' as a descriptor may be associated with a number of norms of conduct including (but not limited to) misrepresentation, conspiracy to defraud and misconduct in public office. No breach of any such norm of conduct has been determined by the provisions of Schedule 6A;

    ii. Schedule 6A in particular does not, and does not purport to, determine that the Plaintiffs, or any other persons, have engaged in corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988* (NSW). While the NSW ICAC made such findings against various individuals,[35] Schedule 6A is not directed at those individuals, in that it affects the rights and obligations of persons beyond those individuals;

    iii. Clause 3(1) of Schedule 6A provides no basis for redress to be sought against any of the Plaintiffs, or any other person, based on their corruption or complicity in corruption. Should the question of an individual's criminal guilt subsequently arise for determination in judicial proceedings, not only does the Parliament's satisfaction not purport to answer that question, it could have no bearing upon it;

    iv. Where the judicial power is deployed in the adjudication and punishment of criminal guilt, it is deployed on an individual basis. That is, guilt and punishment are determined and imposed in relation to an individual, ordinarily in separate criminal proceedings.[36] Here,

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33 *Liyanage v The Queen* [1967] 1 AC 259, 290 - 291; *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717, 727; *Nicholas v the Queen* (1998) 193 CLR 173, 231 (Gummow J).

34 Plaintiff submissions in S119 of 2014 at [45].

35 And therefore indicated the Commission's satisfaction, if the facts found were proved on admissible evidence to the criminal standard, that those individuals had committed a criminal offence against the law of NSW.

36 *Bugmy v The Queen* (2013) 249 CLR 571, [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

the satisfaction of Parliament is not expressed on an individualised basis.

25. The Parliament's 'satisfaction' as to the existence of a set of facts has no broader application than an explanation of the relevant 'mischief' to which the legislation is directed. While the necessity of its inclusion within the Amending Act may be debated, that inclusion does not result in its invalidity. Where legislation is targeted or even *ad hominem*, an explanation by the Parliament as to the legislative purpose or intent is likely to be narrow, but it is not akin to a judicial 'finding' for that reason. As acknowledged by this Court in *Precision Data Holdings Ltd v Wills*, finding fact is not an exclusively judicial function:[37]

> Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.

26. In any event, Parliament has expressed its satisfaction that the *process* leading to the grant of the licences was "tainted". Insofar as it has made a finding, it has done so with regards to *processes* and not to *persons*. Judicial power operates to determine a controversy between *persons*.[38] The Parliament has expressly indicated that a finding with respect to persons has not been made. Clause 4 of Schedule 6A cancels the relevant licences to ensure that no person "*whether or not personally implicated in any wrongdoing*" may derive any further direct or indirect financial benefit from the tainted processes.[39]

27. The Plaintiffs further assert that the provisions of Schedule 6A "*impose a severe punishment in consequence*" of the Parliament's determination of the culpability of the holders of the relevant exploration licences for serious corrupt conduct.[40] However, as discussed above, the Parliament made no such determination in respect of the licence holders.

28. Further, the operation and effect of clauses 4, 5, 10 and 11 of Schedule 6A[41] are justified by the stated purposes and objects in subclause 3(1) and (2), including:

    i. the "*placing of the State, as nearly as possible, in the same position as it would have been had those relevant licences not been granted*",

    ii. "*to ensure that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land*" and

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37 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); see also *The Queen v Davison* (1954) 90 CLR 353, 370 (Dixon CJ, McTiernan J), approving a dictum of Holmes J in *Prentis v Atlantic Coast Line* (1908) 211 US 210, "*most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it is determined by the nature of the act to which the inquiry and decision lead up … The nature of the final act determines the nature of the previous inquiry*".

38 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410, [28] (French CJ and Gageler J).

39 Mining Act, sch 6A, cl 3(c).

40 Plaintiff submissions in S119 of 2014 at [45].

41 Being the provisions which have a direct and detrimental impact on the plaintiffs.

iii. *"to ensure that no person (whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes."*

29. The provisions of Schedule 6A are therefore not, and are not intended to be, retributive or punitive. While the Plaintiffs are undoubtedly detrimentally affected by the operation of Schedule 6A, to create a disability in the future is not to create a punishment.[42]

i. That a law might impose undesirable consequences upon an individual or group of individuals, without operating at a sufficiently high level of generality, does not mean that an individual has been singled out for punishment in the relevant sense. Legislation may validly operate to impose unwelcome and burdensome consequences upon *"a legitimate class of one"*.[43]

ii. The purpose underlying the imposition of a disadvantage will affect whether it is characterised as "punishment". Legislation disqualifying a member of Parliament from sitting on the grounds of bribery has been characterised as discipline rather than punishment.[44] The continuing detention in *Fardon v Attorney-General (Qld)* was not punishment because its purpose was *'not to punish people for their past conduct'* but was *'protective'*.[45] Moreover, in United States jurisprudence, emphasis has been placed upon whether the statute *"can be reasonably said to further nonpunitive goals"*[46] and, conversely, whether the legislature *"evinces an intent to punish"*.[47]

iii. The cancellation of the exploration licences effected by Schedule 6A operates to alter the rights attaching to particular licences and bring the relevant land back within the scheme of the Mining Act. It operates to prevent unjust enrichment arising out of processes found to have been tainted by corruption.[48] It prevents the continuing impact of those corrupt processes. That the legislation operates as restitutionary rather than punitive is indicated by the fact that the licence fees paid for the grant of the authorities are refundable.[49] Moreover, the absence in Schedule 6A of any specification of an individual punished and the punishment for that individual strongly tends against any intention to punish on the

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42 *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717, 736.

43 *Nixon v Administrator of General Services* (1977) 433 US 425, 472; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 64 (Brennan CJ); see also *Nicholas v the Queen* (1998) 193 CLR 173, 277 (Hayne J).

44 *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717, 737.

45 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 655 (Callinan and Heydon JJ); see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 50 (Toohey J), 71 (McHugh J).

46 *Selective Service System v Minnesota Public Interest Research Group* (1984) 468 US 841, 854; *Nixon v Administrator of General Services* (1977) 433 US 425, 475.

47 *Selective Service System v Minnesota Public Interest Research Group* (1984) 468 US 841, 852; *Nixon v Administrator of General Services* (1977) 433 US 425, 474.

48 Similarly, the requirement to disgorge the proceeds of crime has been regarded as non-punitive, albeit that it may be relevant to sentence: *R v McLeod* (2007) 16 VR 682, [16].

49 Mining Act, sch 6A, cl6.

part of the legislature.

Schedule 6A is not a bill of pains and penalties

30. Following on from the above, Schedule 6A cannot be equated with a bill of attainder or a bill of pains and penalties. Unlike the United States Constitution,[50] neither the Commonwealth *Constitution* nor the *Constitution Act 1902* (NSW) expressly prohibit the making of laws having the character of a bill of attainder or pains and penalties. The separation of powers effected by the Commonwealth *Constitution* prevents the Commonwealth from passing legislation having those features of a bill of pains and penalties which amount to a usurpation of judicial power.[51]

    i. In order for legislation to exhibit the characteristics of a bill of pains and penalties, and hence constitute an invalid exercise of judicial power by the legislature, it must meet four criteria which reflect the individualised nature of the adjudication and punishment of criminal guilt: first, it must specify an identifiable individual or individuals, second, it must find the individual or individuals guilty or find a "*contravention of a norm of conduct*",[52] third, it must inflict punishment on the individual or individuals, and fourth it must do so without the protections of a judicial trial.[53]

    ii. As discussed above, Schedule 6A does not make a finding of guilt or otherwise legislatively specify that a norm of conduct has been contravened by an individual or individuals.

    iii. Moreover, Schedule 6A does not impose punishment. Its purpose is not punitive; and its effect is restorative (in terms of the State) and preventative (in terms of denying further direct or indirect benefit from tainted processes).

Schedule 6A is a "law"

31. The Plaintiffs in S206 of 2014 suggests that, in the making of adverse findings, and the visiting of deleterious consequences upon individuals as a result of such findings, Schedule 6A does not answer the description of a "rule of conduct" or of a "declaration as to right, duty or power,"[54] and therefore is not a "law" for the purposes of s5 of the *Constitution Act 1902* (NSW). For the reasons

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50 Article 1, s.9 cl.3 and Article 1, s.10, cl.1. As to which, see *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 535 (Mason CJ).

51 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 536 (Mason CJ); *Haskins v Commonwealth* (2011) 244 CLR 22, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [96] (Heydon J).

52 *Haskins v Commonwealth* (2011) 244 CLR 22, [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 537 (Mason CJ); *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717, 735-6; *Nixon v Administrator of General Services* (1977) 433 U. S. 425, 468.

53 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 70 (McHugh J); *Haskins v Commonwealth* (2011) 244 CLR 22, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 654-5 [218] (Callinan and Heydon JJ); *United States v Brown* (1965) 381 US 437, 442; *Nixon v Administrator of General Services* (1977) 433 US 425, 468; *Selective Service System v Minnesota Public Interest Research Group* (1984) 468 US 841, 846-847.

54 Plaintiffs' submissions in S206 of 2014, [19].

expressed above at [19] to [21], such a suggestion cannot be supported. Schedule 6A is in the form of legislation, passed by a majority of two houses of Parliament, contained in an Act of general application in relation to authorities to mine in New South Wales, and is capable of being amended or repealed.[55] It is a law.

32. The word "law" may have different meanings for different purposes. In determining whether the word "law" as used in the *Constitution Act 1902* (NSW) is used as a word of limitation, little assistance is gained from other meanings that have been given to the word "law" for other purposes. The authority referred to by the Plaintiffs in S206 of 2014 considers the meaning of "law" in the context of determining whether the legislature has entirely delegated its legislative power in relation to a particular subject[56] and also in examining the manner in which legislative commands may come into conflict.[57] Neither context is apposite for present purposes.

33. Further, in *Kable v Director of Public Prosecutions (NSW)*,[58] three judges of this court rejected the argument that the word "law" in s5 of the *Constitution Act 1902* (NSW) by necessary implication limited the types of statutes that the New South Wales legislature could pass.[59] As Brennan CJ noted, acts of attainder were still considered to be "laws" by Coke.[60]

34. The words "*for the peace, order and good government of New South Wales*" have always been considered to confer plenary power, without limitation save as to extraterritoriality.[61] In *Powell v Apollo Candle Company*[62] the Privy Council, applying its decisions in *R v Burah*[63] and *Hodge v The Queen*[64], declared that the legislative powers of the Parliament of New South Wales within their territorial limits were "*plenary powers of legislation as large, and of the same nature, as those of [the Imperial] Parliament itself*".[65] They

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55 *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717, 738. Some functions take their character from the way in which they are to be exercised and, thus, from the body on which they are conferred: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 106 (Gaudron J), and authorities cited therein.

56 *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *New South Wales v Commonwealth* (The Work Choices Case) (2006) 229 CLR 1, 176 [400].

57 *Momcilovic v The Queen* (2011) 245 CLR 1, [230]-[233] (Gummow J).

58 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

59 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 64 (Brennan CJ), 76 (Dawson J), 109 (McHugh J); see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 65 – 66 (Gaudron J).

60 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 64 (Brennan CJ);

61 *Durham Holdings v New South Wales* (2001) 205 CLR 399, 409 (Gaudron, McHugh, Gummow and Hayne JJ); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 (the Court); R *(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, 486 (Lord Hoffmann) 503-4 (Lord Rodger of Earlsferry), 510 (Carswell LJ).

62 (1885) 10 App Cas 282.

63 (1878) 3 App Cas 889.

64 (1883) 9 App Cas 117.

65 *Powell v Apollo Candle Company* (1885) 10 App Cas 282 at 289. Additionally, for many years prior to the passing of s 2 of the Australia Act 1986 (UK) it has been accepted that, notwithstanding what had been said in Powell concerning the territorial limitations of colonial legislatures, those legislatures also had power to make laws which operated extra-territorially: *Bonser v La Macchia* (1969) 122 CLR 177 at 189, 224-5; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 468-9, 494-5; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 12.

also declared in that case that the New South Wales Legislature was "*supreme, and has the same authority as the Imperial Parliament*".[66] Any doubt as to the plenary nature of State legislative power was removed by the *Australia Act 1982* (UK).[67] Any attempt to now imply a significant (and previously undiscovered) limitation on State legislative power cannot be sustained in this context.

Schedule 6A is valid based on applicable authority

35. Schedule 6A is analogous to the legislation found to be valid in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth*,[68] *Kariapper v Wijesinha*[69] and *H A Bachrach Pty Ltd v Queensland*.[70]

36. Like clause 3 of Schedule 6A, the impugned legislation in the *Builders Labourers' Federation case*, the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth) specifically identified the mischief against which Parliament was legislating, reciting that "*Parliament considers that it is desirable, in the interest of preserving the system of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, to cancel the registration of the Australian Building Construction Employees' and Builders Labourers' Federation*". Similar to clause 4 of Schedule 6A, s3 of the Commonwealth Act provided that the registration of the Federation under the *Conciliation and Arbitration Act 1904* (Cth) was "*by force of this section, cancelled*".

37. The effect of the cancellation was that the Federation ceased to have a separate legal identity as a body corporate.[71] It ceased to be capable of holding property in its own right and any creditor or person interested was entitled to apply to the Court for satisfaction of their debt out of that property.[72] The Federation and its members immediately ceased to have the benefit of any applicable award.[73] The Federation lost any right to become a party to a proceeding before the Australian Conciliation and Arbitration Commission.[74] Nevertheless, this Court upheld the legislative cancellation as a valid exercise of legislative power:

> Just as it is entirely appropriate for Parliament to select the organizations which shall be entitled to participate in the system of conciliation and arbitration, so it is appropriate for Parliament to decide whether an organization so selected should be subsequently excluded and, if need be, to exclude that organization by an exercise of legislative power.[75]

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66 *Powell v Apollo Candle Company* (1885) 10 App Cas 282 at 290.
67 *Australia Act 1982* (UK) s2(2).
68 *Australian Building Construction Employees' and Builders Labourer's Federation v Commonwealth* (1986) 161 CLR 88.
69 *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717.
70 *H A Bachrach Pty Ltd v the State of Queensland & Ors* (1998) 195 CLR 547.
71 *Conciliation and Arbitration Act 1904* (Cth), s136, s144(6); *Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986* (Cth), s4(1).
72 *Conciliation and Arbitration Act 1904* (Cth), s144(6); *Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986* (Cth), s4(1).
73 *Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986* (Cth), s4(2).
74 *Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986* (Cth), s4(3).
75 *Australian Building Construction Employees' and Builders Labourer's Federation v Commonwealth* (1986) 161 CLR 88, 95 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

38. Similarly, in *Kariapper*, the Privy Council upheld the validity of legislation which deemed the seat of a named member of the Parliament of Ceylon to be vacant; as well as disqualifying named individuals from participating in elections, or becoming Members of Parliament or public servants. The *Imposition of Civic Disabilities (Special Provisions) Act 1965* followed upon a commission of inquiry which found that allegations of bribery against certain persons had been proved, and evinced the express purpose of imposing "*civic disabilities on the said persons consequent on the findings of the said commission.*" The legislation was not a bill of attainder or otherwise an exercise of judicial power:[76]

> Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the schedule. The question of the guilt or innocence of the persons named in the schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in the circumstances. Secondly, the disabilities imposed by the Act are not, in all the circumstances, punishment. It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment, but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good.

39. Moreover, the fact that the Mining Act generally sets out limited administrative mechanisms for the cancellation of exploration licences, subject to judicial oversight, does not prevent the New South Wales Parliament from legislating to effect the cancellation of specific licences. The impugned legislation in *Bachrach* operated as an amendment to the *Local Government (Planning and Environment) Act 1990* (Qld) which had the effect of permitting a certain shopping centre development. This Court affirmed the legislative power of the Queensland State Parliament to do so:[77]

> When a State legislature enacts legislation which sets up a general scheme of town planning and development control it does not thereby surrender its power to deal differently, by legislation, with particular areas of land where this, for a reason which commends itself to Parliament, is regarded as appropriate. Whether such a power should be exercised in relation to a given area becomes a political question.

Clause 5 of Schedule 6A does not impermissibly direct a court

40. The Plaintiff in S119 of 2014 additionally points to clause 5(2) of Schedule 6A, which provides that as a result of certain applications associated with the relevant licences being rendered void, any associated application is "*not to be dealt with any further under this Act or the Planning Act*". The Plaintiff contends this to be an unlawful direction to the NSW courts as to the manner and exercise of their jurisdiction.[78] To the contrary:

    i. Clause 5(2) would not be read, consistently with *Kirk*, as denying the NSW Supreme Court of the jurisdiction to supervise any purported exercise (or failure to exercise) executive action with respect to any such associated application for jurisdictional error;

    ii. On its proper construction, this provision distinguishes between the consequences of an associated application being declared void, and, for example, the consequences where an applicant for an authority dies or become bankrupt, where the application may "*continue to*

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76 *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717, 736.

77 *H A Bachrach Pty Ltd v the State of Queensland & Ors* (1998) 195 CLR 547, 559 [3] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also *Roche v Kronheimer* (1921) 29 CLR 329, at 337, 340.

78 Plaintiff's submissions in S119 of 2014, [50].

be dealt with";[79]

iii. The provision merely states the natural consequence of the applications being void: that the applications are not valid applications, and that as a result the relevant decision-makers under the Mining Act and the Planning Act do not have jurisdiction to deal with them. The question whether an application the subject of judicial proceedings was an associated application would still be considered as a necessary aspect of the Court determining its own jurisdiction.

Whether the Parliament of New South Wales may exercise judicial power

41. If this Court accepts the submission that clauses 1 to 13 of Schedule 6A do not constitute an exercise of judicial power, the foundation upon which proposition (i) is erected falls. Consistent with this Court's practice, proposition (i) should not then be entertained.[80]

42. If this Court accepts proposition (ii), concluding that clauses 1 to 13 constitute an exercise of judicial power, South Australia contends that, nonetheless, the Parliament of New South Wales may exercise such power.

43. Stripped bare, the proposition advanced by the Plaintiffs is that any and all exercises of State judicial power must be amenable to review by a State Supreme Court and, ultimately, by this Court.[81] The rationale proffered is that absent such requirement an "island of power" insulated from such ultimate superintendence develops.[82] Thus, the proposition advanced by the Plaintiffs attributes depth to the power conferred on this Court by s73 of the Commonwealth *Constitution* (and thereby a conferral of jurisdiction on the Supreme Courts and courts of the States) by virtue of an asserted implication that this Court must ultimately superintend all exercises of State judicial power. The Plaintiffs' argument, with respect, bears the hallmarks of top-down reasoning,[83] inviting this Court to make what they consider a "small leap" from a theory not supported by the text or structure of the *Constitution.*

44. Section 73 is one aspect of the integrated judicial system in Australia[84] in which this Court has the ultimate superintendence over the judicial power of the States exercised by the Supreme Courts' jurisdiction, including their supervisory jurisdiction to enforce limits on the exercise of State

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79 See Mining Act s134.

80 See eg *Plaintiff M76/2013 v Minister for Immigration* (2013) 88 ALJR 324, [148] (Crennan, Bell and Gageler JJ); *Hutchison 3G Australia Pty Ltd v City of Mitcham* (2006) 80 ALJR 711, [110] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

81 Plaintiff's submissions in S119 of 2014, [29], [34].

82 Plaintiff's submissions in S119 of 2014, [32].

83 R A Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights* ((1992) 59 U Chi L R 434.

84 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574, [110] (Gummow and Hayne JJ); see also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 622, [34] (Gleeson CJ, Gummow and Hayne JJ).

executive and judicial power, and courts of States.[85] However, any limitation on the power of State Parliaments based on a negative implication to be drawn from s73 must be securely based.[86]

> The critical point to recognise is that "any implication must be securely based". Demonstrating only that it would be reasonable to imply some constitutional freedom, when what is reasonable is judged against some unexpressed a priori assumption of what would be a desirable state of affairs, will not suffice. Always the question must be: what is it in the text and structure of the *Constitution* that founds the asserted implication?[87] *(footnotes omitted)*

45. "Ultimate superintendence" by this Court is merely a way of stating the consequence of the fact that State Supreme Court decisions are appealable to the High Court under s73 of the *Constitution.* That is, ultimate superintendence is not a free standing principle that supports a constitutional implication as to the conferral of State judicial power.

46. Whilst s73 entrenches the breadth of the capacity of this Court to superintend the exercise of state judicial power by the Supreme Courts and the courts of the States, s73 says nothing as to the depth of that capacity. Section 73 does not confer jurisdiction on the Supreme Courts or courts of the states.[88]

47. In considering the depth of the jurisdiction of a State Supreme Court (and, thereby the depth of this Court's power in s73), the starting point must be to acknowledge that the doctrine of the separation of powers derived from the structure of the *Constitution*[89] has no equivalent foundation in the States. To this must be added the implication arising from s106 of the *Constitution* that, subject to the *Constitution*, the constitutional arrangements for the distribution and exercise of power in the States is a matter for the States. Accordingly the doctrine of the separation of powers does not apply in the States.[90] Thus, returning to s73, it provides for the ultimate superintendence of the

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85 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-1, [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

86 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 134 (Mason CJ); *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at 453- 4 (Hayne J).

87 *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at 453 - 4 (Hayne J).

88 The drafting history of s73 indicates that the framers did not intend to confer any jurisdiction on the Supreme Court. At federation, not all the States had enacted statutes creating rights of appeal to their respective Supreme Courts from all State criminal proceedings. At the 1898 session in Melbourne, Mr Isaacs, Mr O'Connor and Dr Quick specifically discussed s73 on the basis that it would not result in an appeal lying to the High Court from all State criminal proceedings unless an appeal were provided by the State of the Supreme Court. Although Mr O'Connor lamented that this mean an appeal would not necessarily lie in all criminal proceedings, no amendment to the clause was proposed; *Official Record of the Debates of the Australasian Federal Convention. Third Session. Melbourne* (1898) at 1889-1891. It may be assumed that the framers would have expressly conferred jurisdiction on the Supreme Courts if they had intended to change the settled common law position, much in the same way as the words in the first paragraph of s73 conferring appellate jurisdiction upon the High Court are unequivocal.

89 *The Queen v Kirby; Ex Parte the Boilermakers Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

90 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 293 ALR 450, [57] (Hayne, Crennan, Kiefel and Bell JJ)*Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, 466-7 [22] (French CJ), and authorities referred to therein.

exercise of judicial power by the Supreme Courts and courts of the States, but not the exercise of all State judicial power.

48. The proffered rationale does not assist the Plaintiffs in deriving an implication from s73 as to the depth of the jurisdiction conferred. That rationale, observed in *Kirk*, was linked to the supervisory jurisdiction of the Supreme Courts.[91] In *Kirk* the depth of the capacity of this Court to superintend the supervisory jurisdiction of the Supreme Court turned upon the defining characteristics of the Supreme Court and not upon any implied conferral of jurisdiction derived from s73 itself.[92] Thus, whether or not an "island of power" may emerge depends upon the depth of the jurisdiction of a State Supreme Court including the entrenched supervisory jurisdiction.

10 49. It was not the case as at Federation that all exercises of judicial power were necessarily subject to the supervisory jurisdiction of a State Supreme Court. For example:

i. the power possessed by a State Parliament to adjudicate and punish for contempt of the Parliament;[93]

ii. the power possessed by a State Parliament to investigate and punish for breach of its privileges;[94]

iii. the power possessed by a State Parliament to enact legislation providing for the divorce between two subjects;[95]

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91 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

92 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

93 *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC App 560; *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CR 157; *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CR 171. The power to fine for contempt, although not used by the House of Commons since 1666, has in recent years been reasserted by the UK Parliament, as well as Parliaments having the powers of the House of Commons such as the New Zealand House of Representatives, on the basis that no doctrine of desuetude prevails with respect to the powers of Parliament: Joint Committee on Parliamentary Privilege, *Parliamentary Privilege, Report of Session 2013-14* HL Paper 30 HC 100, 23 (2013). As to the power to punish for contempt possessed by the New South Wales Parliament, however, see *Armstrong v Budd* (1969) 71 SR (NSW) 386. In that case, it was suggested that the plenary power to make laws granted by s5 of the *Constitution Act 1902* (NSW) would allow the New South Wales Parliament to expressly vest itself with the powers, privileges and immunities of the House of Commons: at 491 (Wallace P).

94 A court has jurisdiction to determine whether a privilege exists, but not whether the occasion or manner of its exercise is lawful or appropriate; *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CR 157 at 162, 166 (The Court); *Egan v Willis* (1998) 195 CLR 424 at 446, [27] (Gaudron, Gummow and Hayne JJ), 460, [66] (McHugh J). In enforcing its privileges the House of Commons has been recognised as exercising judicial power; *Burdett v Abbott* (1811) 14 East 1 at 149, 159; 104 ER 501 at 558, 561; *Case of the Sheriff of Middlesex* (1840) 11 Ad & E 273 at 289, 295; 113 ER 419 at 425, 427. Likewise, the power to adjudicate upon disputed elections and the qualifications of members and senators (conferred upon the respective houses of the Commonwealth Parliament by s47 of the *Commonwealth Constitution*, and exercised by the Parliament of New South Wales until the *Parliamentary Electorates and Elections (Amendment) Act 1928* (NSW)) by application of the "common law of Parliament" seems to be at least "theoretically" or "scientifically" judicial: *Sue v Hill* (1999) 199 CLR 462, [35]-[36] (Gleeson CJ, Gummow and Hayne JJ), citing *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167.

iv. the power possessed by a State Parliament to enact legislation providing for the sale, management or restoration of an individual's property;[96] and

v. the power possessed by a State Parliament to enact Bills of Attainder and Bills of Pains and Penalties.[97]

50. Once it is accepted that there are, and always have been, exceptions to the supervisory jurisdiction of the Supreme Courts, the "islands of power" justification for limiting the power of a State Parliament evaporates. The jurisdiction of the State Supreme Courts, including the entrenched supervisory jurisdiction, never extended to this depth, and s73, therefore, does not correspondingly require the recognition or protection of such supervisory jurisdiction.

10 51. Here something should be said of the express reference in s73 to the jurisdiction conferred by it being subject to "such exceptions and subject to such regulations as the Parliament prescribes". The ability to except judgments, decrees, orders and sentences of the courts identified from the jurisdiction conferred necessarily contemplates the possibility of "islands of power" arising. It is accepted that such power could not be used to "eat up or destroy" the general regime but it is not necessary to "eat up or destroy" the regime for an island of power to emerge.[98]

52. To suggest that a limitation on the power of the New South Wales Parliament ought now be implied from s73 of the *Constitution* would, in addition, be contrary to s107 of the *Constitution.*

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95 Writing after Federation, J W Gordon in *The appellate jurisdiction of the House of Lords and of the Full Parliament* (1905) refers to ongoing instances of legislative divorce being provided for by the House of Commons. He instances a case in 1827 in which Parliament "*confessedly acting in a judicial capacity to give relief upon general principles of equity to a plaintiff who could have no adequate remedy by the law of the land*" by investigating and annulling a fraudulent and enforced marriage: at 5. The New South Wales colonial courts were not afforded a matrimonial jurisdiction to hear divorce proceedings in the early days of the colony. The New South Wales legislature sought and received advice from the judiciary affirming their power to pass private Acts providing for divorce: J M Bennett, 'The Establishment of Divorce Laws in New South Wales", (1964) Sydney Law Review 241, 242; See also *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ).

96 See for example *Armstrong's Settlement Act 1886* (NSW), in which Mrs Armstrong applied to Parliament for the appointment of new trustees over her marriage settlement and the grant of powers of investment to the new trustees. Parliament recited in detail the factual circumstances, and noted that the existing trustees had been informed of Mrs Armstrong's intention to apply to Parliament to pass the Act and had made no objection thereto. The passage of private Acts vesting trustees with powers for the sale, lease or other management of the property comprising a deceased estate was commonplace in New South Wales: see for example *Whitney Estate Act 1902* (NSW); *Mrs Payten's Estate Leasing Act* (1886). In relation to restoration, JW Gordon in *The appellate jurisdiction of the House of Lords and of the Full Parliament* (1905) at 3 instances an example of the restoration of property wrongfully withheld by a trustee.

97 While the Australian colonies do not appear to have passed bills of attainder or pains and penalties, this appears to have been for want of need rather than power. Such a power was not denied to the colonial legislatures. In 1838, the Legislative Council and Assembly of the Province of Upper Canada passed an "*Act to provide for the more speedy attainder of persons indicted for High Treason, who have fled from this Province, or remain concealed therein, to escape from Justice*"; See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 121 (McHugh J); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 380 (Street CJ).

98 *Sue v Hill* (1999) 199 CLR 462 at [41] (Gleeson CJ, Gummow and Hayne JJ); *Re McJannet; Ex Parte Minister for Employment Training and Industrial Relations* (1995) 184 CLR 620 at 651 (Toohey, McHugh and Gummow JJ); *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 216-217 (The Court); *Cockle v Isaksen* (1957) 99 CLR 155.

Section 107 expressly continued as at the establishment of the Commonwealth "*every power*" of the Parliaments of the Colonies-come-States unless such power was exclusively vested in the Commonwealth by the *Constitution* or was withdrawn from the Parliament of the State.

53. Further, this is not an instance of denotation or meaning of a term changing with time.[99] The suggestion floated that a power not used for many years is a power lost should be rejected. That continued by force of s 107 cannot be lost because it has not been exercised or by reason of the development of the common law.[100] The legislative power of a State Parliament is to be determined by reference to the State's Constitution as at Federation, the overriding effect of the *Constitution*, modifications made to the State Constitution by the Imperial Parliament or the State Parliament itself and the *Australia Act 1986* (Cth).[101] Further, ss 107, 108 and 109 state the result of the distribution of legislative powers, exclusive and concurrent, between the Commonwealth and the States. With the withdrawal of the Imperial Parliament from the Australian legislative field, there is no gap in such distribution.[102]

54. Neither the allocation of power effected by the *Constitution* nor s73 require that *all* exercises of the judicial power of a State must be subject to review by a State Supreme Court. Any abuse of power by a parliament can be superintended by another assumption on which the *Constitution* is erected: responsible government. To suggest that a State Parliament, in exercising powers which are judicial in nature, is an "*island of power immune from supervision and restraint*" ignores the directly representative nature of the members of such bodies. Members of Parliament, being subject to scrutiny within Parliament itself, and ultimately at the hands of the electorate, are subject to the most direct and powerful form of supervision and restraint contemplated by the democratic system of government enshrined within the *Constitution*. The status of a parliament is therefore relevantly different to that of members of the judiciary and the executive, and judicial supervision of their exercise of judicial power cannot be similarly justified.

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99 Contrast *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ); *Sue v Hill* (1999) 199 CLR 462; *Roach v Electoral Commissioner* (2007) 233 CLR 162.

100 *Lange v Australian Broadcasting Corporation* (1997) 178 CLR 520, 566; *Lipohar v The Queen* (1999) 200 CLR *485*, 509-510; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 527-528.

101 *McGinty v Western Australia* (1996) 186 CLR 140 at 172-3 (Brennan CJ).

102 *Australia Act 1986* (Cth) s 2(2).

Part VI: Estimate of time for oral argument

55. South Australia estimates that 30 minutes will be required for the presentation of oral argument.

Dated 12 November 2014

M G Hinton QC
Solicitor-General for South Australia
T: 08 8207 1536
F: 08 8207 2013
E: solicitor-general'schambers@agd.sa.gov.au

L Byers
Counsel
T: 08 8207 2300
F: 08 8207 1724
E: byers.lucinda@agd.sa.gov.au