IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S119 of 2014

No S206 of 2014

No S138 of 2014

BETWEEN:

TRAVERS WILLIAM DUNCAN

Plaintiff in No S119 of 2014

AND:

STATE OF NEW SOUTH WALES

Defendant

CASCADE COAL PTY LIMITED and OTHERS

Plaintiffs in No S206 of 2014

AND:

STATE OF NEW SOUTH WALES

Defendant

NUCOAL RESOURCES LIMITED

Plaintiff in No S138 of 2014

AND:

STATE OF NEW SOUTH WALES

Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II, III. BASIS AND NATURE OF INTERVENTION

2. The Attorney-General for Victoria intervenes in each proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

IV. CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The applicable constitutional and legislative provisions are those annexed to the submissions of the plaintiffs and the defendant in each proceeding.

V. ARGUMENT

4. These proceedings concern the validity of Sch 6A to the *Mining Act 1992* (NSW) (the **Mining Act**), which effects the cancellation of certain specified exploration licences (the **specified licences**). The plaintiffs variously contend that:

   (1) the cancellation of the specified licences and the expunging of any applications relating to those licences is an exercise of judicial power and, by reason of Ch III of the Commonwealth *Constitution*, is beyond the power of the Parliament of New South Wales (the **NSW Parliament**);

   (2) Sch 6A is not a "law" within the meaning of s 5 of the *Constitution Act 1902* (NSW) (the **Constitution Act**) and is thus invalid; and

   (3) cl 11 of Sch 6A, which authorises the use or disclosure of information obtained in respect of the specified licences, is inconsistent with the *Copyright Act 1968* (Cth) and thus invalid by reason of s 109 of the Constitution.

5. Victoria contends that:

   (1) the cancellation of the specified licences by the NSW Parliament is not an exercise of judicial power (paragraphs 8 to 45 below);

   (2) even if such cancellation is an exercise of judicial power, it is within the legislative competence of the NSW Parliament (paragraphs 46 to 56 below); and

(3) Sch 6A is a "law" within the meaning of s 5 of the Constitution Act (paragraphs 57 to 63 below).[1]

A. The statutory regime

6. An exploration licence under the Mining Act entitles the holder to prospect on the specified land for the minerals specified in the licence (s 29). The Mining Act provides for the grant, renewal, transfer and cancellation of exploration licences.

(1) An exploration licence may be granted by the Minister after application or tender under Pt 3 of the Mining Act (ss 13-17, 22, 23 and the definition of "decision-maker" in the Dictionary). Subject to certain exceptions, an exploration licence may be granted over any land, including land over which the applicant or tenderer has no pre-existing rights (ss 18, 19, 24).

(2) An exploration licence may be renewed by the Minister under Div 1 of Pt 7, and transferred with the approval of the Minister under Div 2 of Pt 7.

(3) An exploration licence may be cancelled under Div 3 of Pt 7. Section 125 sets out various bases on which the Minister may cancel a licence.

7. Schedule 6A was inserted into the Mining Act by the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (the **Amending Act**). Schedule 6A relevantly provides as follows.

(1) Clause 3(1) sets out the purposes of the Amending Act. In summary, those purposes are directed to restoring public confidence in, and promoting the integrity of the administration of, the allocation of the State's mineral resources. The Amending Act also has the purpose of placing the State as nearly as possible in the position it would have been in had the specified licences not been granted.

(2) Clause 3(1) also recites the Parliament's satisfaction that the grant of the specified licences was "tainted by serious corruption".

(3) Clause 3(2) sets out the objectives of the Amending Act. In summary, those objects are to cancel the specified licences, to ensure that any future mining and prospecting rights over the same land are properly allocated

[1] Victoria makes no submissions in relation to the s 109 issue.

and to ensure that no person (whether implicated in wrongdoing or not) benefits from the tainted processes that led to the grant of the licences.

(4) Clause 4(1) effects the cancellation of the three specified licences, effective from the cancellation date (defined as the date of assent to the Amending Act: cll 2, 4(2)).

(5) Clause 4(3) provides that the cancellation does not affect any liability incurred before the cancellation date by a licence holder or any person involved in the management of a licence holder.

(6) Clause 5 provides that certain applications made in connection with a specified licence and lodged before the commencement of the Amending Act are, on the cancellation date, void and of no effect.

(7) Clause 6 provides for the refund of certain fees paid in connection with the specified licences.

(8) Clause 7 provides that no compensation is payable by the State in relation to or as a consequence of the Amending Act or any conduct relating to the Amending Act. Clause 8 provides that the State is not liable for relevant conduct including the grant of the specified licences.

(9) Clauses 10 and 11 concern information obtained in connection with the specified licences, and the remainder of Sch 6A concerns various extant obligations in respect of those licences.

B. No exercise of judicial power

8. The cancellation of the specified licences by the operation of Sch 6A does not constitute an exercise of judicial power. Parliament has not determined existing rights or imposed punishment on the plaintiffs; rather, it has altered existing statutory rights that are inherently capable of modification. To the extent that the legislation effects a deprivation or acquisition of valuable property without compensation, that is within the legislative competence of the NSW Parliament.[2] Further, the plaintiffs' reliance on Parliament's recital of its satisfaction that serious corruption occurred is misplaced. Beyond assisting to indicate the purpose

of Parliament in enacting Sch 6A, that statement has no bearing on the operation or proper characterisation of Sch 6A.

1. The plaintiffs' arguments

9. The plaintiffs variously submit that Sch 6A, in whole or in part, constitutes an exercise of judicial power because it:

   (1) purports to determine pre-existing rights or duties;[3] and

   (2) metes out punishment or imposes a penalty, akin to a bill of pains and penalties.[4]

10. The first of these propositions is premised on the principle that the power finally to determine existing rights and liabilities is exclusively judicial in nature. However, that principle says nothing about the power to affect or alter existing rights. A power of that kind may be exercised by the legislature or, in some cases, by courts. Schedule 6A does not purport to make a final determination of existing rights and liabilities; rather, it prospectively alters existing rights.

11. The second proposition is premised on the principle that the adjudgment and punishment of criminal guilt is exclusively judicial in character. Legislation that purported to declare guilt and impose punishment, known as a bill of pains and penalties, would (it is said) therefore involve an exercise of judicial power. However, the impugned legislation neither adjudges guilt nor imposes punishment in the relevant sense.

12. These arguments are developed further below.

2. Judicial power and the determination of existing rights and liabilities

13. It is well established that the binding determination of existing rights, liabilities, and obligations by the application of the law is at the heart of judicial power.[5]

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2 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 (***Durham Holdings***) at 408 [7] (Gaudron, McHugh, Gummow and Hayne JJ).

3 Duncan Submissions at [22(b)], [45].

4 Duncan Submissions at [22(b)]; NuCoal Submissions at [26].

5 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (***Precision Data***) at 188 (the Court).

This involves "a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation".[6]

14. Underlying the concept of judicial determination of existing rights, liabilities and obligations is a process of inquiry into the facts and the law as they exist at the time of the decision. In *Tasmanian Breweries*, Kitto J described this process in the following terms:[7]

> [T]he process to be followed must generally be 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; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.

15. Justice Kitto concluded that, in the absence of such a process, a power would need to possess "some special compelling feature" to be categorised as judicial power.[8] Such an inquiry was similarly acknowledged as part of the judicial process in *R v Davison*, where Dixon CJ and McTiernan J said that "the ascertainment of existing rights by the judicial determination of issues of fact and law falls exclusively within judicial power".[9]

16. In contrast, legislative power is generally directed at what the law should be, rather than at the determination and enforcement of existing rights. As Holmes J observed in *Prentis v Atlantic Coast Line Co*:[10] "Legislation ... 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".

17. The distinction was considered in *Attorney-General (Cth) v Alinta Ltd.* Quoting Holmes J in *Prentis*, Crennan and Kiefel JJ described judicial power thus:[11]

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6 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (***Tasmanian Breweries***) at 374 (Kitto J). See also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 (***Albarran***) at 360-361 [25]-[29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

7 (1970) 123 CLR 361 at 374.

8 Ibid at 374-375.

9 (1954) 90 CLR 353 at 369.

10 (1908) 211 US 210 (***Prentis***) at 226, quoted by Dixon CJ and McTiernan J in *R v Davison* (1954) 90 CLR 353 at 370.

11 (2008) 233 CLR 542 (***Alinta***) at 592 [152], 550 [1] (Gleeson CJ agreeing), 552 [9] (Gummow J agreeing).

> An adjudication is undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are ... [A] judicial inquiry "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

18. Their Honours went on to observe that:[12]

> Neither a legislative, an executive nor an arbitral function has as its purposes the ascertainment and recognition of existing rights or obligations. ... Holmes J described the legislative function as looking to the future and having as its purpose the creation of a new rule to be applied.

19. Of course on occasion the courts may, in the exercise of judicial power, make orders that create rights and liabilities.[13] But the creation of new rights and liabilities or the alteration of existing rights and liabilities are not hallmarks of judicial power — and are certainly not exclusively judicial in nature.

20. It is well established that, in the exercise of legislative power by the Commonwealth Parliament, the alteration of a substantive right does not usurp the judicial power of the Commonwealth.[14] This proposition applies equally to the State Parliaments, which have broad plenary powers to legislate for the peace, welfare and good government of their State.[15]

21. Indeed, the Commonwealth and State Parliaments are permitted to alter existing rights even where those rights are in issue in pending litigation.[16] A primary example is *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth.*[17] The BLF was an organisation of employees registered under the *Conciliation and Arbitration Act 1904* (Cth). That Act contained general provisions allowing for the cancellation of such registration and the *Building Industry Act 1985* (Cth) contained further provisions allowing for the cancellation of registration.

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12 Ibid at 593 [155] (footnote omitted), citing Holmes J in *Prentis* (1908) 211 US 210 at 226.

13 See discussion in *Thomas v Mowbray* (2007) 233 CLR 307 at 327-328 [15]-[16] (Gleeson CJ), 419-420 [323]-[325] (Kirby J); *Precision Data* (1991) 173 CLR 167 at 191 (the Court); Leslie Zines, *The High Court and the Constitution* (2008, 5th edn) at 221.

14 See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 120 [48] (French CJ and Crennan J, dissenting in the result).

15 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 (the Court); *Durham Holdings* (2001) 205 CLR 399 at 408-409 [9] (Gaudron, McHugh, Gummow and Hayne JJ).

16 "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action": *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 (***Humby***) at 250 (Mason J).

17 (1986) 161 CLR 88 (the ***BLF Case***).

22. Under the *Building Industry Act*, the Australian Conciliation and Arbitration Commission declared that it was satisfied that the BLF had engaged in conduct that empowered the Minister to order its deregistration. The BLF applied to this Court to quash the declaration, but before the matter was heard the Commonwealth Parliament enacted legislation that cancelled the BLF's registration.

23. The BLF challenged the validity of the legislation cancelling its registration on the basis that the legislation involved a usurpation of judicial power. This Court held that the legislation was valid, and emphasised that the cancellation of registration was well within the scope of legislative power:[18]

> [T]here is nothing in the nature of participation in that system or in deregistration which makes deregistration uniquely susceptible to judicial determination ... Nor is there anything in the nature of deregistration which makes it unsusceptible to legislative determination. Just as it is entirely appropriate for Parliament to select the organizations which shall be entitled to participate ... so it is appropriate for Parliament to decide whether an organization ... should be subsequently excluded and, if need be, to exclude that organization by an exercise of legislative power.

24. This Court held that deregistration did not interfere with the exercise of judicial power; nor did it involve the Parliament in the exercise of judicial power. Instead it simply made the pending legal proceedings (and the pending judicial determination) "redundant". It was "well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power".[19]

3. Schedule 6A alters existing rights

25. Schedule 6A to the Mining Act does not purport to make a judicial determination as to existing rights; it involves no inquiry into and determination of the law and the facts; it quells no controversy about any contravention, or the application, of the law.[20] Rather, Sch 6A alters existing rights by cancelling the specified licences. Those existing rights were created by statute and have now been cancelled by statute. It is significant that the rights that were cancelled were statutory entitlements to explore for minerals on land not owned by the plaintiffs and were not based on antecedent proprietary rights recognised by the general law.

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18 Ibid at 95 (the Court).

19 Ibid at 96 (the Court).

20 See *Alinta* (2008) 233 CLR 542 at 576 [89]-[90] (Hayne J).

Rights of that kind are, as a general rule, inherently susceptible of variation or extinguishment.[21] Further, the absence of compensation is not relevant because, to the extent that the cancellation may be characterised as an acquisition of property (which need not be decided), the States are competent to acquire property without compensation.

26. The power "to terminate or suspend a right or status, created by statute, by reference, in part, to past conduct" is not inherently judicial.[22] To paraphrase the *BLF Case*, there is nothing about the cancellation of an exploration licence that is "uniquely susceptible to judicial determination". Nor is there anything about the cancellation of such a licence that makes it "unsusceptible to legislative determination". Rather, the power to cancel an exploration licence is a power that takes its character from the body on which the power is conferred.[23] When exercised by the legislature the power is properly regarded as legislative in nature.

27. The proper characterisation of the power exercised by the Parliament is not affected by the fact that Parliament has recited its satisfaction that serious corruption occurred. That conclusion was not a jurisdictional[24] or constitutional[25] fact necessary for the exercise of legislative power by the NSW Parliament. As a matter of statutory construction, the meaning and effect of Sch 6A would not be altered if the supposed "finding" contained within the legislative statement of purpose were to be undermined or even disproved. It is not the "factual fulcrum upon which the entirety of Sch 6A depends for its efficacy".[26]

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21 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 35 [78] (Gaudron J), 56 [145] (McHugh J); *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 200 [144] (Hayne, Kiefel and Bell JJ).

22 *Albarran* (2007) 231 CLR 350 at 361 [29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ), quoting *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466 at 477-478 with approval.

23 See, e.g., *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18 (Aickin J); *Alinta* (2008) 233 CLR 542 at 552 [10] (Gummow J), 577 [93] (Hayne J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 202 [30] (French CJ and Kiefel J). Although often discussed in the context of the separation of judicial and executive powers, the principle is equally applicable to the distinction between the judicial and legislative powers.

24 Cf the legislation considered in *Precision Data* (1991) 173 CLR 167.

25 Cf the legislation considered in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 (the ***Communist Party Case***).

26 Duncan Submissions at [46].

28. To paraphrase Crennan and Kiefel JJ in *Alinta*,[27] the legislature has made something in the nature of a finding in relation to serious corruption. There may be a dispute about whether that has occurred. However, it is not suggested that this finding is itself binding upon any person or that it is determinative of any legal question. Rather, cl 3(1) records a finding preliminary to the enactment of the Amending Act. As Holmes J observed in *Prentis*:[28]

> [I]t does not matter what inquiries may have been made as a preliminary to the legislative act. 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.

29. Nor is the proper characterisation of the power exercised by the Parliament affected by the fact that a purpose of the Amending Act was to place the State as nearly as possible in the same position as it would have been in had the specified licences not been granted (cl 3(1)(c)). This purpose does not mean that Sch 6A, or its operative clauses, determines existing rights and liabilities or otherwise involves an exercise of judicial power. The relevant plaintiffs' characterisation of this aspect of Sch 6A[29] misstates the effect of cl 3(1) and attributes to it a significance that it cannot have. That clause simply records the purpose of the Amending Act; but the operative clauses work prospectively to alter existing rights, not to determine present rights.

30. Clause 5, which expunges associated applications, is also said to determine existing rights.[30] However that clause involves no inquiry into the facts as they are and the law as it is, and no determination of rights. Rather, a right (to have the application considered) is altered and the application is rendered void and of no effect prospectively (i.e., from the commencement date of the Amending Act). This is an exercise of legislative power.[31] The fact that a court would be bound to apply cl 5 in any future legal proceeding does not mean cl 5 interferes with or usurps judicial power.

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27 (2008) 233 CLR 542 at 595 [163].

28 (1908) 211 US 210 at 227.

29 Duncan Submissions at [47].

30 Duncan Submissions at [48]-[50].

31 *BLF Case* (1986) 161 CLR 88 at 96-97 (the Court). It would remain an exercise of legislative power even if it had retrospective operation: *Polyukhovich v The Commonwealth (the War Crimes Act Case)* (1991) 172 CLR 501 (***Polyukhovich***).

4. Schedule 6A does not determine guilt or impose punishment

31. The determination of criminal guilt and the consequent imposition of punishment is a function that is judicial in nature.[32] A bill of pains and penalties is a law that involves a determination of guilt and the imposition of punishment:[33]

> In these cases the legislative body ... exercises the powers and office of judge ... [I]t pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

32. Bills of pains and penalties are not expressly prohibited by the Constitution. In relation to the Commonwealth, "the real question is not whether the Act amounts to a bill of attainder [or a bill of pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power".[34] That characteristic is that the Act in question imposes punishment on a designated person or group of persons in consequence of a legislative determination of guilt for breach of a norm of conduct.[35]

33. The Privy Council considered bills of pains and penalties in the context of legislation arising from an independent inquiry into corruption in *Kariapper v Wijesinha.*[36] That case concerned the validity of the *Imposition of Civic Disabilities (Special Provisions) Act 1965* (Ceylon), which had been passed after a commission of inquiry found that allegations of bribery against certain members of the Ceylon Parliament, including Mr Kariapper, were proven. The preamble recited that the Act was enacted "consequent on the findings of the said commission". The Act imposed disabilities upon any person "to whom the Act

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32 It is therefore a function that is denied to the Commonwealth Parliament by virtue of the separation of judicial power at the Commonwealth level; see, e.g., *Polyukhovich* (1991) 172 CLR 501 at 536-539 (Mason CJ), 608-610, 613-614, 632 (Deane J), 649 (Dawson J), 685 (Toohey J), 705-707 (Gaudron J), 721 (McHugh J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Chu Kheng Lim***) at 27 (Brennan, Deane and Dawson JJ). Whether there is a corresponding limit on State legislative power, or what may be its content, need not be decided in this case.

33 *Cummings v Missouri* (1867) 71 US 277 at 323. And see *Polyukhovich* (1991) 172 CLR 501 at 535-536 (Mason CJ).

34 *Haskins v The Commonwealth* (2011) 244 CLR 22 (***Haskins***) at 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), referring to *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason CJ), 649-650 (Dawson J), 685-686 (Toohey J), 721 (McHugh J).

35 *Haskins* (2011) 244 CLR 22 at 37 [26], 39 [33] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

36 [1968] AC 717 (***Kariapper***).

applies", which was defined to mean "each person specified in the schedule to this Act in regard to whom the relevant commission in its reports found that any allegation or allegations of bribery had been proved". The schedule named six persons, including Mr Kariapper. The disabilities imposed included vacation of a member's parliamentary seat, which resulted in a loss of remuneration and allowances. Mr Kariapper contended that the Act was invalid on the basis that it was a bill of pains and penalties, and was therefore a usurpation of judicial power.

34. Sir Douglas Menzies delivered the advice of the Privy Council. He identified the key issue as "the true character of an enactment which is in form legislation altering legal rights by its own force". Mr Kariapper's "fundamental difficulty" was that "what is claimed to be a judicial determination is in form legislation altering the law as it stood".[37]

35. The Privy Council held that the two essential features of a bill of pains and penalties — a declaration of guilt and the imposition of punishment[38] — were missing from the Act. First, Parliament did not make any finding of its own against Mr Kariapper, and the guilt or innocence of the named persons did not arise for the purpose of the Act. And second, the "disabilities imposed by the Act [were] not, in all the circumstances, punishment". Rather, the purpose of the disabilities was "clearly enough not to punish but to keep public life clean for the public good".[39] The Privy Council concluded that "it is not readily to be assumed that disciplinary action, however much it may hurt the individual concerned, is personal and retributive rather than corporate and self-respecting".[40] *Kariapper* has been cited with approval in various judgments of this Court.[41]

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37 Ibid at 733.

38 Cf *Haskins* (2011) 244 CLR 22 at 37 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); but see at 57-58 [96], where Heydon J (dissenting) expressed the view that a law that *either* declares criminal guilt *or* imposes punishment is a bill of pains and penalties, citing *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason J), 685-686 (Toohey J); *Chu Kheng Lim* (1992) 176 CLR 1 at 70 (McHugh J).

39 *Kariapper* [1968] AC 717 at 736. See also *Nixon v Administrator of General Services* (1977) 433 US 425 at 475-476.

40 *Kariapper* [1968] AC 717 at 737.

41 See, e.g., *Polyukhovich* (1991) 172 CLR 501 at 537 (Mason CJ); *Durham Holdings* (2001) 205 CLR 399 at 430 [69] (Kirby J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***) at 621 [118] (Gummow J); *Albarran* (2007) 231 CLR 350 at 358-359 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

36. Likewise, Sch 6A lacks both a finding or declaration of guilt and the imposition of punishment. It too is better seen as directed to "keep[ing] public life clean for the public good".

(a) No finding or declaration of guilt

37. Parliament's recital of its satisfaction that serious corruption has occurred does not constitute a finding of the breach of any law.[42] "Serious corruption" is not defined, and notably the Parliament did not use the language of the *Independent Commission Against Corruption Act 1988* (NSW) or refer to that Act. Rather, Parliament referred to information that came to light as a result of investigations under that Act. It cannot be assumed that the recital is directed or confined to conduct that contravenes the criminal law.

38. Nor does the recital attribute the serious corruption to any individual or entity; i.e., to any "actual or supposed offender".[43] In so far as cl 3 asserts wrongdoing, it simply recites that a government process has been affected by corruption. There is no declaration of guilt in the relevant sense without a guilty party. Recourse to the Premier's second reading speech cannot fill this gap;[44] and in any event the Premier does not identify individuals said to have committed any criminal offence.

39. Indeed, as the relevant plaintiffs point out,[45] the Independent Commission Against Corruption concluded that there was insufficient evidence to establish that Mr Duncan had engaged in corrupt conduct in relation to the Mt Penny Licence.[46] Parliament expressed no view to the contrary. Irrespective of whether each of the relevant plaintiffs is innocent of any breach of the law in relation to the Mt Penny Licence, Parliament was nonetheless entitled to cancel that licence.

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42 Schedule 6A therefore fails to meet the second characteristic of punishment identified in the NuCoal Submissions at [19], that it be imposed for an offence against legal rules.

43 H L A Hart, *Punishment and Responsibility* (1968) at 4-5, quoted in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265] (Hayne J).

44 Cf Duncan Submissions at [55]-[56].

45 Duncan Submissions at [57]; see also NuCoal Submissions at [9].

46 Duncan SCB at 245.

(b) No imposition of punishment

40. Some caution must be exercised in relation to the categorisation of laws as either punitive or non-punitive,[47] particularly outside the context of detention.[48] Nonetheless, the fact that a law deprives a person of a valuable right (which is the real gravamen of the plaintiffs' complaint) does not mean that the law is a bill of pains and penalties or an exercise of judicial power. As Frankfurter J said in *United States v Lovett*,[49]

> [t]he fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking, all discomforting action may be deemed punishment, because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

Chief Justice Gleeson made a similar observation in *Woolley*, and said that "[p]unishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function".[50] A law that has a protective purpose thus may not be properly characterised as imposing punishment such as to constitute an exercise of judicial power.[51]

41. In this case, Parliament's cancellation of the licences does not amount to punishment. At most it could be said to be a deprivation of property without compensation. But such a deprivation is within the power of a State; and the recital of Parliament's satisfaction as to corruption as the factual background to the enactment of the law does not transform the deprivation of property into punishment. Further, Sch 6A was expressly enacted for protective purposes directed to the integrity of the administration of the laws of New South Wales, as set out in cl 3. The fact that the consequence of this protective legislation — the cancellation of the specified licences — deprives the plaintiffs of benefits that they

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47 See *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 144-145 [31]-[32], 146 [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). However *Rich* concerned "a different field of discourse" from the present case: see *Albarran* (2007) 231 CLR 350 at 356 [9] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

48 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Woolley***) at 12 [17] (Gleeson CJ).

49 (1946) 328 US 303 at 324.

50 (2004) 225 CLR 1 at 12 [17].

51 See, e.g., ibid at 26-27 [61]-[62] (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [44]-[45] (McHugh J); *Fardon* (2004) 223 CLR 575 at 633-634 [154] (Kirby J), 654-655 [216]-[219] (Callinan and Heydon JJ); *Pollentine v Bleijie* (2014) 88 ALJR 796 at 807 [64]-[65] (Gageler J).

would otherwise have enjoyed does not make the legislation punitive in the relevant sense.

42. Nor do cll 9-11, which provide for the provision of reports by the licence holders and for the use and distribution of information by State officers, constitute punishment,[52] for the same reasons.

43. Schedule 6A may be distinguished from the scheme considered in *Attorney-General (NT) v Emmerson*,[53] where the operation of the *Criminal Property Forfeiture Act* (NT) effected the forfeiture of certain property to the Territory. That regime depended upon a person's conviction for certain crimes.[54] Accordingly, it was held by the majority to impose punishment for crime, and was not an acquisition of property.[55] Schedule 6A, in contrast, does not depend upon the conviction of any person for a crime.

44. As Professor Zines observed, it would go beyond the object of the separation of powers principle "to treat all burdens imposed on specified persons or special groups as 'punishment' and therefore a legislative usurpation of judicial power".[56] Whilst it may be that, from the point of view of the plaintiffs, the cancellation of the specified licences would seem to be a kind of punishment for past conduct judged by the Parliament to be corrupt, on analysis, that is not the true legal character and function of Sch 6A.[57] There has been no determination whether any of the plaintiffs has committed any offence.[58] Nor has there been any imposition of punishment.

45. A similar argument in relation to acquisition of property other than on just terms was put in *Durham Holdings*, where the applicant argued that the legislation there in question was a bill of pains and penalties because it "amount[ed] to a legislative judgment that purported to confiscate the applicant's property as a form of punishment, in effect for being one of the three 'big fellows', to use the Minister's

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52 Cf Duncan Submissions at [67].

53 (2014) 88 ALJR 522.

54 Ibid at 539 [74] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

55 Ibid at 539-540 [75] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

56 Zines, above n 13 at 291-292.

57 See *Albarran* (2007) 231 CLR 350 at 378 [96] (Kirby J).

58 Ibid at 358 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

description".[59] This submission was shortly rejected.[60] As Kirby J observed,[61] the legislation did not comprise anything analogous to a bill of pains and penalties. It did not constitute, or impose, punishment for guilt of any offence. It did not impose a judgment on the applicant. It did not involve a legislative exercise of judicial power, even assuming that to be forbidden to the NSW Parliament. The same conclusion ought to be reached here.

C. The NSW Parliament may exercise judicial power

46. Even if Sch 6A is properly characterised as an exercise of judicial power, Ch III of the Constitution does not preclude the NSW Parliament from exercising judicial power, at least in matters not involving detention (as to which no issue arises in this case). The principle identified in *Kirk v Industrial Court (NSW)*[62] does not preclude a State Parliament from exercising judicial power. Nor is there a strict or entrenched separation of State judicial power under the Constitution Act.[63]

47. The single common law and the integrated system of courts considered in *Kirk* do not require that the exercise of a power to cancel specified statutory entitlements, even if considered to be judicial, must always be subject to Supreme Court supervision of the same kind that would apply to executive or judicial decision-making, so as to preclude the exercise of the power by the legislature. *Kirk* was concerned with the supervisory jurisdiction of the Supreme Court of a State as "the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power" exercised by the executive and judicial branches. The mechanism for that supervision is through the grant of prohibition, certiorari, mandamus and habeas corpus.[64]

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59 (2001) 205 CLR 399 at 429 [67] (Kirby J).

60 Ibid at 408 [8] (Gaudron, McHugh, Gummow and Hayne JJ, Callinan J agreeing at 433 [79]), 429-430 [67]-[69] (Kirby J).

61 Ibid at 430 [69].

62 (2010) 239 CLR 531 (***Kirk***).

63 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***) at 65 (Brennan CJ), 77-78 (Dawson J), 92-94 (Toohey J), 109, 118 (McHugh J), 142 (Gummow J). The *Kable* principle has no application in this matter because Sch 6A does not confer any function on a State court that might undermine the integrity of State courts as potential repositories of federal judicial power.

64 (2010) 239 CLR 531 at 580-581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); and see 581 [99]. The fact that the NSW Parliament cannot create a court or tribunal "outside the regular court system" (Duncan Submissions at [38]) — that is, outside the supervisory jurisdiction of

48. The constitutional principles that animated the decision in *Kirk* have no application to the exercise of judicial power by a State legislature. The High Court's position at the apex of the integrated judicature under Ch III is relevantly recognised by its ability to review legislation for constitutional validity.[65] This is one of the means by which the Constitution ensures that Australian legislatures (which of course remain accountable to their electorates) are not "islands of power". If a State Parliament undertakes an exercise of judicial power, the High Court's apical position calls for no specific review on that account. A State legislature does not, even if exercising a power properly characterised as judicial, declare, develop or state the common law.[66] Its exercise of such a power therefore stands axiomatically outside the judicial hierarchy overseen by the High Court.

49. The better view is that this indicates that, when exercised by a State legislature, a power that would be regarded as judicial if exercised by a court is properly characterised as legislative and not as judicial.[67] But in any event, even if the exercise of such a power is properly classed as judicial, well established examples show that this will not of itself preclude the Parliament from acting.

50. First, there is no bright line rule forbidding a State Parliament from exercising judicial power. Houses of State Parliaments have power to punish for contempt or breach of privilege. In *R v Richards; Ex parte Fitzpatrick and Browne*, Dixon CJ observed that, as a matter of history, that power has been regarded as "not strictly judicial but as belonging to the legislature".[68] However, his Honour said that "considered more theoretically — perhaps one might even say, scientifically — [it] belong[s] to the judicial sphere".[69] That must be correct, given that the conviction of an individual for contempt of Parliament finally determines the question of whether that person has in fact and in law contravened the applicable

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the Supreme Court of New South Wales — does not mean that Parliament itself cannot exercise powers outside that supervisory jurisdiction.

65 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

66 See the discussion in *Western Australia v The Commonwealth (the Native Title Act Case)* (1995) 183 CLR 373 at 484-485 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). That is not to deny the power of a State legislature to affect the common law through statute: ibid at 487-488.

67 See, e.g., *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 (Kitto J). The matters referred to in the NuCoal Submissions at [50], [51] and [55], identifying that Parliament lacks the characteristics of a court, support that conclusion.

68 (1955) 92 CLR 157 at 167.

norm of conduct. Further, the judicial character of the power to punish for contempt and to enforce parliamentary privilege has been recognised in decisions of the Courts of King's Bench and Common Pleas,[70] as well as in later decisions of this Court.[71]

51. Even assuming that, under the Constitution Act, the Houses of the NSW Parliament do not have a power to punish for contempt,[72] that is not to deny that Parliament is competent to confer such a power upon its Houses[73] (as the Parliament of each State other than New South Wales has done[74]). At the Commonwealth level the Constitution effects a strict separation of judicial power, but it nevertheless contemplates that the Houses of the Commonwealth Parliament may exercise judicial power in punishing for contempt.[75] There is no reason then why the Constitution should be read as impliedly limiting the power of State Parliaments to legislate for their own adjudication of contempt charges.

52. Second, legislation may validly share many of the features of a judicial decision. Private Acts of Parliament provide directly for the rights, powers, duties or obligations of specified individuals, including by quelling through legislation controversies between private parties of a kind that have otherwise been resolved through the exercise of judicial power. Such legislation was familiar in England in the 19th century and has been enacted in Australia.[76]

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69 Ibid.

70 See *Brass Crosby's Case* (1771) 2 Black W 754 at 756-757 [96 ER 441 at 442]; *Burdett v Abbot* (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 295 [113 ER 419 at 427].

71 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 574 (Brennan and Toohey JJ), 581 (Deane J); *Polyukhovich* (1991) 172 CLR 501 at 626 (Deane J); *Chu Kheng Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ); but see *Woolley* (2004) 225 CLR 1 at 22 [50] (McHugh J); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 622-623 [142(2)] (Kirby J).

72 Cascade Submissions at [24]-[26]; and see *Egan v Willis* (1998) 195 CLR 424 at 447 [31] (Gaudron, Gummow and Hayne JJ), 463 [72] (McHugh J), 504 [158] (Kirby J).

73 *Egan v Willis* (1998) 195 CLR 424 at 454 [51] (Gaudron, Gummow and Hayne JJ). Equally, it is not relevant to inquire whether the United Kingdom Parliament conferred judicial power on the New South Wales legislature (NuCoal Submissions at [37]ff). It suffices that the State Parliament is able to confer such power on itself through the exercise of its own legislative power.

74 *Constitution Act 1975* (Vic), s 19; *Constitution Act 1934* (SA), s 38; *Constitution of Queensland 2001* (Qld), s 9; *Parliamentary Privileges Act 1891* (WA); *Parliamentary Privilege Act 1858* (Tas). See also, as to the Legislative Assembly of Victoria, *Dill v Murphy* (1864) 1 Moo PC (NS) 487 [15 ER 784]; *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC App 560.

75 Constitution, s 49; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

76 *Kable* (1996) 189 CLR 51 at 64 (Brennan CJ); Sir Malcolm Jack, ed, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (2011, 24th edn) at 921-922.

53. In particular, as this Court recently observed, private legislation was once the only means available for individuals to obtain the dissolution of their marriage.[77] State Parliaments had the power to enact such legislation notwithstanding that doing so had much in common with an exercise of judicial power to achieve the same end.[78]

54. As Mason J held in *Humby*, the old procedure of dissolving a marriage by private Act demonstrates that the Commonwealth's legislative power with respect to divorce is not limited to authorising termination of the matrimonial relationship by means of a judicial determination in a judicial proceeding: "[i]t is for Parliament in the exercise of the power to select the means by which the marriage is to be dissolved and the means by which consequential provision is to be made respecting the rights and obligations of the parties".[79] An enactment annulling a specific marriage has both a legislative and a judicial character. That conclusion is consistent with Brennan CJ's observation that a private Act "may be a law which, by reason of its specificity, is enacted in exercise of a power that is not purely legislative".[80]

55. Nothing in Ch III, nor the reasoning in *Kirk*, requires that such exercises of power by the legislature be subject to judicial review, or that the unavailability of such review renders them constitutionally invalid. Likewise Sch 6A. To the extent that it involves the exercise of judicial power, it is analogous to a private Act and the NSW Parliament was competent to enact it as a law of the State.

56. This conclusion is not avoided by asserting that the Court's decisions in *Kirk* and *Kable* were informed by the requirement that the Constitution be interpreted consistently with the rule of law.[81] "Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but

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77 *PGA v The Queen* (2012) 245 CLR 355 at 378 [47] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

78 See, similarly, the discussion in *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 175-176 [15] (Gleeson CJ) of the statutory powers of the Parliaments of South Australia and Queensland to wind up particular companies.

79 (1973) 129 CLR 231 at 248 (with Gibbs J agreeing at 240).

80 *Kable* (1996) 189 CLR 51 at 64.

81 NuCoal Submissions at [44], [49].

such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution".[82]

D. Schedule 6A is a "law" within the meaning of s 5 of the Constitution Act

57. Some of the plaintiffs assert that Sch 6A is not a "law" within the meaning of s 5 of the Constitution Act on the basis that Sch 6A is not a "rule of conduct" or a "declaration as to right, duty or power".[83] However, that submission is unsustainable. Schedule 6A cancels licences; this is precisely a declaration (for the future) of rights and duties.[84]

58. In any event, as Fullagar J observed in the *Communist Party Case*, a law of the Commonwealth Parliament that "d[id] not purport to impose duties or confer rights or prohibit acts or omissions", but simply to "declare a particular unincorporated voluntary association unlawful and to dissolve it" would not be invalid for that reason, providing a constitutional head of power supported it.[85]

59. It is not necessary that a law expressly state a rule of conduct.[86] As Gummow J recently observed:[87]

> In dealing with statute law, further analysis may be required of what is involved in a "command". A repealing statute is creative in the sense that its command removes the requirement for further compliance with the anterior law. An amending statute of itself might have no operation beyond changing the requirements of that anterior law.

60. Further, the fact that a law is directed to specific individuals or circumstances, and is not of more general operation, does not mean that it is not a law. There is no requirement that "legislation in respect of property and civil rights must be general in character and not aimed at a particular right".[88]

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82 *McGinty v Western Australia* (1996) 186 CLR 140 at 231-232 (McHugh J); see also at 168-170 (Brennan CJ), 188 (Dawson J), 269-270, 285 (Gummow J).

83 Cascade Submissions at [19].

84 *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ).

85 (1951) 83 CLR 1 at 261.

86 See generally H L A Hart, *The Concept of Law* (1961), Ch V.

87 *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at 107 [230] (Gummow J).

88 *Abitibi Power and Paper Co Ltd v Montreal Trust Co* [1943] AC 536 at 548, cited in the *Communist Party Case* (1951) 83 CLR 1 at 261 (Fullagar J). The relevant passage continued: "Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes".

61. Schedule 6A cancels existing licences and expunges associated applications. The operative provisions remove rights and provide for the rights and liabilities of the parties in the future (i.e., after the commencement of the Amending Act). The command of the law is prospective and clear in its terms.

62. In any event, statutes that do not create rights or impose duties, but which have a more limited effect, although "something of a rara avis in the world of statutes", are nonetheless laws.[89] Laws similar to those envisioned by Fullagar J, which have enabled and effected deregistration of industrial organisations, have been upheld as valid by this Court.[90] Schedule 6A, which cancels the relevant licences, can be regarded as analogous to such laws.

63. Finally, to the extent that the plaintiffs submit that Sch 6A is not a law because it is an exercise of judicial power,[91] they wrongly conflate the issue of what constitutes a law with the issue of whether the NSW Parliament can exercise judicial power. Even if Sch 6A could be characterised as making a judicial determination and imposing penalties in an exercise of judicial power, this would not deprive it of the character of a "law". As Brennan CJ observed in *Kable*:[92]

> a purported law has never been held to lack the character of a law simply because it affects the liberty or property of only a single individual. Acts of Attainder were nonetheless laws ... The Act may be a law which ... is enacted in exercise of a power that is not purely legislative, but it is nonetheless a law.

VI. ESTIMATE OF TIME

64. Victoria estimates that it will require 20 minutes for oral argument.

Dated: 12 November 2014

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89 *Momcilovic* (2011) 245 CLR 1 at 107 [230] (Gummow J), quoting *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 393 (Mason J).

90 *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636; *BLF Case* (1986) 81 CLR 88.

91 Cascade Submissions at [24].

92 (1996) 189 CLR 51 at 64, 109 (McHugh J agreeing), Toohey J, Gaudron J and Gummow J finding it not necessary to address the point, at 98-99, 100 and 126 respectively.